100381

Vol. I

TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. 1923

No. [redacted]32

ILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

RIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 6, 1922.

CERTIORARI AND RETURN FILED JULY 21, 1922.

(23,812)

(28,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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VOL. I.

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In the District Court of the United States for the Eastern District of Pennsylvania, December Session, 1914.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY.

Bradford & Doolittle.
Francis Rawle, Joseph Henderson.

Docket Entries.

Dec.	22, 1914.	Bill of Complaint filed.
"	22, "	Subpœna issued returnable January 11, 1915.
"	23, "	Printed copy of Bill of Complaint, filed.
Jan.	4, 1915.	Subpœna returned "Served with copy of Bill" on Dec. 23, 1914, and filed.
"	11, "	Order for the appearance of Francis Rawle, Esq., and Joseph Henderson, Esq., for defendant, filed.
"	29, "	Printed Answer of defendant filed.
Mar.	17, 1915.	Stipulation as to taking testimony and notice by Complainant of taking of depositions filed.
"	18, "	Complainant's motion for and order appointing Charles E. Riordon as Special Examiner filed.

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Apr.	3, 1915.	Depositions of E. G. Eberhardt; R. A. Whiddin; C. L. Hooper; D. B. Dunham; Louis Pink; A. D. Thorburn; Jesse E. Wilson and J. K. Lilly, on behalf of plaintiff, filed.
"	24, "	Depositions on behalf of plaintiff filed.
June	1, 1915.	Stipulation extending time for taking depositions and order of approval filed.
July	31, 1915.	Depositions of A. J. Garner; C. N. Turner; John J. Whitley; C. J. Thurman and Dr. C. A. Noriet, on behalf of plaintiff, filed.
Aug.	2, 1915.	Motion to amend Bill of Complaint, filed.
"	2, "	Order allowing amendment to Bill of Complaint, filed.
"	2, "	Amendment to Bill of Complaint, filed.

Apr. 11, 1916. Depositions of Garfield D. Merner; Henry J. Pitsyik; James W. Wilkins; B. F. Jones; Howard Henry Richards; Henry Joseph Gonzales; Clinton Gordon McCarthy; Ernest R. De Vall; William C. Kerstmann; Eugene R. Brown; Fred C. Stevenson; Ulysses S. McClellan; Oscar G. Salb and Edward Halbig, on behalf of defendant, filed.

May 10, 1916. Motion for leave to amend Answer, filed.
" 10, " Amendment to Answer filed.
" 10, " Consent to amendment filed.
" 10, " Order allowing amendment to answer, filed.

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Dec. 20, 1916. Depositions on behalf of plaintiff, filed.
" 21, " Defendant's printed record on final hearing filed.
Jan. 6, 1917. Depositions on behalf of plaintiff filed.
Feb. 26, 1917. Depositions on behalf of plaintiff filed.
May 1, 1917. Motion by defendant for leave to take sur rebuttal proofs, filed.
" 1, " Argued sur motion for leave to take sur rebuttal proofs.
" 9, " Order, Thompson, J., allowing taking of additional testimony, filed.
Feb. 19, 1918. Depositions on behalf of plaintiff filed.
Dec. 28, 1918. Order of Court continuing hearing, filed.
Mar. 5, 1919. Order of Court fixing rate for hearing, filed.
" 10, " Order of Court continuing hearing filed.
May 26, 1920. Argued.
" 27, " Hearing resumed.
" 28, " Hearing concluded.
Sept. 29, 1920. Opinion, Thompson, J., dismissing Bill of Complaint filed.
Oct. 18, 1920. Defendant's Bill of Costs filed.
" 18, " Decree dismissing Bill of Complaint filed.
Nov. 13, 1920. Assignments of Error filed.
" 13, " Petition for Appeal, filed.
" 13, " Decree granting prayer of petition, filed.
" 20, " Copy of Notice of Appeal, filed.

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" 24, " Bond sur Appeal in $2,750 with National Surety Company, surety, filed.
" 24, " Order of Court approving Bond sur Appeal, filed.
" 24, " Citation allowed and issued.
" 29, " Citation returned "service accepted" and filed.
Feb. 14, 1921. Præcipe for Transcript of Record sur Appeal, filed.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, the Honorable Court approving, that depositions may be taken under rules 47 and 54 as follows: Those of the plaintiff to be taken and filed on or before May 15, 1915; those of the defendant to be taken and filed on or before June 15, 1915; and rebutting depositions by either party to be taken and filed on or before July 15, 1915.

J. ADDISON ABRAMS,
E. W. BRADFORD,
Counsel for Plaintiff.
FRANCIS RAWLE,
Counsel for Defendant.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The plaintiff in the above entitled cause, by its counsel, moves for the approval of the attached stipulation of counsel for the respective parties, relative to the taking of depositions, basing this motion upon the facts set forth in the attached affidavit of counsel for plaintiff.

J. ADDISON ABRAMS,
E. W. BRADFORD,
Counsel for Plaintiff.

CITY OF WASHINGTON,
District of Columbia, ss:

Ernest W. Bradford, being duly sworn deposes and says that he is of counsel for plaintiff in the above entitled cause, and is in charge of the case for plaintiff; that on account of the inability of important witnesses to be available for examination at an earlier date, he has been obliged to give notice for the beginning of taking of depositions on March 22nd; that plaintiff's case must be established, if at
17 all, by evidence secured from witnesses residing throughout the country in widely separated localities; that as will appear by the attached copy of notice to the defendant's counsel, there are a number of such witnesses to be examined and a number of different localities to be visited for the purpose; that the extension of time as provided in the stipulation will not be unreasonable, and that it has been impossible for him to arrange for the taking of said depositions earlier.

ERNEST W. BRADFORD.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for said City and District, at Washington, D. C., this 6th day of March, 1915.

[SEAL.] A. M. PARKINS,
Notary Public, D. C.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Washington, D. C., March 6, 1915.

Hon. Francis Rawle,
Counsel for Defendant,
West End Trust Building,
Philadelphia, Pa.

DEAR SIR:

Please take notice that, pursuant to our previous oral under-
18 standing, I will on Monday, March 22, 1915, at 10 o'clock in the forenoon, at the office of Bradford & Doolittle, Rooms 1451 to 1455 Lemcke Annex, Indianapolis, Indiana, begin taking testimony on behalf of plaintiff in the above entitled cause. At the time stated, Josiah K. Lilly, A. D. Thorborn, Dr. Eberhardt and others will be examined as witnesses on behalf of plaintiff.

At the conclusion of the examination in Indianapolis, we will pro-
ed to Detroit, Michigan, where W. H. Martin, Wm. M. Merithen,
F. Knowles and others will be examined.
At the conclusion of the examination in Detroit, we will proceed
Saginaw, where B. Q. Wright will be examined.
At the conclusion of the examination in Saginaw, we will proceed
North Branch, Minnesota, where Mr. Anderson of the Anderson
rug Company will be examined.
At the conclusion of the examination at North Branch, we will
roceed to Chicago, where Mr. Morrison of the Morrison Drug Com-
ny and others will be examined.
At the conclusion of the examination in Chicago, we will proceed
other points, as may at the time be agreed upon, for the further
amination of witnesses as follows:
Mr. Joseph Wolsey, Mr. James Kinder and Dr. Geo. Walker of
ne Girardeau, Missouri; Mr. John B. Messenger, Mr. H. N. Hen-
ell, Mr. Harry W. Shuh of Cairo, Illinois; Mr. W. H. Buck, Mr.
L. Winchester, Mr. C. O. Manning, Mr. W. R. Scott and others
f Memphis, Tennessee; Mr C. H. Porter of Henning, Tennessee;
r. B. P. Moffatt of Troy, Tennessee; Mr. G. W. Madden, Mr. A. L.
elton and Mr. J. Blodau of Nashville, Tennessee; Mr. W. L.
riffin and others of Houston, Texas; Mr. F. V. Perry of Little
ock, Arkansas; Mr. Davis of Davis & Son of Warren, Arkansas;
Mr. A. Fly of New Orleans, La.; Mr. Birdsong of Yazoo City,
La.; Mr. Barnes of the McComb Drug Store, McComb City,
Mississippi; Mr. Julian Holt of Meridian, Mississippi; Mr.
ayfield of the Collins Drug Company of Collins, Mississippi; Dr.
ones of Brookhaven, Mississippi; Mr. C. G. Boyett of Ruleville,
Mississippi; Mr. C. E. Bateman of Prattville, Alabama; Mr. J. M.
oseley of Geneva, Alabama; Mr. J. B. Reed of Union Springs,
Alabama; Dr. A. L. Vaughan of Cuba, Alabama; Dr. Rowland of
rkadelphia, Alabama; Mr. J. H. Vinson and Mr. J. B. Riley of
Macon, Georgia; Mr. W. A. Jolley of Marshallville, Georgia; Mr.
Daniel Coleman of Ft. Gaines, Ga.

We will then proceed to Richmond, Virginia, to Washington,
D. C., and Baltimore, Md., where other witnesses will be examined
whose names are not now available but will be given you later.

You are invited to attend and cross-examine our witnesses.

Please take notice, further, that while the above list of witnesses,
and places of examination, are as complete as we can give at this time,
it will be my purpose to avoid the examination of such witnesses as
seem to be unimportant, or will only unnecessarily duplicate the
evidence obtained prior to reaching them. It is possible, therefore,
that a number of the witnesses herein named may not be called for
the reason that before they are reached sufficient evidence for our
purpose, along the line of their knowledge, may already have been
secured. It is also possible that when we are in any locality other
evidence, of which we have no knowledge at this time, may come to
our notice, and we shall desire to introduce it and thus perhaps avoid
extending the trip to some other locality. While we have given the
places of residence of the several witnesses as near as we can, I shall

endeavor, so far as possible, to bring the witnesses to convenient localities where proper facilities may be obtained for taking their depositions, of all of which you shall be duly informed. It is
20 not my intention to make the trip any longer, or the depositions any more numerous than may seem necessary to properly substantiate the allegations of the bill of complaint.

Yours very truly,

E. W. BRADFORD,
Counsel for Plaintiff.

Service accepted and a copy received at Philadelphia, Pa., this 17th day of March, A. D. 1915.

FRANCIS RAWLE,
Counsel for Defendant.

Before Dickinson, J.

Motion granted and stipulation approved this 18th day of March, 1915.

By the Court,

Attest:

GEORGE BRODBECK,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

21 The plaintiff in the above entitled cause, by its counsel, moves for the appointment of a Special Examiner to take depositions on behalf of plaintiff in the above entitled cause, and nominates Mr. Charles E. Riordon, of Washington, D. C., for such appointment.

Counsel for plaintiff has known Mr. Riordon for more than fifteen years as a thoroughly competent and trustworthy Examiner and Notary Public, and one who has had large experience in such work and also in various forms of legal reporting. He is an Attorney at Law and familiar with the forms and rules of the court, in addition to his qualifications as a rapid and competent stenographer, typewriter and Notary Public.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Plaintiff.

I consent to the appointment above requested.
FRANCIS RAWLE,
Counsel for Defendant.

Before Dickinson, J.

Pursuant to the agreement of Counsel, the above motion is granted and the appointment of Mr. Charles E. Riordon, as a Special Examiner in Chancery, with authority to administer oaths and take the depositions of witnesses on behalf of complainant, in accordance with law, is hereby made and it is so ordered.
March 18th, 1915.
By the Court,

Attest:
GEORGE BRODBECK,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Testimony taken on behalf of complainant in the above entitled cause pursuant to notice to counsel for defendant and also pursuant to stipulation by and between counsel for the respective parties, approved by the Court, before A. C. Rice, a Notary Public, at the office of Bradford & Doolittle, Rooms 1451-55 Lemcke Annex, Indianapolis, Indiana, beginning at ten o'clock a. m. Monday, March 22, 1915.

Present:

Mr. E. W. Bradford for complainant.
Mr. Francis Rawle for defendant.

Counsel for complainant offers in evidence a certified copy of the Certificate of Incorporation of The Eli Lilly and Company and marks the same "Complainant's Exhibit, Document No. 1."

Mr. ERNEST G. EBERHARDT, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford testifies as follows:

Q. 1. Please state your name, age, residence and occupation?

23 A. E. G. Eberhardt. 50 years. My occupation I always give for the City Directory as Chemist, Eli Lilly & Co. but I am in charge of the administrative work of the Scientific Division for that concern.

Q. 2. How long have you been employed by Eli Lilly & Co.?

A. Since 1886. 29 years next June.

Q. 3. Do you know anything concerning the manufacture by Eli Lilly & Co. of a product known as Coco-Quinine? If so, will you please give, in narrative form, the history of said product so far as you know it?

A. Well, I know a great deal about that. As a matter of fact, I am the man who worked out the process for its manufacture. Towards the close of 1899 I received instructions from Mr. J. K. Lilly to prepare a syrup containing quinine which would be as palatable as I could make it, to be put upon the market as a liquid preparation of quinine and in the development of the work I finally worked out the product which they are now marketing as Coco-Quinine. I can say this, of course, that the work that I first did was not anything like the product we now have on the market. The first attempts were the mere mixture of Quinine Sulphate with syrup and with Yerba-Santa as a disguisant for the bitterness. Previous to that time Eli Lilly & Co. had been marketing a syrup under the name of Yerbazin which contained Yerba-Santa and was put upon the market as a vehicle for quinine in prescriptions. In the original work this syrup Yerbazin was used as one of the ingredients in the preparation we were trying to work out and later the idea of adding chocolate came to the write as a means of giving a distinctive color and a characteristic appearance and furthermore to keep in better suspension the material in the preparation. The work of finally getting the formula where it would be a thoroughly satisfactory and stable product extended over some time. The main portion of that work as I recall, was done in the early
24 part of 1900 when the preparation had already been placed on the market. I recall one series of experiments that was kept under observation one year. The early history was not very encouraging, because of numerous difficulties that developed and the experiments I spoke of were made to overcome these difficulties. I think that fairly well covers the history of the preparation.

Mr. Rawle: Counsel agreeing that objection can be made at the end of the answer, if desired, counsel for defendant objects to so much of the answer as relates to steps prior to the making of the precise preparation which is referred to in the Bill of Complaint for the reason that the Bill of Complaint sets up no monopoly for exclusive right in such preparation.

Q. 4. When, so far as you know, was the product placed on the market under the name "Coco-Quinine"?

A. I could not state the date definitely. I know, however, that my work was done somewhere near the close of 1899 and I know that in that Winter the product was placed on the market under the name of Coco-Quinine. It was never on the market under any other name. I know this, that it was placed on the market just as soon

the house could do it, rather a little hastily and really before the rking formula had been tried out sufficiently long, by aging the oduct to be sure that all difficulties had been eliminated.

Q. 5. Have you any means of refreshing your memory as to these tes? If so, what?

A. Well, I don't know as I would have. It might be in a record the experimental work done which I wrote up after the work was one and which has some dates, but that record wouldn't tell us when he product was first placed on the market.

Q. 6. I hand you a paper and ask you what this is?

A. That is the record I spoke of that I wrote up.

Q. 7. Is that the original record?

25 A. That is the original record that I wrote in the book in which I entered the experimental work that I was doing at that time.

Q. 8. When was that written by you?

A. That was written in 1900. I don't know the exact date but it was written after these experiments had been under way for some time. The original record was kept on paper where my notations were made and then it was entered in the book later on.

Q. 9. What are the dates appearing on that record?

A. The first date here is March 23rd, 1900, and the next was March 26, 1900, when a series of experiments were started.

Q. 10. Please read the first paragraph of the paper you hold in your hand.

A. The first paragraph is headed Quinine Syrup and relates to the first part of the work.

A series of experiments were made using as a base Yerbazin (uncolored); Yerbazin 3 & Syr. 1; and Yerbazin 1 and syrup 1 with quinine alkaloid, quinine sulphate and quinine tannate respectively. It was found that the alkaloid was the most and the tannate the least bitter. Also diluting the Yerbazin tended to develop the bitterness. To give a distinctive color both Cudbear and Carmine were used. It occurred to the writer that a syrup containing chocolate would give both a distinctive color and an elegant flavor. Accordingly, the following were tried. Then goes on and gives a record of experimental work.

Mr. Rawle: Same objection.

Q. 11. Please state what the paper I now hand you is.

A. It is evidently a photo-lithograph of the paragraph I have read.

Q. 12. In your own handwriting?

A. It is in my own handwriting.

Counsel for complainant offers in evidence the paper con-
26 taining copy of the paragraph read and marks the same "Complainant's Exhibit Document No. 2."

Q. 13. In the copy of your memorandum which you have read, I note that it is stated that the chocolate would give both a distinctive color and an elegant flavor to the product. Was the chocolate added for this purpose?

A. That was the purpose of adding the chocolate to make a preparation that would be totally different from anything I knew of, and in fact it was a new departure as far as I was aware in pharmaceutical preparations.

Q. 14. As a chemist, can you state whether or not other syrups than chocolate might be employed for the same purpose as the chocolate syrup was employed in this preparation?

Mr. Rawle: Same objection.

A. There is no question about that because the preparation as a syrup was made up in an experimental way before the chocolate idea developed. That is to say, that a liquid preparation in which the bitterness of the quinine was disguised was made up before the chocolate idea was developed.

Q. 15. Please name over other syrups which, in your opinion might be employed in this preparation to give it a distinctive color and a distinctive taste?

Mr. Rawle: Same objection.

A. Well, you could use anything for that purpose that would be agreeable. You could flavor it with vanilla, you could flavor it with orange, you might flavor it with any sort of flavor that you might desire. You could add any coloring matter that you might desire. You might color it brown with caramel, or red with carmine, or any other desirable color. The essential point is that Yerba-Santa be present in order to disguise the bitterness.

27 Q. 16. Have you any of the product made, omitting the chocolate from the preparation?

Mr. Rawle: Same objection.

A. Yes, I have had experiments made containing the other ingredients, except the chocolate and also the reverse containing the chocolate and other ingredients with the Yerba-Santa omitted.

Q. 17. Have you samples of such preparations with you?

A. Yes, I brought two.

Q. 18. Will you please produce them?

Witness produces a bottle and hands the same to counsel.

Q. 19. Please state what this bottle contains?

Mr. Rawle: Same objection.

A. This is a sample of the product containing the Yerba-Santa and the other ingredients, but not the chocolate.

Complainant offers the bottle in evidence and marks the same "Complainant's Exhibit, Bottle No. 1."

Mr. Rawle: Same objection.

Witness also produces another bottle and hands the same to counsel.

Q. 20. Please state what this bottle contains?

Mr. Rawle: Same objection.

A. That is a sample of the preparation containing all the ingredients of Coco-Quinine with the Yerba-Santa omitted.

Complainant offers said bottle in evidence and marks the same "Complainant's Bottle No. 2."

Mr. Rawle: Same objection.

Direct-examination Closed.

28 Cross-examination.

By Mr. Rawle:

X Q. 21. Was the formula for the preparation as you made it when you first put it out, the same precisely as it is now?

A. As it was first marketed?

X Q. 22. Yes, if you choose to put it that way.

A. I would say, essentially it is the same. There may have been minor changes in the proportion of some of the ingredients.

X Q. 23. Can you mention any minor changes in the ingredients?

A. I recall one at this time, that is, the proportion of chocolate was changed somewhat later for the reason that we put in too much at first and it produced thickening in the product and we had to reduce the amount.

X Q. 24. What I am asking you about is whether subsequent to first putting it on the market you took out any ingredients and substituted others or put in any ingredients that had not at first been present?

A. I think not.

X Q. 25. You have said that Quinine could be made into a preparation with caramel or carmine or chocolate or Yerba-Santa or orange or vanilla. Do you know of any preparations now on the market made by other houses which are made up with any of those various ingredients, added for the sake of disguising the bitter taste of the quinine?

Mr. Bradford: Counsel for complainant objects to the question as not justified by the witness' testimony, witness having not stated that either of the syrups in question is used or can be used for disguising the bitterness of the quinine except the one called Yerba-Santa.

A. I am not familiar at this time with what is on the market and just at this time I can't recall any preparation containing
29 quinine prepared in that way, but I do know that syrups have been put out as a vehicle without the Quinine, which was to be added later on by the physician or the druggist, which were colored in various ways. I spoke of Yerbazin which is put out by Eli Lilly & Co. which is colored and I recall a similar product

under the name of Quinimel, which was colored red, as I remember, I think marketed by a former house of Searle & Hereth. Further than that, I don't recall any products at this time.

X Q. 26. I understand your last answer to refer only to syrups or such like preparations intended to be made up apart from the quinine and to be administered with the Quinine by the doctor or the druggist. Is that correct?

A. That is correct.

X Q. 27. Have you personally had practical experience covering any considerable length of time with a preparation made up of Quinine and other syrups not containing chocolate?

A. My experience in that respect was limited to the work I did in developing the formula for Coco-Quinine. I think I stated that the first experiments that were made up were made up without chocolate but they contained quinine. Previous to that I had frequently made mixtures of Yerba-Santa with Quinine.

X Q. 28. I understood you to say that these were laboratory experiments.

A. Yes, sir.

X Q. 29. Will you please state whether preparations of Yerbazin and the one you call Quinimel have not been intended for extemporaneous mixture with the Quinine at the time of administering the Quinine?

A. That was the purpose, as I know the preparations they were merely vehicles and sold as such with the idea that the Quinine be added in whatever proportion that the physician might choose.

X Q. 30. And this addition of Quinine to the other preparations respectively was intended to be at the moment of administering the dose substantially?

A. Well, I would hardly say that it was at the time of administering the dose. Usually these products were prescribed and the mixture would be made by the druggist who filled the prescription.

X Q. 31. In the Coco-Quinine preparation, which you have been talking about, doesn't the chocolate aid in disguising the bitterness of the Quinine and holding the Quinine in suspension?

A. The chocolate plays no part in disguising the bitterness but it does aid, to some extent, in holding the Quinine in suspension, as any other thickening agent would do.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 32. Are your duties such that you would naturally be posted as to all products of this character that might now be on the market?

A. No, I would say not. Casually I might learn of them.

R. D. Q. 33. As I understand your answer to Mr. Rawle, the products known as Yerbazin and Quinimel after being mixed with Quinine by the druggist in accordance with the physic-an's pre-

scription, may be taken by the patient as other prescriptions are taken, that is from time to time until the quantity is used up? Is this correct?

A. That is correct.

R. D. Q. 34. It is not then necessary that the Yerbazin and Quinine or Quinimel and Quinine must be used at the moment the compound is made?

A. No, that is not necessary.

Redirect examination closed.

31 Recross-examination.

By Mr. Rawle:

R. X Q. 35. Would you say that a mixture of Yerbazin and Quinine disguises the bitter taste of the Quinine, as well as your Coco-Quinine?

A. Undoubtedly it does, so far as disguising the bitterness solely is concerned, apart from the flavor.

R. X Q. 36. What do you mean by "apart from the flavor?"

A. The disguising of the bitterness and the imparting of a flavor are really not exactly one and the same thing, only in so far as the Yerba-Santa itself gives a flavor.

R. X Q. 37. You are not very clear to me. If Yerba-Santa imparts a flavor does it not necessarily disguise the bitterness in so far as it does impart a flavor?

A. The Yerba-Santa has the property of disguising the bitterness of the Quinine and it also possesses characteristics aromatic properties.

R. X Q. 38. What is the predetermination or ruling flavor of your Coco-Quinine? Is it chocolate or Yerba-Santa to the person who tastes it with a trained palate?

A. That might be a matter of personal opinion. The chocolate certainly gives it a distinctive flavor as well as a color.

R. X Q. 39. But what I want you to answer is, whether the chocolate does not disguise the taste of the Quinine?

A. I will answer that by saying this. That the Quinine Sulphate mixed merely with a syrup containing chocolate and no Yerba-Santa is very bitter, which shows that it does not disguise the bitterness.

R. X Q. 40. Now I ask you whether the chocolate doesn't aid the Yerba-Santa in disguising the bitterness?

A. No, sir.

R. X Q. 41. How permanent a preparation, in lasting qualities, would a mixture of Yerbazin and Quinine be?

32 A. It would be as permanent as any pharmaceutical preparation of that character ordinarily is.

R. X Q. 42. And how permanent is that?

A. Under ordinary conditions, it would keep for an indefinite length of time.

R. X Q. 43. Can you say that such a preparation would be a stable

and satisfactory preparation for the purpose of putting on the market?

A. It certainly would.

Deposition closed.

E. G. EBERHARDT.

Mr. RAY A. WHIDDEN, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford testifies as follows:

Q. 1. Please state your name, age and occupation.

A. Ray A. Whidden. Thirty-seven. 204 West Randolph St., Chicago, Ill. Manager, Chicago Department, The Eli Lilly and Company.

Q. 2. How long have you been employed by the Eli Lilly & Company, and where and in what capacity?

A. I will have to give the approximate date as I don't recall the exact date when I was employed. About seven years ago I was engaged by Eli Lilly and Company to travel in the States of Oregon and Washington. After two years was transferred to the City of San Francisco and I covered the San Joaquin Valley and later acted as City Salesman in San Francisco, California. At times acting as assistant to Mr. R. B. Zane, Manager of the Pacific Coast Department. My duties at that time were sales work in the City of San Francisco and assisting in coaching practically all of the salesmen employed by Eli Lilly & Company in the Pacific Coast Department. March 1st, 1914, I was transferred to Chicago as Manager of the Chicago Department.

33 Q. 3. I hand you a paper and ask you if you have ever seen same before and if you have, when and what it is.

Mr. Rawle: Objected to as immaterial.

A. Yes, sir. This is a list of substitutes and competing preparations manufactured by Wm. R. Warner & Co. that was turned over to me in April, 1912, by Mr. C. L. Hooper.

Mr. Rawle: The answer is objected to as the witness is in no position to say what was the purpose of Mr. Hooper in turning it over to him. The paper must necessarily speak for itself.

Q. 4. Who is Mr. C. L. Hooper and what position did he occupy at the time he turned this list over to you?

A. Mr. C. L. Hooper was the local representative in San Francisco and Central California for Wm. R. Warner & Co. who resigned some time in March, 1912 and was engaged by Eli Lilly & Co. and was turned over to me to coach and instruct in sales work for Eli Lilly & Co.

Mr. Rawle: Question and answer objected to as immaterial.

Q. 5. I show you a bottle and ask if you recognize the same and what it is?

A. I do. This bottle of Quinimel was purchased this month by me through the regular drug channels in Chicago.

The bottle in question is offered in evidence and marked "Complainant's Exhibit Bottle No. 3."

Mr. Rawle: Objected to as immaterial.

Direct-examination closed.

Mr. Rawle: No cross-examination.

Deposition closed.

RAY A. WHIDDEN.

34 Mr. CHARLES L. HOOPER, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Charles Leonard Hooper. 29 years old. Portland, Oregon. Traveling Salesman for Eli Lilly & Co.

Q. 2. How long have you been so employed by Eli Lilly & Co.?

A. Three years this coming first of April.

Q. 3. By whom were you employed prior to that time?

A. By the Pfeiffer Chemical Company of St. Louis.

Q. 4. In what capacity were you employed by the Pfeiffer Chemical Company, and where?

A. I was employed as a traveling salesman in the territory from Bakersfield, California, North to Ukiah, California.

Q. 5. I hand you a document and ask you if you have ever seen it before and if so, what it is?

A. Yes, sir, I have seen that document before. I received that from the Pfeiffer Chemical Company, giving names of preparations that the Pfeiffer Chemical Co. made that were the same as competing preparations.

Mr. Rawle: Same objection.

Q. 6. Please explain, if you can, anything that you know relative to the preparation known as Coco-Quinine, a product manufactured by Eli Lilly & Co. and the substitute product known as Quin-Coco sold by the defendant, Wm. R. Warner & Co. herein?

Mr. Rawle: Question is objected to because of the use of the words "substitute product" and because it is too general in scope and is immaterial.

35 A. In the capacity as a representative for the Pfeiffer Chemical Co. I received instructions from Mr. F. C. Stevenson who was representing the Pfeiffer Chemical Co. to sell Quin-Coco as a substitute product for Coco-Quinine, that being the only way that we could sell Quin-Coco as there was no demand at all for Quin-Coco. In making my sale of Quin-Coco I told the druggist that it was exactly the same as Coco-Quinine made by Lilly & Com-

pany and that Quin-Coco would cost the druggist less money. And that on a physician's prescription for Coco-Quinine, he could use Quin-Coco, the products were so similar that he need not be afraid of detection. In this manner we disposed of quite an amount of the Quin-Coco. The physicians in my territory to the best of my knowledge did not write for Quin-Coco on prescription. After leaving the Pfeiffer Chemical Company and joining the sales force of Eli Lilly & Company, going over the same territory, with Coco-Quinine, soliciting sales for Coco-Quinine, the druggists asked me if in selling Coco-Quinine I felt consistent in my previous statement that the product Quin-Coco was the same as Coco-Quinine? Several doctors who were prescribing Coco-Quinine, thinking that they were getting Coco-Quinine, in reality were getting Quin-Coco. A Dr. Weaver of Visalia told me that he was prescribing Coco-Quinine in large amounts. When interviewing the druggists Huntoon & Douglass, asking them if they were wanting any Coco-Quinine, they replied: They had plenty in stock, that they bought it in big quantities. I asked them where they got it. They said from the Pfeiffer Chemical Co. That they could buy it cheaper from the Pfeiffer Chemical Co. than they could from Lilly & Co. I wrote Eli Lilly & Co. advising them to write the Doctor that there was an imitation product of Coco-Quinine on the market and to suggest to him that he made sure that he got Coco-Quinine. In
36 the State of Oregon, three druggists, The Medford Pharmacy, Medford, Oregon, The Hillsboro Pharmacy, Hillsboro, Oregon, Yerrington & Allen of Eugene, Oregon, were three druggists using Quin-Coco. I told the druggists that if they didn't discontinue using an imitation product for our specialty Coco-Quinine, I would inform the doctors.

Mr. Rawle: The question is objected to, the answer is objected to as a whole. Whatever is hearsay is objected to as hearsay. The testimony of the witness as to groups of persons who are stated by him to have said or done certain things are objected to; the statements of witness to other persons is objected to; so much of the answer as states what other persons said to the witness, is objected to.

Mr. Bradford: An endeavor will be made to clear up such points of uncertainty and to bring out definitely as possible, the matters related by witness and covered in a general way.

Q. 7. Have you personally seen the prescriptions written by physicians for the product in question, and if so, how were such prescriptions written?

Mr. Rawle: Objection is made to the question which calls for the contents of a physician's prescription, unless the prescription is produced.

A. I have seen a prescription written by a Doctor, in Hillsboro, for Coco-Quinine. The prescription was filled with Quin-Coco.

Mr. Rawle: Objected to because the act of the physician referred to his prescription and the act of the druggist in filling the same does not bind or in any way affect the defendants in this case.

Q. 8. How do you know this?

Mr. Rawle: Objected to because the act of the druggist in filling the prescription referred to in the question cannot in any way bind or affect the rights of the defendants.

A. I was behind the prescription case just after having left the Doctor. Dr. Bailey. Mr. Paine was the party filling the prescription.

Q. 9. How do you know that Mr. Paine used the product known as Quin-Coco, instead of the Lilly Coco-Quinine, called for by the prescription?

Mr. Rawle: Same objection.

A. The product was taken from a gallon bottle of Quin-Coco. The druggist had to fill the prescription with Quin-Coco, because he hadn't any Coco-Quinine. I spoke to him about it and told him that when that gallon was emptied, if he purchased any more I would be compelled to inform the Doctor.

Mr. Rawle: Objected to because the threats of the witness to the druggist are not relevant to the issue between these parties.

Q. 10. Will you please tell us something more relative to the document to which I called your attention at the beginning of the deposition and how you are able to identify it as one that came to you from the Pfeiffer Chemical Company?

A. I can identify the document by the notations made by myself on the bottom of the 3rd page.

Q. 11. Were those notations in your own handwriting?

A. Yes, sir.

Q. 12. What was your understanding of the information given near the bottom of page 1 of this document, relative to Coco-Quinine, in the first column and Quin-Coco in the second column?

Mr. Rawle: Objection to the question upon the ground that the paper handed to the witness speaks for itself and because the understanding of the witness is irrelevant and immaterial.

A. I understood from the document that Quin-Coco was a substitute preparation for Coco-Quinine.

Q. 13. Did Mr. Stevenson, to whom you have before referred make any statement to you as to this document?

Mr. Rawle: Objection to the question upon the ground that statements by Mr. Stevenson to the witness are irrelevant to this issue.

A. Yes, sir.

Q. 14. What were they?

Mr. Rawle: Same objection.

A. Mr. Stevenson told me in my leisure moments to study up an get posted on competing preparations.

Q. 15. What did he say, if anything, relative to the Coco-Qui nine?

Mr. Rawle: Same objection.

A. That to go ahead and sell Quin-Coco for Coco-Quinine, as was the same and cost the druggists less money.

Mr. Bradford: The document in question is introduced in ev dence and marked "Complainant's Exhibit Document No. 3," th same being the identical document referred to in the deposition the previous witness, Mr. Whidden.

Mr. Rawle: Objection is made to the offer as irrelevant and imm terial.

Q. 16. When, if you can state, did you receive this document N 3 from the Pfeiffer Chemical Company?

Mr. Rawle: Same objection.

A. As to the date, I don't know. I had about three of those doc ments. I guess I wore one out and I sent for more and that ma have been one of the last two that I received.

Q. 17. Can you state approximately when this was receive

39 A. No, sir, I cannot state when I received this documen I received the first document which was the same as th one, about four years ago.

Direct-examination closed.

Cross-examination:

Mr. Rawle, reserving all objections heretofore made to the tes mony of this witness, cross-examines as follows:

X Q. 18. You testified that Mr. Stevenson told you in your leisu time to get posted on competing preparations. This blue list, as understand it was a list of competing preparations, was it not?

A. Yes, sir.

X Q. 19. And you were directed to study up those competin preparations, was that right?

A. Yes, sir.

X Q. 20. And that is what you mean by "substitute?"

A. No, sir. I mean by "substitute" preparations those that a exactly the same insofar that the doctor can't tell the difference.

X Q. 21. You mean can't tell the difference by taste or by lookin at it or what?

A. From a physical appearance.

X Q. 22. But doctors could tell the difference if he looked at th labels, couldn't he?

A. Yes, sir.

X Q. 23. And you mean that the druggists could not tell the difference in physical properties between the two?

A. The druggist could not tell the differenc between the two products from their physical appearance.

X Q. 24. From your experience in traveling for the Pfeiffer concern or, the Lilly concern, are there a great number of products sold by each which are so similar in physical properties, taste, etc., that a druggist could not tell the difference between them, irrespective of the package or label?

Mr. Bradford: Objected to as immaterial.

A. In the Lilly products we have nothing "the same as" a competing preparation. In selling pharmaceuticals for the Pfeiffer Chemical Company, I have made the statement that the product I was selling was exactly "the same as" the competing product from a physical and therapeutic standpoint.

X Q. 25. Do you mean to say that selling for Lilly you sold or offered for sale no preparation which competed with the preparations of other concerns?

A. We have emphatic instructions from Lilly & Co. that we have nothing "the same as" or "just as good" as a competing product. The preparations we list might differ in physical appearance but the therapeutic effect may be what the physician is desiring. In such a case, we detail the doctor on a product that is similar, soliciting his specification for the Lilly label.

Mr. Rawle: The answer is objected to as volunteered and irresponsive and the question is repeated.

A. The word competition as used in that question is rather vague. The products made by Eli Lilly & Co., and Lilly & Company, are competitive to all products and houses.

X Q. 26. Is that answer clear to your mind.

A. Perfectly.

X Q. 27. When you were selling preparations for any Pharmaceutical house, isn't it part of your equipment as a saleman to know what preparations are being sold by other pharmaceutical houses, so that you can talk intelligently to the proposed buyers of your preparation?

A. It is the policy of the salesman to know a little about the other fellow. In my capacity as salesman for Lilly I devoted all my time to knowing my own line irrespective of competition.

X Q. 28. I understand that the blue list marked "Exhibit 7" is intended to give information to a salesman as to what is being done by various pharmaceutical houses, is it not?

A. Yes, sir.

X Q. 29. Hasn't the Lilly house given you any information either in print or otherwise as to what other pharmaceutical houses are doing in the way of selling preparations?

A. No, sir. By that do you mean competing preparations?

X Q. 30. You can answer the question on the basis that I meant competing preparations, if you wish.

A. No.

X Q. 31. Why then did you ask me why I referred to competing preparations?

A. Because Lilly & Company make preparations that other houses make and if the other fellow is or isn't selling a certain product, we get busy and sell.

X Q. 32. And if the other fellow is selling a competing product, then what?

A. Then we get busier.

X Q. 33. Then there are products of Lilly which compete with products of other concerns, are there not?

A. Yes, sir. Provided that the other fellow's product is competing with Lilly's. If I might give a case in point of my statement. Pituitary Extract in Ampules is sold by practically every pharmaceutical house in the world. Medical journals are enthusiastic over its results. We are given instructions to sell the above product while the physicians are in such a state of mind. That is what I mean by competing.

X Q. 34. Is it not true that the plaintiff, Eli Lilly & Co. sell only to jobbers?

A. To the best of my knowledge, Eli Lilly & Co. sell only to the jobbing trade.

42 X Q. 35. Then your answer to my last question is "Yes?" Is that correct?

A. Yes, sir. If you say jobbing trade, it is correct, drug jobbers.

X Q. 36. When you spoke of someone named Paine having mixed a prescription, was Paine the druggist or in the employ of the druggist?

A. Paine is a partner in the firm. McPhetter & Paine are the firm and the Hillsboro Pharmacy is the title of the company.

X Q. 37. Where was Hillsboro?

A. Hillsboro, Oregon.

X Q. 38. Are you not furnished by Lilly & Co. with any printed matter setting forth preparations that are on the market and are being sold by other pharmaceutical houses?

A. No, sir.

X Q. 39. If you haven't had printed information as to what your competitors are doing sent you by the Lilly concern, have you had letters or oral communications from them giving you such information as to what your competitors are doing?

A. I have had letters from the house mentioning our competitors at various times.

X Q. 40. Have you been, while employed by Lilly as salesman, in the habit of calling on physicians to ask them to prescribe Coco-Quinine and thereby creating a market for it?

A. I have called on physicians, leaving them a sample of Coco-Quinine and asking them to try it out and if they liked it and they got results from it, to write prescriptions for it.

X Q. 41. Have you done this very commonly and very frequently and as a regular part of your business, as a salesman?

A. Yes.

X Q. 42. And that creates a market for the product which you are placing before the physician, does it not?

A. It does.

X Q. 43. And that is a legitimate way to create a market for anything that you are selling, is it not?

A. It is.

X Q. 44. And if any given physician has been using Quin-Coco or any other compound of cocoa and quinine instead of using Lilly's, what is your argument with him?

A. I have never had occasion to argue with a physician as no physician, to my knowledge has prescribed, when wanting Coco-Quinine, any other product.

X Q. 45. What I want to know is this. Have you run across physicians who have been using Quin-Coco or any other preparation of Cocoa and Quinine and have you thereupon talked with such physician about the propriety of using Coco-Quinine made by Lilly?

A. I have never run across a physician using Quin-Coco.

X Q. 46. Or any other product of Cocoa and Quinine except Lilly's.

A. Yes, that's the idea.

X Q. 47. What has been your territory during all of your employment by Lilly?

A. Bakerfield, California to Portland, Oregon. Bakersfield is about the middle of the State of California.

X Q. 48. You mean the Northern half of California up to Portland, Oregon?

A. Yes.

X Q. 49. How often did you see Mr. Stevenson and talk with him? More than once?

A. Yes, sir. I have seen Mr. Stevenson about twice.

X Q. 50. Where?

A. San Francisco and Sacramento.

X Q. 51. At which of the interviews did he tell you what you have said above that he told you.

A. At San Francisco.

Q. When was it?

A. When he engaged me to represent the Pfeiffer Chemical Company.

X Q. 53. Did he ever write you anything to that same effect?

A. No, sir.

X Q. 54. Did you ever communicate with the Home Office on that subject?

A. No, sir.

X Q. 55. Did you ever get any letter from the Home Office to the effect that Quin-Coco was the same product as Coco-Quinine?

A. No, sir, I did not.

X Q. 56. Did you ever get any letter or have any communication from the Home Office to the effect that any Pfeiffer Chemical preparation was exactly like any competing preparation?

A. Never received any communication from the Home Office to that effect.

X Q. 57. To make it perfectly clear, I now ask you whether all the instructions that you got when you went into the employ of the Pfeiffer Chemical Company in regard to competing products were from Mr. Stevenson?

A. Yes, sir.

X Q. 58. Did you in this connection ever have any written or other communication with Wm. R. Warner & Co. with regard to competing preparations?

A. Not to the best of my knowledge have I received any communication from Wm. R. Warner & Co.

X Q. 59. I think you said you were in the employ solely of the Pfeiffer Chemical Company?

A. I drew my salary from the Pfeiffer Chemical Co. and understood that the Pfeiffer Chemical Co. engaged me as a representative.

X Q. 60. You had a written contract as salesman with them?

A. I did.

45 X Q. 61. And in it you agreed in writing to turn over to them all their property when you left their employ.

Mr. Bradford: Objected to as incompetent.

A. I don't remember what the contract called for, never did get an understanding of the contract.

X Q. 62. Didn't you have a copy of it?

A. I had a copy of it.

X Q. 63. Don't you remember perfectly well that you agreed therein that when you left their employ you would turn back to them all their property?

Mr. Bradford: Objected to as immaterial.

A. No, I don't, as I never got an understanding of the contract.

X Q. 64. This blue paper which you produce here was a paper which belonged to them, did it not?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 65. Did you turn back other property to them?

Mr. Bradford: Same objection.

A. I did. Property in substance.

X Q. 66. And retained this blue paper? Is that correct?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 67. And when you went into the employ of the competitor Lilly, you handed this blue paper to them. Is this correct?

Mr. Bradford: Same objection.

A. I handed the blue paper to Mr. Whidden as it was of no use to me, seeing that I was not representing them, the Pfeiffer Chemical Co.

Adjourned until 2 p. m.

Met pursuant to adjournment.

X Q. 68. Who is Mr. Whidden?

A. At that time representing Lilly & Company in San Francisco, California.

X Q. 69. You have testified to a conversation you had with Mr. Stevenson, as I understood it. Was this conversation or was anything put in writing?

A. Nothing put in writing. Just verbal instruction.

X Q. 70. Where were you when you talked with Mr. Stevenson?

A. In the Argonaut Hotel and also for two or three days while he was schooling me in my work.

X Q. 71. Where were you being schooled during those two or three days?

A. In San Francisco.

X Q. 72. In what building or house or otherwise or on the road?

A. From store to store.

X Q. 73. Was Quin-Coco the only preparation that you would handle and as to which he was instructing you?

A. Quin-Coco was the product I was given explicit instructions to sell against Coco-Quinine as Coco-Quinine had an enormous sale in California.

X Q. 74. Repeated.

A. To the best of my knowledge it was the only pharmaceutical product that emphasis was laid on.

X Q. 75. You still don't answer my question. I ask you now what other products you were starting out to sell and to which you were receiving instruction from Mr. Stevenson.

A. The other Pfeiffer products were Castoria to be sold against Fletcher's Castoria; Arnica Salve to be sold against Bucklins Arnica Salve, which was at that time competitive. Those are the only two preparations that I can recall to mind.

X Q. 76. Hadn't the Pfeiffer Company a long list containing a great many preparations which were being sold on that market?

A. They had. Yes.

X Q. 77. Well, can't you remember what you were to sell?

A. No, sir, I can't.

X Q. 78. Is that because your memory is deficient or is it because there were no others?

A. I don't remember them because I have had so much to learn in the Lilly line whose policy is so different that I proceeded to forget what I learned in the Pfeiffer line.

X Q. 79. I still ask you whether there may not have been a considerable number of other products which you were to sell subsequent to your talk with Stevenson?

A. There may have been but I don't recall them.

X Q. 80. Then your memory is deficient in that respect?

A. No, sir.

X Q. 81. Then why can't you recall them, if there may have been such.

A. Because in representing the Pfeiffer Chemical Co. if I remember rightly, there were 37,000 items listed and I made it a point of selecting from the list, items to specialize on and items that had the biggest market.

X Q. 82. What sort of a list did you have in your hand to show you what the items were that the Pfeiffer Company were selling, a book or so?

A. I had catalogues.

X Q. 83. And you were authorized to sell any of those items on your catalogue, were you not?

A. I was authorized to sell all the products that the Pfeiffer Company made.

X Q. 84. During your employment by that company how many of these different products did you sell?

Mr. Bradford: Objected to as immaterial.

48 A. I cannot recall.

X Q. 85. You have testified that Mr. Stevenson gave you specific instructions as to the sale of Quin-Coco. I now ask you to state those instructions in his own language.

Mr. Bradford: Objected to as calling for an impossibility.

A. That I cannot do because apart from the items to be sold and instructions on items, I had so many other things to learn as I was just starting on the road and everything was new to me.

X Q. 86. Had you never sold drug preparations before?

A. I had sold them in a retail drug store but I had never sold them on the road.

X Q. 87. Where was the drug store?

A. The B. & S. Drug Store, 21 Ellis St., San Francisco, California.

X Q. 88. Then it would seem that Mr. Stevenson's instructions crowded on you a good deal?

A. Not exactly crowded. I remembered the facts that he emphasized.

X Q. 89. Can you remember the facts he emphasized in regard to any other product than Quin-Coco?

A. Castoria.

X Q. 90. What did he emphasize on that?

Mr. Bradford: Objected to as immaterial.

A. Sell Castoria as a replacer of Fletcher's Castoria.

X Q. 91. What do you understand "replacer" means?

A. Replacer I understand as a substitute.

X Q. 92. What do you understand a substitute to mean in your trade?

A. The understanding of substitute while with the Pfeiffer Chemical Company was that we had a product that was so much
49 like the other fellow's that one could not tell the difference between the two.

X Q. 93. Do you mean that one could not tell the difference be-

tween the preparation itself with respect to the appearance, taste, etc., or one could not tell the difference between the packages in which the preparations were put up?

A. My understanding is that you could not tell the difference between the product, irrespective of the package.

X Q. 94. Can't you remember just what Stevenson said to you and give me his exact words?

A. No, sir, I can't.

X Q. 95. Can you see in your mind's eye where he was or in what building or room or place when he said to you, what you have testified to in chief?

A. No, sir.

X Q. 96. Then all you can do is to give us a sort of a general idea that that was the substance of what he said to you or taught you. Is that correct?

A. The instructions given to me by Mr. Stevenson were so emphatic that I am absolutely certain that Mr. Stevenson told me not only once, but several times, that Quin-Coco was the same as Coco-Quinine.

X Q. 97. And you can't give his words?

A. No, sir. I can't.

X Q. 98. And that was the subject of his teaching, was it?

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 99. Please state who Mr. Stevenson was. That is, what relation he held to the Pfeiffer Chemical Company, so far as your understanding went.

Mr. Rawle: Objected to because the question is not proper for re-direct-examination.

50 A. My understanding of the position that Mr. Stevenson held with the Pfeiffer Chemical Company was that while he wasn't exactly a Pacific Coast Manager, I saw a letter or telegram, I am not sure, which, from the Pfeiffer Chemical Co. suggesting or instructing him to engage the services of a representative for the territory that I had in California and my understanding from that was that he was an overseer, as it were, of the Pacific Coast representatives for the Pfeiffer Chemical Company.

Mr. Rawle: Objection to the question and answer because transactions with the Pfeiffer Chemical Co. do not bind the defendant also objects to the answer because it is purely hearsay and the witness cannot testify to a writing or telegram which he does not produce or explain his failure to do so.

R. D. Q. 100. Did you or did you not accept the instructions of Mr. Stevenson as given with the authority of the Pfeiffer Chemical

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Company and as the authorized representative and agent of that company?

Mr. Rawle: Objection to the question as not proper for re-direct-examination also because dealings with the Pfeiffer Chemical Co. does not bind the defendants. Also because what the witness did is not relevant to this issue.

A. I accepted Mr. Stevenson's authority.

R. D. Q. 101. I think in your direct examination you stated with reasonable clearness what Mr. Stevenson's instructions were, so far as the sale of Quin-Coco is concerned but Mr. Rawle has endeavored to have you state Mr. Stevenson's exact words. I will not ask you to state his exact words, but to state his instructions again as nearly as you can in the words that he used.

Mr. Rawle: Objection to the question because what occurred between the witness and Pfeiffer Co. does not bind the defend-
51 ants; also because his question is entirely improper for re-direct-examination, the witness having fully answered a similar question on direct-examination and having answered a like question on cross-examination and this attempt to have the witness vary his statements is entirely irregular.

Mr. Bradford: Counsel for complainant resents the imputation that there is any attempt to have witness vary his statements. There was a plain attempt by counsel for defendant to obtain such result and the above question is merely for the purpose of affording witness an opportunity to re-state the facts as he remembers them, without seeking to confine him to the exact words used by Mr. Stevenson.

Mr. Rawle: Mr. Rawle points out the impropriety of the statement just put on the record by the opposing counsel while the witness is on the witness stand.

A. I can't remember the words Mr. Stevenson used, but the nut of my instructions was to sell Quin-Coco for Coco-Quinine as he had been slipping it to Lilly on Coco-Quinine in the Sacramento Valley.

R. D. Q. 102. And this was coupled with such instructions as stated in your direct testimony concerning representations that you might make to the drug trade. Is this so?

Mr. Rawle: Mr. Rawle objects because the acts of Pfeiffer Company do not bind the defendants, because the witness has been fully examined and this question is not proper for re-direct-examination and because the question is absolutely leading.

A. It is.

R. D. Q. 103. In your cross-examination a number of questions were based upon "competing" products. Is or is it not true
52 that there are a large number of general pharmaceuticals manufactured and sold by all pharmaceutical manufacturers?

A. The catalogue of pharmaceutical houses is usually made up into two. General Line and Specialties. The general line part are

practically all competitive. The specialty part is a list of products that a house specializes on and is not generally competitive.

R. D. Q. 104. I think you stated that there were something like 37,000 items in the Pfeiffer Chemical Co. catalogue. Do you make this statement on your actual knowledge from counting the items or merely as a guess or as a statement from some other source?

A. I had the idea that, and I don't know where I got the idea from, that the Pfeiffer Chemical Company listed 37,000 items. That was the understanding I had.

Re-direct-examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 105. If there were various pharmaceutical concerns selling a class of competitive preparations, do you mean by that that more or less of them competed on any one class of products or that several of them sold similar products?

A. I mean that Part 1 of the Catalogue as referred to previously was competitive to the Part 1 of the Catalogue issued by competitive pharmaceutical houses generally.

R. X Q. 106. And when different drug concerns sold competing articles they could be substituted for each other, could they not?

A. That is not substitution in my understanding of substitution. If a physician specifies Fluid Extract of Cascara, Lilly, and a fluid extract of Cascara made by another house is put in to fill a prescription, that is substitution. But if he writes for Fluid Extract
53 of Cascara and does not specify that, the druggist has the privilege of using any make he wishes.

R. X Q. 107. And that is all a question of the honesty of the druggist, is it not?

A. To a large extent.

R. X Q. 108. And substitution is dishonest and the other practice is square?

A. Substitution is dishonest, yes, sir.

R. X Q. 109. It is a question of conscience of the druggist, isn't it?

A. Yes.

R. X Q. 110. And when you went out to sell goods after your talk with Mr. Stevenson, did you proceed to tempt the druggist to buy your products and substitute?

A. I was paid by the Pfeiffer Chemical Co. to sell goods and if I didn't wish to follow out instructions, how could I hope to draw my salary?

Re-cross-examination closed.

Deposition closed.

CHARLES L. HOOPER.

Mr. D. B. DUNHAM, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.
A. D. B. Dunham. 39. 530 Arbor Ave., Indianapolis, Indiana. Druggist.
Q. 2. Please state if you are familiar with the preparation known as Coco-Quinine and if so, by whom it is manufactured and what you know about it?
A. I am familiar with the preparation. It is manufactured by Eli Lilly & Co., Indianapolis, Indiana. It is a preparation of Quinine with the taste of Quinine disguised by the cocoa.
54 The first put on the market that I know of was this preparation Coco-Quinine manufactured by Eli Lilly & Co.
Q. 3. Do you know anything of other preparations of a like character and if so, what?
A. Well, yes. Wm. R. Warner & Co. has a similar preparation of a different name. They give it the name Quin-Coco.
Q. 4. What do you know about Quin-Coco?
A. Well, Quin-Coco, as far as I know, is a similar preparation to the Coco-Quinine. It contains the same amount of Quinine to the ounce as the Coco-Quinine.
Q. 5. Do you handle both preparations?
A. I handle both preparations.
Q. 6. From whom do you buy Quin-Coco?
A. Wm. R. Warner & Co. and Coco-Quinine from Eli Lilly & Co. shipped through the jobber.
Q. 7. What representations, if any, are made to you by Warner & Company or their salesmen, when soliciting your orders for Quin-Coco?
A. Well, it is represented to me to be the same preparation as the Coco-Quinine and no difference could be detected by the people and costs us less money than the Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Do you carry on a large and important drug store in Indianapolis, Indiana?
A. I am carrying on a drug store that makes me a living.
X Q. 9. Centrally located?
A. No, sir.
X Q. 10. And you say that you handle both the Quin-Coco and the Coco-Quinine. Is that correct?
A. Yes, sir.
55 X Q. 11. And sell them to your customers as different preparations?
A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 12. Where is your drug store located?
A. 1277 Oliver Avenue, Indanapolis, Indiana.
R. D. Q. 13. Do you sell these preparations on physician's prescriptions or over the counter or both ways?
A. Well, I don't remember ever having a prescription for the Quin-Coco but I have had prescriptions for the Coco-Quinine. The other preparation I sell to the trade as a syrup of quinine, when a syrup of quinine is called for or if they ask me for a preparation of that kind I give them that and label it Quin-Coco or Syrup of Quinine.
R. D. Q. 14. But as I understand your last answer, you sell it when Syrup of Quinine is called for and label it Syrup of Quinine?
A. If I recommend it to them I label it as it is named. Lots of people come into the store and call for preparations of that kind under different names. The reason why I label it the name they call for is to enable them to not become confused and think they got the wrong preparation.
R. D. Q. 15. When physicians' prescriptions specify Coco-Quinine, do you ever use the Quin-Coco?
A. No, sir.
R. D. Q. 16. I think you stated in speaking of this product that it is a preparation of Quinine with the Quinine disguised by Cocoa or some statement of that kind, I don't recall the exact language. Is this correct?
A. No, it is not disguised by Coco. It is disguised by Yerba Santa.
56 R. D. Q. 17. What is the Cocoa used for in the preparation, if you know?

Mr. Rawle: Objected to as the witness is not qualified to answer the question.

A. For flavoring.

Re-direct-examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 18. Do you know of any other preparations on the market of Chocolate Quinine?
A. No, I do not. Never handle any other.
R. X Q. 19. Do you know of any?
A. I do not.
R. X Q. 20. Have they ever been offered to you?
A. They have not.

Deposition closed.

D. B. DUNHAM.

Mr. Louis Pink, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation?
A. Louis Pink. Age, 39. Residence, 2715 North Illinois St. Place of business, 550 Indiana Ave. Retail Druggist.
Q. 2. Please state what you know, if anything, concerning a pharmaceutical product known as Coco-Quinine and also the product known as Quin-Coco.
A. All I know of Coco-Quinine is that it is made by Eli Lilly & Co. and I have been handling it ever since they have had it on the market. I don't know anything about the other product excepting having seen the same of the salesman. I have never handled any of it.

57 Q. 3. Have you been solicited to purchase Quin-Coco and if so, how?

Mr. Rawle: Objected to unless the witness first states who solicited him and shows a relation with the defendants.

A. Well, there were different salesmen representing the Pfeiffer people. I don't know their names but they have sold me other goods from the Pfeiffer Chemical Co. They solicited my business on that product but I never bought any. They said that I could use it in place of Coco-Quinine, that there was absolutely no difference and no one could tell the difference.

Mr. Rawle: Mr. Rawle objects to the answer because no transactions with the Pfeiffer Chemical Co. can affect the rights of the defendants.
Mr. Bradford: In respect to this objection and for the information of the Court it is made of record that Mr. G. A. Pfeiffer of the Pfeiffer Chemical Co. is present and has been since the beginning of the examination of witnesses in constant consultation with counsel for defendant.
Mr. Rawle: Mr. Rawle states that Mr. Pfeiffer is here as officer of the defendant company and in no other capacity.

Q. 4. How do you dispense Coco-Quinine in your store?
A. Why we dispense it on physician's prescriptions and also if it is called for by the laity.
Q. 5. Have you ever had a physician's prescription which called for Quin-Coco?
A. No, sir.
Q. 6. Have you ever had a customer call for Quin-Coco?
A. No, sir.

Mr. Rawle: No cross-examination.

Deposition closed.

LOUIS PINK.

Mr. A. D. THORBURN, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. A. D. Thorburn. 42. 316 East 33rd St., Indianapolis, Indiana. Pharmacist in the employ of Pitman Moore Co., Manufacturing Pharmacists, and Secretary of the Company and chemist in charge of the production of the goods.

Q. 2. How long have you been in your present place of employment and where were you employed previously?

A. I have been with Pitman-Moore Company since September, 1906, and for about five years previous to that time with the Searle & Hereth Co., of Chicago.

Q. 3. What do you know, if anything, of a product on the market under the Searle & Hereth label, called Quin-Coco?

A. Nothing.

Q. 4. Was such a product manufactured by the Searle & Hereth Co. while you were with them?

A. No, sir.

Q. 5. Are the Searle & Hereth Co. now in business, do you know?

A. Yes, I understand they are in business. I have no direct knowledge but I presume they are. I hear of Searle & Hereth goods being sold, so I suppose they are still in business.

Q. 6. It is stated that the Searle & Hereth Co. are controlled by the Pfeiffer Chemical Co. If this is true, do you know when the Pfeiffer Chemical Co. took over the Searle & Hereth business?

Mr. Rawle: Objected to as hypothetical and because the witness has not been shown to have any knowledge on this subject and it is not the best evidence.

A. Mr. G. A. Pfeiffer, so far as I know, took charge of the Searle & Hereth business in June, 1906. I don't know whether at that time he controlled the business through ownership or the exact date at which this transfer took place.

Q. 7. Do you know that at that time the Searle & Hereth Co. had not begun the manufacture of Quin-Coco?

A. While I was with the Searle & Hereth Co. for several years, a sample of each batch of goods made by the Searle & Hereth Company went through my hands and there was at no time a sample of Quin-Coco submitted in this way. Nothing was sold until it had first passed through the Inspection Department, of which I had charge. The formulas owned by the Searle & Hereth Company were in my hands also and we did not have a formula on hand for the manufacture of Quin-Coco, consequently up to June, 1906, I think it is extremely unlikely that the company made any of these goods, without my knowing about it and I am quite sure that this article was not made by the Searle & Hereth Company.

Q. 8. When did you leave the employment of the Searle & Hereth Company,

A. The first part of August, 1906.

Q. 9. Was anything done in the way of manufacturing Quin-Coco between June and August, 1906.

A. No, sir; not at the Chicago plant.

Q. 10. Have you any knowledge of the product known as Coco-Quinine and if so, what can you tell us relative to it.

A. I have bought and sold Coco-Quinine in retail drug stores and possibly have seen a sample of it some ten years ago, but have not seen any since.

Q. 11. Do you know by whom it is manufactured?

A. It is made by Eli Lilly & Co. of this City.

Q. 12. Is or is it not recognized in the trade as one of their specialties?

60 A. I have always understood that it was one of their specialties or one of their preparations to which they have given special attention and to be specially interested in the sale of it.

Q. 13. Did the Searle & Hereth Co. manufacture or contemplate manufacturing any product of the same character so far as you know while you were with them?

Mr. Rawle: Objected to as irrelevant.

A. During all the time I was with the Searle & Hereth Co. I was employed in experimental work on new preparations. Very often our salesmen or customers asked us to furnish articles which were being sold in the trade by other houses. My recollection is that we considered for a time making a chocolate quinine mixture and that Mr. Hereth gave instructions that we should not do so. I do not think that we made any definite experiments for the development of the formula but simply received the request and accumulated a few facts regarding the article and then asked for instructions from Mr. Hereth. Following his instructions we discontinued all work on this article.

Mr. Rawle: Answer is objected to as irrelevant and as largely hearsay.

Q. 14. What reasons, if any, did Mr. Hereth give for his instructions not to proceed with this matter?

Mr. Rawle: The question is objected to as irrelevant.

A. He told us that this was a preparation on which Eli Lilly & Co. had done special work and that he preferred not to compete with them on this article.

Q. 15. As a chemist, I would like to ask whether or not in your opinion it is possible to make a liquid quinine preparation without the use of the chocolate or cocoa, that would be successful from a therapeutical and commercial standpoint?

61 Mr. Rawle: Mr. Rawle objects to the question as entirely vague.

A. Yes, sir.

Q. 16. Please state whether or not, in your opinion the cocoa is essential to any therapeutical virtue of the product.

Mr. Rawle: Mr. Rawle objects to the question because it doesn't appear what the product is or what a therapeutical virtue is.

A. I do not regard it as essential to any therapeutic virtue of Coco-Quinine.

Q. 17. Would or would it not be possible to make other liquid Quinine preparations flavored with other syrups than Chocolate or Cocoa and if so, will you suggest some such syrups?

Mr. Rawle: Same objection.

A. Quinine syrups are often made with Yerba-Santa and such added flavors as Anise, Coriander or other sweet essential oils. Licorice in syrups is also used to disguise the taste of Quinine and this mixture can be flavored with essential oils, such as above named.

Q. 18. In the last named preparation what function does the licorice perform?

A. It disguises the taste of the Quinine and gives color to the preparation.

Q. 19. As I understand it, this would be used in with the Yerba-Santa or in the place of?

A. This usually is employed without the Yerba-Santa and is considered an effective cover for the taste of Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 20. You have testified to the possibility of making the Quinine mixture with Anise, Coriander or other oils or
62 Licorice. Have you ever known of such preparation to be made with Quinine and any of those oils that have been commercially successful or more or less largely sold on the market?

A. The Pitman-Moore Co., with whom I am now employed, sell a mixture containing Calisaya alkaloids, including Quinine made from simple syrup and flavored with Lemon and a similar preparation flavored with Peppermint in white and yellow colors, which meets every demand made on us by our customers for a tasteless Quinine preparation. We consider it one of our successful preparations.

X Q. 21. What about making commercially a similar preparation out of Anise, Coriander or Licorice? Has that been done commercially and successfully?

A. We have made such preparations and I have frequently dispensed them in retail drug stores.

X Q. 22. What you dispensed were made up at the time?

A. In some cases, yes. When I say "we" have made them I mean "I" have made them as a retail druggist.

X Q. 23. But no drug house has ever made such a Quinine preparation with Anise, Coriander, etc., to any commercial extent. Is that correct?

A. We have supplied customers with this same liquid Quinine preparation flavored with Anise.

X Q. 24. You mean in a few instances?

A. Yes, in a few instances. We have not thought it necessary to supply it regularly because we had already settled on the formula with lemon and peppermint referred to above and are supplying that as a stock article.

X Q. 25. Won't you reflect a moment and see if you cannot remember that Searle & Hereth did make and sell a syrup of Quinine that had either Chocolate or Cocoa in it?

A. I have no knowledge of such preparation while I was
63 in their employ and I feel very certain if they had made it, I would have known it.

X Q. 26. Mention some of the leading drug manufacturers in the country.

A. Parke-Davis; Sharpe & Dohme; John Wyeth & Co.; H. K. Mulford & Co.; W. R. Warner & Co.; Eli Lilly & Co. selling a general line of pharmaceuticals.

X Q. 27. Is it not a common practice among pharmaceutical houses to manufacture and place on the market preparations similar to those of other houses?

A. It is common practice to place preparations representing the same therapeutical agents contained in preparations sold by other houses.

X Q. 28. And is it not common where one preparation has met with certain success for other houses to place a similar preparation on the market?

A. It is not common for us to do that in the sense of duplicating the other articles and selling it as a substitute complete and entirely as the preparation that has met with success.

X Q. 29. What is meant in the trade by "selling as a substitute"?

A. My understanding is that means something that completely replaces the successful article or the article to be substituted.

X Q. 30. In other words, it comes directly into competition with the article that is already on the market? Is that correct?

A. I would say that it is something intended to entirely replace the article that is already on the market.

X Q. 31. Don't you mean an article intended to come in direct competition with another article?

A. It is possible to come in direct competition with it without furnishing a substitute in the sense in which the trade understand these words. We can furnish an article intended to replace the successful one from a medicinal standpoint without intend-
64 ing to duplicate the successful article in every particular, pharmaceutical or in regard to the physical characteristics of the preparation.

X Q. 32. If two preparations are pharmaceutically the same would the mere change in color of one by any important coloring matter take it out of the class of substitutes?

A. I think it would. Such a change would make it impossible

to deceive a purchaser into thinking he was getting one article for the other.

X Q. 33. Could you give a list of any considerable number of replacers?

Mr. Bradford: Objected to as immaterial.

A. I don't quite understand the word "replacers."

X Q. 34. What do you understand by the word "replacer?"

A. I would suppose you meant one preparation could be sold for another and would lead the purchaser to think that he was getting an article of one manufacturer when he was getting in reality the article of another.

X Q. 35. I understand that was what you meant by the word "substitute." Am I correct?

A. That would be practically the same meaning. I am not familiar with the exact shade of the word "replacer" in the trade.

X Q. 36. Are you familiar with the word substitute in the trade.

A. I have heard that used more frequently, yes.

X Q. 37. Is it not a fact that the drug houses for many years have in many instances put out preparations similar to existing and more or less successful preparations sold by other houses?

A. I think it is.

X Q. 38. Isn't it true that the practice has been quite general in the drug houses?

95 A. I don't know how general it is but I know that there have been efforts made to stop the practice by voluntary agreement between the houses.

X Q. 39. A gentlemen's agreement?

A. Well, I think some of the drug associations have adopted an understanding. I don't know just what form, by which the members of the association understood that they were not to duplicate other preparations.

X Q. 40. Then by substitute or replacer you would now use the word "duplicate," would you not?

A. No, sir.

X Q. 41. What meaning then, in this connection, has the word "duplicator"?

A. I think the word "duplicate" is used in this connection so as to have a somewhat indefinite meaning, so that an association would not be adopting too narrow a view of the subject.

X Q. 42. Have you in mind any particular association as having attempted to prevent duplication?

A. The American Association of Pharmaceutical Chemists has suggested this to its members. I think that outside of the associations the American Druggist, a trade journal, at one time suggested that preparations be registered through their office so that names and labels and characteristics would not be duplicated.

X Q. 43. Then there were two efforts in this direction, neither of which were naturally successful. Is that correct?

A. I am not able to say how successful these have been.

X Q. 44. Can you mention an effort on the part of any other body or combination of drug houses?

A. I don't recall any organized effort beyond what I name, though such may have occurred.

X Q. 45. From these efforts, if no more, may we not infer that there was a somewhat general practice in the drug houses of duplicating?

66 A. I think it has been more general than it is at present.

X Q. 46. Do you mean that perhaps the drug houses are keeping up their old duplications but are not going into so many new ones?

A. I think some of the old ones have been discontinued.

X Q. 47. And is the other statement in my question partly true?

A. I think so many new ones have not been made.

X Q. 48. And also some of the old ones have not been kept up?

A. I expect some of the old ones have.

X Q. 49. Now are you not ready to say that in earlier days it was distinctly common to duplicate?

A. As long as I have been connected with the drug trade there has been a protest against such duplication and I do not think that it has been as common to duplicate these preparations as it has been to make new ones.

X Q. 50. Question repeated.

A. No.

X Q. 51. How common was it? Was it done more or less?

A. It was done, but I am unable to say how common it was.

X Q. 52. Was it done to your knowledge to a considerable extent?

A. Considering the number of preparations that had been introduced into medical use, I do not think that the drug trade generally has made a practice or did at any time make a practice of duplicating a large number of these preparations in such a way that the new article could be sold for the old and the purchaser deceived.

X Q. 53. In referring to deceiving the purchaser, are you speaking of the physical and pharmaceutical qualities of the drug only or do you also include the package in which the preparation might be put up?

67 A. It would include the package, the physical properties, and the origin or maker.

X Q. 54. That being your answer, I now ask you to disregard the package and the appearance of the preparation when offered for sale and to say whether it was not at least a common practice on the part of drug houses to duplicate the preparations of other houses? Disregard also protection by trade-mark or other governmental protection.

A. Not to my knowledge. No.

X Q. 55. Please say what was not to your knowledge.

A. It was not common practice to duplicate the successful article so as to deceive the purchaser in regard to the origin of the article.

X Q. 56. Are you not in this answer bringing in the question of

the way in which the package or the preparation was put up and offered to the trade?

A. No, sir.

X Q. 57. If two preparations of the same color are put up in entirely different packages, you would call that duplication or replacer?

A. Without more knowledge of the case, I could not say.

X Q. 58. Haven't you, in your last two or three questions been thinking of articles which both in themselves and in the package were similar to each other?

A. I have been thinking of articles rather not similar to each other as the question required me to.

X Q. 59. If one Trade Journal and one National Association of the drug trade took up the question of duplication, what was the evil they sought to remedy?

A. I think in the case of the Trade Journal it was an attempt primarily to establish priority of rights and in the case of the Association it was this same factor entered into their consideration and also there was a desire to keep one house from infringing on the rights of another.

X Q. 60. Do you mean to keep one house from duplicating the products of another?

A. No. I mean if one house could establish a right to a preparation, that the Association sought a simple way of notifying the trade that this house had or claimed to have those rights and that the members of the Association would then make no effort to make a substitute for this article.

X Q. 61. I asked you a few questions ago to state what was the mischief to be remedied which led the drug trade and the journal to take up this question?

A. I presume the people who thought they had rights to the manufacture and sale of these preparations felt that the rights were being injured by someone and that the effort through the journal and the association was an attempt to protect themselves.

X Q. 62. Do you mean that their rights were being injured by some other drug house?

A. That is my opinion.

X Q. 63. And in that opinion you are not referring to what we would call legal infringement of legal rights of members of the drug trade, are you?

A. I don't think the question of rights was limited only to the legal rights, that is rights by copyright or patent or trade-mark.

X Q. 64. And it was not limited to any kind of infringement which might grow out of similarity of packages, was it?

A. No. I don't think so.

X Q. 65. Then it went beyond that on a moral plane, did it not?

A. I think it did.

X Q. 66. And it went beyond legal rights on a moral plane, did it not?

A. I think it did.

X Q. 67. As a result of these two movements on the part of the

Association and the Trade Journal, was the mischief fully remedied?

69 Mr. Bradford: Counsel for complainant has refrained from objecting to this long line of irrelevant examination, expecting to discover some pertinent purpose, but now interposes an objection to the questions based upon any action of any drug journal or any trade association as having no possible bearing upon the issue.

A. I am unable to say from personal knowledge what the general condition of the drug trade is in this respect.

X Q. 68. When your house gets out a new preparation, does it register it with that Trade Journal or with that association?

A. It never has registered anything with the trade journal and we notify other members of our association by means of price list when we make additions to our list of preparations.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 69. Has it ever been, within your experience, considered good morals or good business ethics for one drug manufacturing concern to place upon the market a preparation which can be used as a "replacer" or substitute for a successful specialty of another concern?

Mr. Rawle: Mr. Rawle objects to the question because the witness' opinion on the moral question is not required for the enlightenment of the Court and because the question is so framed that it brings not only the physical preparation but includes the package.

A. No, I have never regarded it as good practice.

R. D. Q. 70. Does the house with which you are connected, the Pitman-Moore Co., make a practice of manufacturing sub-
70 stitutes for the successful specialties of other houses?

A. No, sir.

R. D. Q. 71. Why does it not?

Mr. Rawle: Objected to as irrelevant.

A. We have found that business secured in this way does not help the reputation of the house. It is not directly profitable and does not win us the support of our customers. There is a decided sentiment among our customers against this practice.

R. D. Q. 72. So far as you know, was there any other motive behind the movement on the part of the Drug Association to which you referred, than to promote the ethics of the business and establish business practices in the trade upon a higher plane?

A. No, sir.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 73. You have just asked if your house makes a practice of making substitutes for the specialties of other houses. What do you understand to be the meaning of "substitute" in that question?

A. An article that can be sold to a purchaser and he be made to understand that he is getting the same as the successful article already on the market.

R. X Q. 74. That includes both a similarity of the physical preparation and probably also the dress in which it is also put up and sold.

A. It would depend upon the circumstances of the sale at the time. Now, if it is sold to a druggist or a physician in an original package then, of course, in order to deceive this purchaser, why, everything connected with it would have to be an imitation. If it is sold taken from this original package and sold to another party, then the question of the original container itself would not enter into consideration.

R. X Q. 75. Then by "making substitutes" in the question put to you by Mr. Bradford, you include such similarity of package as would tend to deceive the buyer, do you not?

A. That is included in the question, yes.

R. X Q. 76. Now, he asked if you made a practice of "making substitutes" and I understood you to say that your house did not. I now ask you whether you ever have made a preparation similar to that of another drug house but put up in a distinctive package?

Mr. Bradford: Objected to as immaterial.

A. Yes.

R. X Q. 77. Can you mention one or more instances in which your house has done so?

A. Before I came with the Pitman-Moore Co. a Quinine preparation like Coco-Quinine was made. It was not offered in a package that imitated the Eli Lilly & Co. package.

R. X Q. 78. How was that preparation made and what was it called?

A. It was called Quin-Coco, and was made from Yerba-Santa and Chocolate or Cocoa and sugar and flavoring material and Quinine Sulphate.

R. X Q. 79. Can you mention any other preparations of your house similar to those of other houses physically and pharmaceutically, but not similar in package, in addition to the Quin-Coco which you have just specified as one such?

A. We make a Hydrastis and Sodium Bicarbonate mixture that I think represented the same medicinal agents as a preparation made by another house but I am unable to say that it is exactly similar to that made by the other house.

R. X Q. 80. Was it intended to be similar in medicinal effect?

72 A. It is intended to be similar in medicinal effect.

R. X Q. 81. Can you mention any others?

Mr. Bradford: Objected to as entirely immaterial.

A. We make a liquid Cascara preparation.

R. X Q. 82. To whose preparation is that similar?

A. To any aromatic Cascara. We were not the originators of this preparation.

R. X Q. 83. Who was?

A. I think it is claimed that Parke Davis & Co. or Frederick Sterns & Co. originated this.

R. X Q. 84. Any other?

Mr. Bradford: Same objection.

A. We make a long line of preparations that are similar in medicinal action to the same drugs as represented in preparations made by other houses.

R. X Q. 85. Are there dozens of such or how many, roughly?

A. Our firm has introduced very few new chemical compounds or crude drugs to the medical profession and necessarily the preparations which we sell, represent articles previously known so far as their medical action is concerned.

R. X Q. 86. And preparations previously known?

A. No, sir.

R. X Q. 87. Do not other drug manufacturers follow the same practice as you have said you followed?

A. I expect they do.

R. X Q. 88. Do you know of Guaiatonic?

A. I do.

R. X Q. 89. Do you make any similar product?

A. We make a product representing Guaiacol and Creosote but it is a different color and different materials are used in flavoring it and it is made by a somewhat different process than Guaiatonic.

Recross-examination closed.

73 Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 90. Is it or is it not true that there is a long line of general pharmaceuticals manufactured in common by nearly all of the drug manufacturing concerns?

A. It is true there is a long line of pharmaceuticals such as fluid extracts, tinctures and other preparations representing the same drugs manufactured by pharmaceutical concerns.

R. R. D. Q. 91. Is the fact that such common pharmaceuticals are manufactured by different concerns in your judgment any justification for one concern manufacturing an imitation or a substitute for a successful specialty of another concern?

Mr. Rawle: Mr. Rawle objects to the question as irrelevant and because the opinion of the witness on a moral question is not required for the enlightenment of the Court, it being a question purely for the Court.

A. No.

R. R. D. Q. 92. Mr. Rawle has in his questions referred not only to physical characteristics but also to patents, trade-marks, etc. So far as you know, is the product Coco-Quinine dispensed by the druggists in original packages?

A. Why, I have no knowledge of this feature of the matter.

R. R. D. Q 93. Suppose the fact to be that the product is dispensed on physicians' prescriptions in broken packages and without the original label, would the color and the flavor of the product, in your judgment, be of value in identifying the origin of it?

A. It would.

74 Re-recross-examination.

By Mr. Rawle:

R. R. X Q. 94. Then it is all a question of the honesty of the druggist, is it not?

A. Why, the purchaser ought to be considered in the matter. I don't quite connect the question with the subject-matter.

R. R. X Q. 95. If a druggist in compounding a prescription wilfully uses therein the wrong drug or preparation, isn't that solely a question of the honesty of the druggist?

A. That determines whether the druggist is honest or not.

Re-re-cross-examination closed.

Deposition closed.

A. D. THORBURN.

Recess till 10 a. m. tomorrow.

Met pursuant to adjournment.

Mr. JESSE E. WILSON, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Jesse E. Wilson; 42; 148 North Pennsylvania St., Indianapolis, Indiana; Pharmacist, Manager Francis Pharmacy.

Q. 2. In your business have you had any experience with a product known as Coco-Quinine? If so, what can you tell us about it?

A. Well, it is a preparation manufactured by Eli Lilly & Co. for a good many years. I can't say how many. It is universally considered as a standard preparation of Quinine with the taste 75 disguised. A pleasant preparation of Quinine. It is the only preparation of its kind we sell.

Q. 3. How is it dispensed in your store?

A. It is dispensed on prescriptions and the public has a large

knowledge of it and quantities of it are sold over the counter and it is asked for under that name.

Q. 4. It is asked for under what name?

A. Coco-Quinine.

Q. 5. Comparatively speaking, what is the extent of your prescription business?

A. Compounding prescriptions constitutes the larger part of our business. I presume that we do the largest prescription business in the State.

Q. 6. Have you ever had a prescription calling for Quin-Coco?

Mr. Rawle: Objected to as irrelevant.

A. Not to my knowledge.

Q. 7. Have you ever had a call for Quin-Coco in your store?

Mr. Rawle: Same objection.

A. Not to my knowledge.

Q. 8. What is the policy of your store as to handling what are known in the trade as substitute preparations?

Mr. Rawle: Objected to as irrelevant and immaterial.

A. We never use substitutes of any kind.

Direct-examination closed.

Mr. Rawle: No cross-examination.

Deposition closed.

JESSE E. WILSON.

76 Mr. J. K. LILLY, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Josiah K. Lilly; President of the corporation of The Eli Lilly and Company; age, 53; 1420 North Meridian Street, Indianapolis, Indiana.

Q. 2 As President of the complainant corporation you are familiar with the issue involved and I would ask you to please state in a narrative way the history of the beginning of the manufacture and sale of a product known as Coco-Quinine?

A. For a number of years previous to the introduction of Coco-Quinine we felt an urgent demand for a palatable liquid preparation of Quinine. This demand was largely created by a proprietary preparation then on the market that was palatable and that had a large demand. It consisted in a mixture of Cinchona Alkaloids suspended in a syrupy medium. To fill this field we designed and placed on the market the preparation known as Coco-Quinine. The basis of this preparation was a syrup of Yerba-Santa used at that time to some extent by pharmacists to disguise the bitter taste of Quinine by mixing the Quinine with the syrup at the time of dis-

pensing. This syrup of Yerba-Santa, known under various names by different manufacturers, called Yerbazin by the Lilly corporation, yielded a satisfactory preparation, but being common property and all manufacturers having a perfect right to manufacture it, we saw the necessity of giving our new preparation a characteristic color and flavor so that it would be different from anything that had been previously used. We found a satisfactory color and flavor in chocolate and after considerable experimentation and having overcome many difficulties, the preparation was perfected and placed upon the market under the name of Coco-Quinine. This name also to give it character. The experimentation was done largely in the year of 1899 and the preparation was marketed generally in 1900. Depending on the characteristic color and flavor and the distinctive name, we expended considerable sums upon promoting its sales till it became one of our most important specialties.

Q. 3. Please explain, if you can, how this preparation was received by the trade and the extent of its sales and the growth thereof from year to year in response to your efforts to promote its sale?

A. The result of our first year's sales were about $14,000. This was 1900. The sales grew year by year until they amounted to nearly $100,000 annually. For several years past, however, the sales have not increased and occasionally would be a little less than the previous year.

Q. —. About what period did the growth of the sales appear to reach the climax?

A. About 1913. The sales were virtually the same for the years 1910, 1911, 1912 and 1913.

Q. 5. Have the efforts of Eli Lilly & Co. to promote the sales of this specialty been relaxed during the period of the apparent standstill in the sales?

A. No, the usual efforts were made annually to promote its sales.

Q. 6. Please explain if you can the reasons for the growth of the sales stopping at about the period named?

Mr. Rawle: Objected to as for a matter of opinion instead of a matter of fact.

A. We have good cause to believe that it was due wholly to the competition of preparations made to duplicate Coco-Quinine in color and in flavor and offered to the drug trade at a lower price.

Q. 7. On what do you base this belief?

Mr. Rawle: Same objection.

A. Reports from our 145 traveling representatives who reported seeing on the shelves of the trade the preparations aforesaid and the frequent information coming to them that other preparations were being substituted upon prescriptions calling for Coco-Quinine.

Mr. Rawle: The answer is objected to as hearsay and especially as it refers to "substituted upon prescriptions calling for Coco-Quinine," which must be, so to speak, hearsay.

Q. 8. I show you a bottle of preparation and ask you what it is.
A. It is a preparation known as Coco-Quinine made by Eli Lilly & Co. in the original package of one pint.

The bottle in question is offered in evidence and marked "Complainant's Exhibit Bottle No. 4, being a bottle of complainant's product known as Coco-Quinine.

Q. 9. I now show you another bottle and ask you what this purports to be?
A. This is an original pint package (which we have opened for the purpose of sampling) of a preparation marketed under the title of Quin-Coco under the name of the Searle & Hereth Co., Manufacturing Chemists, St. Louis, Mo.

The bottle in question is offered in evidence and marked "Complainant's Exhibit Bottle No. 5," the same being a bottle of defendant's product called Quin-Coco.

Q. 10. Please state what you know of this preparation and what bearing it has upon the sales of Coco-Quinine?
A. This preparation known as Quin-Coco has, to our certain knowledge, been offered generally throughout the United States and having the same appearance and flavors may easily be mistaken for our preparation of Coco-Quinine and being sold to the drug-
79 gist at a somewhat lower price it has been largely placed with the trade and has, without doubt, secured a large volume of sales, the volume of which is unknown to us.

Mr. Rawle: The answer is objected to as hearsay and opinion evidence and not based upon any ascertained or stated facts and as inadmissible and guesswork.

Q. 11. Please state as to the comparative appearance and flavor and therapeutical value of these respective products?
A. Almost identical.
Q. 12. Would you, if given a quantity of the Quin-Coco by a druggist, in response to a physician's prescription for Coco-Quinine, be able to detect, either by ordinary observation or taste, the difference between the product called Quin-Coco and Coco-Quinine?
A. Comparison by experts might detect a slight difference. Ordinary examination would not detect a difference.
Q. 13. Please state as to the practice of the manufacturers of pharmaceuticals in placing upon the market preparations of similar character? In other words, what is regarded as the ethics of the business among reputable concerns?

Mr. Rawle: Objected to because the question calls for an answer from the witness on a matter of law and the opinion of the witness on so broad a basis as the one contained in the question would obviously not enlighten the Court.

A. Many manufacturers in the United States scrupulously avoid duplicating, in a manner that might deceive, the preparations of

other manufacturers, especially those designated as specialties. This practice is generally considered among manufacturers as good morals and proper ethics and is considered perfectly legal as long as it does not tend to create a monopoly or restrain trade. Other manufacturers make it a practice to duplicate as nearly as possible the preparations of others in such manner as to deceive, rendering it possible to substitute the one preparation for the other.

Q. 14. Are there, or are there not, many pharmaceutical products of a general character manufactured in common by all manufacturers of pharmaceuticals?

A. Yes, many thousands of them, those that are official in the United States Pharmacopœia and many others that are called for by the medical pharmaceutical professions and are common property to all.

Q. 15. Please explain the difference, from an ethical standpoint, between the practice of different concerns in manufacturing pharmaceuticals of this character which are substantially duplicates of each other and the practice of manufacturing what you have termed as specialties, which are duplicates of each other.

Mr. Rawle: Objected to as calling for a statement of what is a matter of law on the facts.

A. What is known as general pharmaceuticals being common property all manufacturers feel perfectly free to make and market them without any restrictions whatsoever. When one manufacturer, however, creates something new and original and expending time and money in creating, introducing and establishing same, many other manufacturers do not feel that they have any legal or moral right to duplicate the preparation precisely in color and flavor or general nature and undertake to secure trade that has been created by the originator. They, therefore, refrain from such practices. This does not interfere in the least with their creating something entirely different yet competing in the same field of usefulness.

Q. 16. Have, or have not, the complaints coming into your office from your representatives throughout the country concerning the substitution of Quin-Coco for Coco-Quinine been general or from special localities?

Mr. Rawle: Objected to as calling for hearsay; such complaints of admissible evidence should be produced by the witness; objection is further made to the word "substitute" or "substitution" as the witness has not shown that there is any such thing in fact.

A. The reports have come from nearly all portions of the United States but naturally very largely from those sections known as malarial sections, where quinine is used more frequently.

Mr. Rawle: The answer is further objected to as not in any way specifically connecting the evidence with the defendants.

Q. 17. Please explain the purpose of the chocolate or cocoa in the preparation of Coco-Quinine.

A. It was selected as a color and a flavor for this preparation because there was not on the market a liquid preparation of Quinine that contained Cocoa, so it was selected to make it different from any other like preparation and to designate it as the Lilly product. Its presence is not essential to its palatability or Quinine-disguising power.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

Not waiving objections to the examination-in-chief.

X Q. 18. You have referred to the malarial districts or sections of the country. Is it not true that in the last five or ten years malaria as a disease has very substantially lesse-d in this country and especially the Southern States, such as Texas, Louisiana, Mississippi, Arkansas, due probably to better drainage and to the elimination, more or less, of mosquitoes as malaria carriers?

82 A. There is no doubt that malaria is decreasing in such districts, yet there still remains a very large use of Quinine in those districts.

X Q. 19. Are you prepared to say that your sales in malarial sections have not fallen off?

A. They have fallen off in Coco-Quinine but not in other Quinine preparations, such as capsules, pills, tablets, etc.

X Q. 20. Are you now speaking of malarial sections only?

A. No, I am speaking of the United States generally, but more particularly in those districts known as malarial districts.

X Q. 21. What do you understand to be malarial districts?

A. Those districts of the country contiguous to the lower Mississippi, the tidewater countries of Connecticut, New Jersey, Virginia and Florida, and such sections where stagnant water and mosquitoes abound as distinguished from the higher, better drained sections.

X Q. 22. Hasn't there been a general war declared on mosquitoes and haven't they become to be considered as malaria carriers?

A. There has been a great deal of agitation of the subject but as far as I can observe, very little actual results have been obtained.

X Q. 23. Isn't Quinine a specific for malaria or chills and fever?

A. It is a specific for the destruction of the malaria plasmodium.

X Q. 24. And that it is such a specific is very deeply rooted in the minds of the American people, is it not?

A. It is.

X Q. 25. Are you prepared to say, in view of these facts that the amount of malarial fever in the low-lying districts that you have mentioned, has not been diminished in late years?

A. I am not informed.

83 X Q. 26. I was under the impression that in answer to an earlier question you said that the amount of malarial fever had been reduced.

A. You are wrong in that, sir.

The witness having had the first question in cross-examination read to him, now states:

A. We are informed that the amount of malaria is decreasing in such districts, but to just what extent I am not informed.

X Q. 27. You have testified as to lessening sales of your Coco-Quinine and referred to other houses duplicating it. Will you name the houses that have done so to your knowledge?

A. The Wm. R. Warner Co. under the label of Searle & Hereth most largely. Smaller quantities have been noted on the market being made by the John T. Milliken Co. of St. Louis; Meyer Bros., Drug Co., of St. Louis; the Henry S. Wampole Co., of Baltimore, and the H. K. Mulford Co. of Philadelphia.

X Q. 28. May there be others?

A. That is hearsay, Mr. Rawle.

X Q. 29. Please state any information that you have on the subject of others.

A. The First Texas Chemical Company of Dallas, Texas, and the William S. Merrell Co. of Cincinnati have been reported to us as making and selling such a preparation.

X Q. 30. Are the preparations that these various concerns make and sell similar products to yours in respect to being a compound of chocolate and quinine?

A. Yes.

X Q. 31. Are they being offered or are some of them being offered for sale all over the country or to a large extent throughout the country?

A. I am not fully informed.

X Q. 32. Have you come into competition with them or all of them in the sale of this preparation, more or less?

A. To a small extent.

X Q. 33. You have testified as to a large number of preparations that are set forth in the United States Pharmacopœia and have become, as you said, common property. Is that correct?

A. Yes.

X Q. 34. Is it not true that certain specialties have from time to time become so acceptable that they have become standard and then have passed substantially into the United States Pharmacopœia or the National Formulary?

A. Certain preparations that were first introduced as specialties have been incorporated into the National Formulary so far as to formula as near as the compilers of the National Formulary were informed as to the true formulas. But in no case where such formulas were incorporated in the National Formulary was any attempt made to duplicate the specialty in color, odor, flavor or characteristics that would give it individuality.

X Q. 35. You say, "no attempt was made." By whom do you mean no attempt was made?

A. By the compilers of the Formulary.

X Q. 36. What is the National Formulary?

A. The National Formulary is a publication issued under the auspices of the American Pharmaceutical Association in which is

incorporated certain drugs and compounds not incorporated in th
United States Pharmacopœia. This publication being included wit
the Pharmacopœia under the Food and Drugs Act of June 30, 190
is now an authoritative standard.

X Q. 37. Hasn't your company recently, or within the last fe
years increased its facilities for the manufacturing of empty an
filled capsules?

Mr. Bradford: Objected to as immaterial.

A. Yes.

85 X Q 38. And haven't you also during the period mentione
put special stress on the manufacture and sale of Quinin
filled capsules?

A. No.

X Q. 39. Is it a considerable part of your business?

A. No.

X Q. 40. Have the sales in the Quinine-filled capsules increase
during the past five years?

A. Yes.

X Q. 41. Extensively?

A. Not extensively.

X Q. 42. To a considerable extent?

A. Not to a great extent but has increased in proportion to th
general increase of the business.

X Q. 43. Is it not possible that this increase in the Quinine-fille
capsules may have affected the sale of your Coco-Quinine product?

A. I think not.

X Q. 44. Why not? Are they not both Quinine preparations,
specific for malarial fever?

A. Yes, they are both of the same nature and for the same pu
pose but we put special effort in advertising and sales power on Coc
Quinine but, owing to the small profit enjoyed from the sale
Quinine capsules, we make no effort whatever to promote their sal
Furthermore, it has been demonstrated that capsules are contra-in
dicated in certain low form of fevers where the process of digestion
all but suspended and in such cases a liquid preparation, such
Coco-Quinine is more beneficial. By contra-indicated I mean th
the indication is against their use owing to the danger of the capsu
passing through the body undissolved, the patient thereby failing
secure the benefit of the action of the Quinine.

X Q. 45. You have testified that there are many thousands
preparations manufactured by all pharmaceutical manufacturers an
you specified among them those that are set forth in the Unite
States Pharmacopœia. Assume that two or more pha
86 maceutical manufacturerers place any one of these prepar
tions on the market and there is a case of substitution, is n
that a mere question of the honesty of the druggist who makes th
substitution?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. If the preparation when prescribed or called for is indicated

he that of some particular manufacturer and the druggist substitutes the preparation of another manufacturer, that is, of course, simply a question of the honesty of the druggist, providing he does this without the permission of the prescriber.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 46. Referring to the sale of Quinine in capsule form, is not this method considered free to all and common in the business of all manufacturers of pharmaceuticals?

A. Yes.

R. D. Q. 47. In addition to the reason given in your cross-examination for the administration of Quinine in liquid form, are there any other reasons than those stated that you can think of or any other instances where the liquid preparation would be preferred to a Quinine preparation in capsule form?

A. Many patients have difficulty in swallowing a capsule. Especially is this frequent with women and children. Here the liquid preparation is preferable. The presence of the gelatine might be considered objectionable in certain cases as before noted.

R. D. Q. 48. Mr. Rawle has asked your opinion as to the practice of druggists in the substitution of a U. S. P. preparation of one manufacturer for a similar preparation of another manufacturer called for by the prescription. I would like your opinion on this question. Suppose a druggist is induced by the representative of a manufacturing concern to purchase a medicinal preparation on the representation that it is the same as a well known and popular specialty of another house and can be dispensed when the preparation of the other house is called for by its trade name and that the physician and the customer will never know the difference and that the druggist can obtain this preparation for a lower price than the price of the preparation of the original manufacturer, thereby making a larger profit and the druggist yielding to the temptation thus offered, buys the substitute preparation and uses it in the manner as explained to him by the representative in question, then does this practice become solely a question of the honesty of the druggist?

Mr. Rawle: Objected to as irrelevant and hypothetical.

A. My opinion is that such practice on the part of both the druggist and the representative is reprehensible in the extreme.

R. D. Q. 49. Will you please state whether or not you have any practical experience as a chemist and whether your answers calling for chemical knowledge have been based on such experience?

A. I have studied chemistry and practiced chemistry, am a graduate of the Philadelphia College of Pharmacy. Have been engaged in the manufacture of chemicals and pharmaceuticals for 39 years.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 50. I hold in my hand Complainant's Exhibit Bottle No. 4, being a pint bottle of liquid Quinine produced by you. I see on it a representation of a factory with the word "Lilly" in red
88 letters. What significance has that mark in your business?

Mr. Bradford: Objected to as immaterial and not cross-examination.

A. The cut of the factory has no significance but the word "Lilly" in red script is a fac-simile of the signature of the founder of the house and is a registered trade-mark appearing on all labels affixed to the goods emanating from our laboratories.

R. X Q. 51. In substantially the form as it appears on this bottle?

A. Yes.

R. X Q. 52. Could you state when that was registered as a Trade-mark?

A. My memory does not serve me but a copy of the registration will be furnished you.

R. X Q. 53. Have you ever in your advertisements referred picturesquely to this red Lilly as indicating the Lilly product. Perhaps in the words, "If you see the red Lilly there, it is our product" or any similar words.

A. I would not flatter ourselves that we are able to do anything picturesquely but we have a slogan in use to effect—"If it bears a red Lilly, it's right."

R. X Q. 54. Do you print and have you always printed that slogan on your advertising literature, more or less?

A. No, that doesn't appear on all of our literature and on none of our labels but just occasionally, as an advertising proposition.

R. X Q. 55. Has it ever appeared on your letter heads?

A. My memory does not serve me in this respect.

R. X Q. 56. Can you say whether this red "Lilly" has invariably been on the label of your Coco-Quinine product?

A. Possibly not, in the first few years, but it has been in the main and is now universal.

89 R. X Q. 57. And has been for the last five years?

A. Yes.

R. X Q. 58. For the last ten years?

A. Possibly, but no longer.

R. X Q. 59. Do your numerous salesmen make use of this slogan or are they instructed to do so, or understood to do so?

A. No, it is only issued in printed form.

R. X Q. 60. Is its existence in a slogan in the words you have mentioned well known to your salesmen and has been?

A. Yes.

R. X Q. 61. It is rather current around your business, isn't it?

A. Yes.

R. X Q. 62. Sort of E Pluribus Unum?
A. Sic Semper Tyrannis.

Re-cross-examination closed.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 63. Is the trade-mark "Lilly" the only trade-mark by which the various products of your concern are known?

Mr. Rawle: Objected to as immaterial.

A. The only trade-mark for the general line, but we have certain trade-marks for individual preparations.

R. R. D. Q. 64. Is the general trade-mark referred to or the special trade-marks for the several products the only means by which those products become identified with the house and their origin recognized in the trade?

A. No, the name of the corporation The Eli Lilly and Company appears with these Trade-marks on all packages.

R. R. D. Q. 65. Reference has been made to advertising. What field is covered by your advertising and in what way?

90 A. Our advertising goes to physicians, pharmacists, dentists and veterinarians in the form of circulars, pamphlets, letters and also in the technical journals going to such professions, such as The Pharmaceutical Era, American Druggist, Practical Druggist, Journal of the American Medical Association, and a number of other medical journals.

R. R. D. Q. 66. Are your products advertised to the laity?

A. No.

R. R. D. Q. 67. Is Coco-Quinine sold to the laity generally in original packages or in bottles provided by the druggist?

A. Rarely in original packages, almost universally re-bottled into smaller containers by the druggist. Our direct sales are made only to wholesale druggists who in turn supply them to the retail druggist. Our salesmen call upon physicians and retail druggists. All orders from physicians are turned to the retail druggist for execution and all orders from the retailer are turned to the jobber for execution, we making no direct sales to either druggist or physician.

Re-redirect examination closed.

Deposition closed.

JOSIAH K. LILLY.

It is stipulated and agreed by and between counsel for the respective parties that the Exhibits introduced or to be introduced may remain in the custody of the party in whose behalf they are introduced, until the day of the hearing, subject to examination by opposing counsel and use of opposing counsel, whenever needed in the taking of evidence or preparation of the case.

Adjourned to meet at the Hotel Ponchartrain, Detroit, Michigan, at 9.30 a. m. to-morrow.

91 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

STATE OF INDIANA,
County of Marion, ss:

I, A. C. Rice, a Notary Public in and for the County of Marion, and State of Indiana, do hereby certify: That, pursuant to notice and agreement of Counsel, I was attended at the office of Bradford Q Doolittle, 1451-1455 Lemcke Annex, in the City of Indianapolis, and State of Indiana, by E. W. Bradford, Esq., on behalf of complainant and Francis Rawle Esq., Counsel for defendant, on the days and dates hereinbefore stated; that the aforenamed witnesses, E. G. Eberhardt; R. A. Whidden; C. L. Hooper; D. B. Dunham; Louis Pink; A. D. Thorburn; Jesse E. Wilson; and J. K. Lilly; who were of sound mind and lawful age, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the above entitled cause and that they thereupon testified as is above shown; that the depositions by the witnesses subscribed as above set forth were reduced to writing by myself and under my direction in the presence of the witnesses themselves and from their state-

92 ments, and were read over by the said witnesses and subscribed by them, and that all was so done at the place above specified and at the times set forth, and that said depositions were written and signed in the presence of myself and Counsel for complainant.

I further certify that each of the above witnesses resides at a place more than one hundred miles from the place of the trial of this cause.

I further certify that the exhibits as cited, were offered in evidence and marked as specifically noted in the foregoing depositions of E. G. Eberhardt, Ray A. Whidden, and J. K. Lilly and that, pursuant to a stipulation by Counsel for the respective parties, I have delivered said exhibits to Counsel for complainant to be retained and produced in accordance with the stipulation in that behalf contained.

I further certify that I am neither Attorney nor Counsel for any of the parties in said deposition or caption made, and am in no wise interested in the result of said cause.

Witness my hand and official seal at Indianapolis, in the State of Indiana, this 23rd day of March, 1915.

[SEAL.]

A. C. RICE,
Notary Public, Marion County, Indiana.

My commission expires April 9, 1916.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

Detroit, Michigan, March 24th, 1915.

Depositions of Witnesses Taken on Behalf of the Plaintiff Before Charles E. Riordon, Special Examiner, Commencing Wednesday, March 24th, 1915, at Detroit, Michigan.

Met pursuant to adjournment from yesterday, at Indianapolis, Indiana, and pursuant to notice and agreement of Counsel, at the Ponchartrain Hotel, Detroit, Michigan.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

ROCKWELL ROMAN, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Rockwell Roman; age, 32; Detroit, Michigan; foreman of the Order Floor of the Michigan Drug Company.
Q. 2. What are your duties in this position?
A. To oversee all the orders that go out.
Q. 3. Do you see all the orders that come in as well?
A. Yes.
Q. 4. Does your house handle the product known as Coco-Quinine?
A. We do.
Q. 5. What do you know in regard to this product?
A. I know that we have handled Coco-Quinine for a number of

years and have never known of any similar preparation in our stock.

Q. 6. Have you ever had orders for a similar preparation under other names?

A. I don't recall any such orders.

Q. 7. Is this product recognized in the trade as the product of any particular manufacturer and if so, who?

A. It is recognized as the product of the Eli Lilly Company.

Q. 8. Is the demand a continuous and general one in your territory?

A. Yes, it is quite extensive, almost every day we have orders for it.

Q. 9. What is the extent of the territory served by the Michigan Drug Company?

A. We cover the better part of Michigan with the exception of the extreme West, and the northern part of Ohio and Indiana.

Q. 10. Your house does a strictly jobbing business?

A. Yes, strictly jobbing.

Q. 11. How does the business of your house compare with other jobbing houses, if you know?

95 A. Well, we think we are one of the largest in the country.

Q. 12. Has the demand for Coco-Quinine at your house been an increasing or a diminishing one in recent years?

A. Increasing without a doubt.

Q. 13. In case you receive an order for liquid chocolate quinine preparation or quinine preparation containing chocolate or cocoa, what preparation would you think was intended by the party giving the order?

A. I would think that Coco-Quinine would fill the bill. We never have in stock anything else.

Direct examination closed.

No Cross-examination.

ROCKWELL ROMAN.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILLIAM H. MARTIN, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William H. Martin; age, 44; 620 Pa. Ave., Detroit, Michigan; representative of the Eli Lilly & Company, for Eastern Michigan.

Q. 2. What are your duties as representative of the Eli Lilly & Company?

A. Selling Eli Lilly's complete line of pharmaceuticals, including detail work of physicians such as leaving samples and [illegible]

8 ture. I also call on the retail trade and jobbers, take orders and turn the orders over to the jobbers. We fill no orders ourselves.

Q. 3. Among other products which you handle or the sale of which you promote do you include Coco-Quinine?

A. Yes, sir.

Q. 4. Tell us in your own way what you can relative to the trade in Coco-Quinine in your territory and any interference with that trade which you have experienced?

A. Well, for a number of years I have sold Coco-Quinine to the trade and for the last two or three years I have frequently noticed some of the buyers, that is retail druggists handling a preparation called Quin-Coco, which was sold to them for a preparation said to be similar to Lilly's Coco-Quinine. I have frequently asked druggists that were handling Quin-Coco if they received prescriptions for same. They have told me that they did not and that all prescriptions for Coco-Quinine or like preparations specified by prescriptions read Coco-Quinine. I have been to my knowledge in one store behind the prescription case when a person handed in a slip of paper calling for Coco-Quinine and the prescription clerk came behind the prescription counter in the presence of another party and filled the Coco-Quinine order with Quin-Coco. At the same time I called his attention to it.

To my knowledge Coco-Quinine is the only advertised product to the physicians by the way of literature and samples. I have never seen a syrup of chocolate quinine or sweet quinine or Quin-Coco, with my experience of some six or seven years with the Eli Lilly & Co., left in a physician's office or any literature pertaining to any preparation claimed to be similar to Lilly's Coco-Quinine.

My retail druggists that I have asked why they buy Quin-Coco have answered in this way that it cost them less money than Coco-Quinine.

9 By Mr. Rawle: I object to so much of the answer as is palpable hearsay and object specially to the statement of the witness as having been behind the prescription desk of a druggist, &c., for the reason that no act of such druggist is relevant here or can affect any right of the defendant.

I also ask the Special Examiner duly appointed by the court to instruct the witness in future answers to confine his testimony to facts known to him as facts and not to make any statements of what other people have told him.

By Mr. Bradford: Counsel for plaintiff objects to any instructions going to control the witness in his answers for the reason that in this kind of examination opposing Counsel is privileged to place his objections upon record against any testimony not within the accepted rules of evidence and the court alone is the only tribunal competent to pass upon the competency or incompetency of such testimony.

Further that the enforcement of such instructions outside of the court is dangerous inasmuch as it might prevent placing upon the

record facts that are material to the interests of one or the other parties to the suit.

(The Special Examiner in response to Mr. Rawle's request states that he does not consider it within the province of the Special Examiner to instruct the witness but under the rules and decisions is required to take everything said by the witness.)

Q. 5. Did you report the facts which you have referred to in your last answer to your house, I mean to Eli Lilly & Co.?

By Mr. Rawle: Objected to as irrelevant.

A. I did.

98 Q. 6. And were these facts the basis of your report?

(Same objection.)

A. They were.

Q. 7. As I understood your answer in the one instance referred to you saw the prescription for Coco-Quinine which was filled by the druggist with a product called Quin-Coco?

(Objected to unless the writing is produced for cross-examination, and for the reason given above that the act of the druggist does not bind the defendant.)

A. I said that I saw a piece or slip of paper that was handed to the prescription clerk in the presence of a witness, Mr. Otto Kessel, calling for Coco-Quinine and will state further as the prescription clerk passed by the witness and myself he said I have an order for Coco-Quinine but as I have none I will use Quin-Coco. I saw him take a bottle and fill it from a Quin-Coco bottle, label same and hand back to customer.

By Mr. Rawle: The answer is objected to so far as the same is hearsay.

Cross-examination:

Mr. Rawle, without waiving objections heretofore made, cross-examines as follows:

X Q. 8. Did you consider that honest on the part of that druggist?

A. No, sir.

X Q. 9. Give me his name and address?

A. W. H. Friars, Saginaw, Michigan. That is the store. The clerk's name I do not know.

X Q. 10. When was this incident?

A. Inside of the last four months. He gave me an order for a gallon of Coco-Quinine while I was there.

By Mr. Rawle: Notice is hereby given that at the proper time motion will be made to strike from the record he hearsay

99 testimony given by the witness and the other parts of his testimony to which objection has been made.

WILLIAM H. MARTIN.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

NOTE.—After the conclusion of the deposition the witness informs counsel that he has ascertained the name of the clerk referred to in answer to X Q. 9, to be a Mr. Day, and by request of counsel this note is added to make said name of record.

JOHN M. FRANCIS, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John M. Francis; age, 47; Detroit, Michigan; Chemical Superintendent of Park, Davis & Co.

Q. 2. Please state what experience you have had that will qualify you to testify as an expert in a case involving the giving of an opinion on chemical questions?

A. Twenty-three years service as pharmaceutical chemist with Parke, Davis & Co., during which time being intimately associated with and the examination of pharmaceutical materials, the use of pharmaceutical manufacturing processes and the production of pharmaceutical preparations.

Q. 3. Have you any familiarity with the product on the 100 market called Coco-Quinine, the same being a liquid preparation containing quinine?

A. Yes, sir, to the extent of having read the literature published in connection with such a preparation; and in having examined several commercial samples of such a product purchased from time to time and also from having made chemical analysis of the same and from having produced in an experimental way a similar preparation.

Q. 4. Will you please state your opinion as to any use or purpose of the chocolate or cocoa contained in this preparation?

A. My opinion as to the utility of chocolate or cocoa in such a preparation would be that it serves the purpose of imparting to such a preparation a distinctive flavor and a distinctive color. The use of such substance does not, in my opinion, impart to the mixture any characteristic medicinal action, nor does it modify the medicinal activity of the other ingredients involved.

Q. 5. Might or might not other syrups or other colors and other flavors be used in the product without changing its medicinal properties or characteristics?

A. Yes, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 6. In using a syrup in a quinine preparation of the general kind under consideration, what part does the syrup play?

A. If the syrup is not medicated it serves as vehicle and may serve according to its construction to give to the preparation a characteristic flavor and color.

X Q. 7. Does the chocolate or cocoa in such a preparation perform any function in holding the quinine in suspense, or in affecting the quinine in any way after the preparation is made, by solution or otherwise?

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A. In my opinion it does not.

X Q. 8. After such a preparation is made does any change take place in the quinine, physically?

A. I do not know.

X Q. 9. Is the quinine dissolved?

A. My belief based upon similar syrups made under my own supervision is that the quinine is in solution.

X Q. 10. Before or after the ingredients are mixed?

A. The quinine in the case of my own experiments was in solution at the time of mixing the ingredients. I would not argue from this, however, that such a preparation could not be made using quinine not in solution at the time the ingredients are combined.

X Q. 11. If not in solution at the time of mixing would solution of the quinine follow the combining of the ingredients?

By Mr. Bradford: Objected to as immaterial.

A. I cannot answer the question definitely; it would depend largely upon what other ingredients might be present in the prepar-tion.

X Q. 12. Are you not familiar with the ingredients in Coco-Quinine, Lilly?

A. Only insofar as this information is published by the above firm and insofar as my examination of the preparation concerned in an attempt to produce a similar preparation. I am basing my answers on quinine sulphate.

X Q. 13. Basing your answers upon such knowledge of Coco-Quinine, Lilly, please say whether, if the quinine sulphate is not in solution at the time of combining the ingredients as you understand them, solution of the quinine sulphate would follow such combining?

By Mr. Bradford: Objected to as immaterial.

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A. I believe that the greater portion of the quinine sulphate would exist in the preparation in solution.

JOHN M. FRANCIS.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

CLIFTON H. BRIGGS, a witness, called by and on behalf of the plaintiff, having been duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Clifton H. Briggs; age, 37; Detroit, Michigan; Chemist with Parke, Davis & Company.

Q. 2. Please state what experience you have had that will qualify you to testify as an expert in a case involving the giving of an opinion on chemical questions?

A. I am a graduate of the University of Michigan, with the degree of Master of Sciences, specializing in chemistry. I have been employed by Parke, Davis & Co., for nearly fifteen years as a research chemist and chemist in charge of the analytical and experimental chemical department.

Q. 3. Have you any familiarity with the product on the market called Coco-Quinine the same being a liquid preparation containing quinine?

A. Yes, sir. Coco-Quinine is a liquid preparation containing quinine Yerba-Santa and cocoa.

Q. 4. Please state your opinion as to the use or purpose of the cocoa or chocolate in this preparation?

A. It is used as a flavor and in my estimation does not lend
163 any particular properties as to covering up of the taste of the quinine, and it also gives a color to the product.

Q. 5. In your opinion could or could not other syrups of other colors and other flavors be used in this product instead of the chocolate and for the same purpose?

A. They could.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 6. What experience have you had which enables you to form an opinion as to the use or purpose of the cocoa or chocolate in Coco-Quinine?

A. I am familiar with some work which was done to attempt to produce a product of a similar nature to Coco-Quinine.

X Q. 7. What do you understand to be the ingredients of Coco-Quinine, Lilly?

A. Quinine in some form, Yerba-Santa, cocoa and syrup, with perhaps some other ingredients.

X Q. 8. When quinine sulphate is combined in this preparation does it afterwards come into solution? Assume that it had not previously been in solution.

By Mr. Bradford: Objected to as immaterial.

A. To the best of my knowledge the quinine does not exist in this preparation in soluble form.

X Q. 9. Do you mean that after the preparation has been made and placed in the bottle it will not come into solution?

(Same objection.)

A. So long as it is not removed from the bottle.

Cross-examination closed.

CLIFTON H. BRIGGS.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

104 WILLIAM M. MERITHEW, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William M. Merithew; age, 36; Highland Park, Michigan; Pharmacist, having a Pharmacy located in Highland Park, Mich.

Q. 2. Do you handle the product known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose product do you recognize this to be?

A. The product of Eli Lilly & Company, of Indianapolis.

Q. 4. How is this product dispensed in your store?

A. Both on prescription and counter calls. It is mostly dispensed in two, four, six and eight ounce bottles; very seldom in original packages. I mean in our own prescription bottles, under our own labels.

Q. 5. Do you know anything of a product called Quin-Coco, and if so, what?

A. Mr. H. L. Starring, representing the William R. Warner Company, offered to sell me a preparation known as Quin-Coco, stating that it could be dispensed as Coco-Quinine, when Coco-Quinine was called for. He exhibited a sample from his sample case, and stated to me that in both taste, physiological action and appearance it could not be distinguished from the original Coco-Quinine.

Q. 6. What other inducements, if any, did Mr. Starring offer as reasons why you should purchase the product he thus offered to you?

A. He stated to me that this product would be a good deal more economical in price than the original Coco-Quinine preparation.

105 That several druggists were using it in preference to the original Coco-Quinine, in several cities in Michigan, some of which he named as Saginaw, Bay City, and Flint.

Q. 7. Did you accept Mr. Starring's proposition and purchase Quin-Coco, and if not, why not?

A. I did not accept it for the reason that I have always tried to be ethical and dispense only those preparations which are specified either on original doctor's prescription blanks or given me orally by a customer.

Q 8. Did you ever receive a doctor's prescription calling for Quin-Coco?

A. No, I have not.

Q. 10. Did you ever receive a call over the counter for Quin-Coco?

A. No, I have not.

Q. 11. How long have you been handling this product? I mean Coco-Quinine.

A. To the best of my knowledge I have handled and dispensed Coco-Quinine ever since it has been on the market. I cannot give the exact date as to when I first dispensed it, but to the best of my knowledge the length of time is fifteen years.

Q. 12. Where is your drug store located in relation to Detroit?

A. Highland Park, Michigan, a suburb of Detroit.

Q. 13. Did Mr. Starring call upon you in reference to matter more than once and if so how many times?

A. To the best of my knowledge he spoke to me about it three distinct times.

Q. 14. Making the same representations each time?

A. Yes, sir, making the same representations.

Q. 15. How do you know that Mr. Starring is the representative of William R. Warner & Co.?

A. From his name appearing in the space on William R. Warner's bill heads, provided for their representatives.

Q. 16. Do you buy other goods from William R. Warner & Co., through Mr. Starring?

A. Yes, sir.

Direct examination closed.

106 Cross-examination.

By Mr. Rawle:

X Q. 17. When this salesman made these representations to you which you say were not ethical did you give him to understand that you resented them as an imputation on your honesty?

By Mr. Bradford: Objected to as immaterial and incompetent.

A. Not on my honesty but that I knew Eli Lilly's Coco-Quinine was the original product of cocoa and quinine and having had experience with a similar preparation manufactured by Parke, Davis & Co., of Detroit, I knew that it should not be palmed off on the unsuspecting public. Furthermore, I did not believe in substitution.

X Q. 18. And you thought substitution was not honest, did you?

A. Substitution is not honest.

X Q. 19. Then, he was asking you, according to your testimony to do something that was not honest, was he not?

A. He was.

X Q. 20. Now I ask you again whether when he asked you to do something that was not honest you gave him to understand that you resented that as an imputation on your honesty?

(Objected to as immaterial.)

A. I did not become angered at him or accuse him of wrongdoing, I politely informed him that I had never substituted, neither did I care to start to do the same.

X Q. 21. Then you did not show him that you resented his suggestion to you to do a dishonest thing?

A. I just simply told him that, as I have stated before, I did not care to dispense a substitute for the original article asked for.

X Q. 22. Give the exact words which you used?

107 By Mr. Bradford: Counsel for plaintiff has no objection to having all material facts upon the record, but it is apparent that the witness has answered counsel fully and frankly even to this immaterial thing and he objects to further questioning along this line as totally immaterial, irrelevant and incompetent.

A. I cannot recall the exact words.

X Q. 23. Can you recall the exact words which he used or any of them?

A. I cannot. I only can give a synopsis.

X Q. 24. How long ago was this?

A. The first time he spoke to me about this preparation was, as near as I can remember, a year and six months ago. I can give the date by reference, if the counsel so wishes.

X Q. 25. Is that substantially a correct statement of the length of time?

A. As near as I can remember.

X Q. 26. What was the date of the second time?

A. As near as I can remember it was three months thereafter.

X Q. 27. And the third time?

A. As nearly as I can remember it was six months after the second time.

X Q. 28. Then you talked with him three times within a year and a half or thereabouts and you cannot state now the exact language which he used or any part of it?

By Mr. Bradford: Counsel for plaintiff calls the court's attention to the fact that the witness has stated the substance of the conversations that took place and stated that he has given the language as near as he can recall it. Objection is made to further repetition of questions for no apparent purpose.

A. As I answered before to a previous question I cannot remember the exact language, only giving a synopsis of the same.

108 X Q. 29. Wasn't what he said that Quin-Coco was a similar preparation to Coco-Quinine and lower in price?

A. I cannot state his exact words, but he inferred to me that Quin-Coco was lower in price than Coco-Quinine, and therefore several of

the druggists were dispensing it in the cities of Michigan which I heretofore named.

X Q. 30. And that is the substance of what he said to you?

A. No, it is not. He spoke about the similarity of the preparation both in quality of quinine contained in each ounce, the physiological action and appearance. Now I am through.

X Q. 31. Have you finished your answer to that question?

A. I have.

X Q. 32. How long did the first interview last?

A. I cannot state the length of time he consumed in his conversation with me.

X Q. 33. How long did the second conversation last?

By Mr. Bradford: This question and the previous one objected to as immaterial.

A. As I am not in the habit of timing representatives of the various pharmaceutical houses who call on me, I cannot say.

X Q. 34. How long did the third interview last?

(Same objection.)

A. I cannot state for the reason before given.

X Q. 35. Did you buy any other preparations from him at either of these interviews?

A. I did.

X Q. 36. At all of them?

A. I did the first time he spoke to me about it and the second time. But as to the third I cannot just recall, but by looking at my books I can state more fully, in regards to the last time.

Cross-examination closed.

109 Redirect examination.

By Mr. Bradford:

R. D. Q. 37. In answer to one of Mr. Rawle's questions concerning the substance of Mr. Starring's representations to you, you said: "He spoke about the similarity of the preparation both in quantity of quinine contained in each ounce, physiological action and appearance."

In this answer what do you mean by "similarity," similarity to what?

A. To the preparation known as Coco-Quinine.

WM. M. MERITHEW.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

ERNEST G. SWIFT, a witness, called by and on behalf of the plain-

tiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Ernest G. Swift; age, 54; Detroit, Michigan; Secretary and General Manager of Parke, Davis & Co.

Q. 2. In what business is Parke, Davis & Co., engaged?

A. Manufacturers of pharmaceutical and biological products.

Q. 3. Do you know of Eli Lilly & Co., the plaintiff herein?

A. I do. They are a competing house in the same line of business as ours.

110 Q. 4. Do you know of a pharmaceutical preparation on the market known as Coco-Quinine, and, if so, state what you can in reference to it, and as to its origin, etc.?

A. It is a product manufactured by Eli Lilly & Co., and we have always recognized it as their own product and have not made or offered a competing article.

Q. 5. Do you know whether or not it would be possible to make a product which would compete in the same field so far as medicinal action is concerned, without duplicating the appearance and flavor of said product?

By Mr. Rawle: Objected to because the question is too general and too vague and because it does not appear that the witness is a chemist or trained in pharmaceutical matters, and the combination of material therein.

A. It is quite possible to make such a product, so far as competing in medicinal value is concerned, but that to duplicate the flavor by Parke, Davis & Co., would infringe on the Lilly priority rights.

By Mr. Rawle: The last part of the answer is objected to as irresponsive and volunteered.

Q. 6. Have you ever seen samples of liquid quinine preparations colored differently and flavored differently from Coco-Quinine?

A. I have seen several samples submitted by our experimental departments in response to the request of representativs for a similar article flavored entirely different but of a chocolate color.

Q. 7. Please state why Parke, Davis & Co., have not placed a preparation on the market similar to Coco-Quinine, if you know?

By Mr. Rawle: Objected to because the witness is not Parke, Davis & Co., and because the question is irrelevant to the issue and the answer could not bind the defendant.

111 A. Because they have respected what they believed to be the priority rights of Eli Lilly & Co., in the manufacture of said product.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. How many separate drugs and preparations does your concern make and sell at any given time?

By Mr. Bradford: Objected to as immaterial.

A. We have probably eight thousand or more items listed.

Cross-examination closed.

ERNEST G. SWIFT.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at the Bancroft Hotel, Saginaw, Michigan, at 5 p. m., to-day.

Saginaw, Michigan,
Bancroft Hotel, March 24th, 1915—5 p. m.

Met pursuant to adjournment and notice.

Parties present as before.

ALBERT F. KNOWLES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

112 A. Albert F. Knowles; age, 41; Saginaw, Michigan; Druggist, and my Pharmacy is located in Saginaw, Michigan.

Q. 2. Please state if you handle in your store a product known as Coco-Quinine?

A. I do.

Q. 3. Whose product is this recognized to be in the trade?

A. Eli Lilly & Co.

Q. 4. How long have you been selling Coco-Quinine?

A. For thirteen years.

Q. 5. How do you dispense it?

A. On prescriptions and on calls, over the counter, in my own containers, with my own labels.

Q. 6. Do you ever receive prescriptions calling for a product under the name of Quin-Coco?

A. I have not.

Q. 7. Do you ever receive calls from customers for a product called Quin-Coco?

A. No.

Q. 8. Have you ever heard of a product called Quin-Coco, and, if so, what can you tell us with reference thereto?

A. A representative of the William R. Warner & Co. introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of Coco-Quinine when I could use his product at a cheaper price.

Q. 9. Use his product for what purpose?

A. For dispensing purposes, and also to sell on call.

Q. 10. On call for what?

By Mr. Rawle: The question and the preceding questions are objected to as not in proper form, the witness having referred to a conversation can only be asked — to what was said to him at that conversation. The question is therefore leading.

By Mr. Bradford: I will restate the question.

113 Q. 11. Please state what if anything the representative of William R. Warner & Co., said to you in reference to the dispensing of this product called Quin-Coco on call? I mean on call for what?

By Mr. Rawle: The question is objected to as irrelevant and leading and for the reason just stated.

A. For Coco-Quinine or chocolate quinine, syrup quinine or where the syrup of quinine is used.

Q. 12. Under what name is such a product as you have referred to usually called for in prescriptions and by customers at your store?

A. The prescription, Coco-Quinine. Over the counter on call, "Coco-Quinine," "chocolate quinine" and some even go as far as "syrup of quinine, brown color," depending upon the education of the customer.

Q. 13. What product do you understand a customer intends to order when he asks for chocolate quinine or any of these other names you have mentioned?

A. That is rather a hard question to answer. In my store I have educated my customers to use and I have always dispensed Coco-Quinine on such orders, as I have no other product with which to fill their calls.

Q. 14. Did you ever know of a chocolate quinine preparation prior to your knowledge of the Lilly product?

A. No.

Q. 15. What is the name of the representative of William R. Warner and Co., who made these representations to you in reference to Quin-Coco?

A. His name I have forgotten.

Q. 16. Was he their present Michigan representative?

A. No, that is, he was not the one that called on me last.

Direct examination closed.

114 Cross-examination.

By Mr. Rawle:

X Q. 17. When was this that this salesman called on you?
A. When he mentioned about the quinine it was in the Fall of 1914.
X Q. 18. You understood that he was not their regular man in this territory at that time?
A. I had no understanding to that effect at all.
X Q 19. Had you been visited by any other William R. Warner and Co. salesman in 1914?
A. Not that I can recollect.
X Q. 20. Have you ever bought drug preparations from William R. Warner & Co.?
A. I have.
X Q. 21. Through what salesmen?
A. The names I cannot remember excepting Mr. Berkeley. He called on me for quite a number of years, a couple of years before, I think.
X Q. 22. Has the William R. Warner & Co. salesman that you first referred to solicited your trade since the time you referred to?
A. Yes.
X Q. 23. How often?
A. I cannot recollect that.
X Q. 24. Briefly, what did he look like.
A. Medium height, rugged looking, red face, thick lips, dark hair, smooth shaven.
X Q. 35. Has he been at your place of business this year?
A. Not that I know of.
X Q. 26. Was that the last time you have seen him there?
A. No, he called once since.
X Q. 27. How long did this conversation last?
A. Probably ten minutes.
X Q. 28. Won't you state the salesman's exact words with reference to selling his product on call, &c.

By Br. Bradford: Objected to as immaterial.

115 A. He took a sample of Quin-Coco from his grip and asked me if I handled that product. I said "No, I have always used Coco-Quinine for all such calls." He said "Well, don't you think you could handle this to your advantage." I said "I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to used the Coco-Quinine." Then he stated the price that I was paying for the Coco-Quinine and that I could use his product and save the difference. I told him "no, I will continue with the Coco-Quinine as it always gave the best satisfaction."
X Q. 29. And that was all on that subject?
A. That was all on that subject.

Cross-examination closed.

A. F. KNOWLES.

Subscribed and sworn to before me this 24th day of March, 1913.

CHARLES E. RIORDON,
Special Examiner.

NOTE.—After the conclusion of Mr. Knowles' deposition he was asked by Mr. Rawle if on his return to his store he would not ascertain the name of the Warner representative and furnish it to the Examiner by telephone. He promised that he would and pursuant to such promise telephones the name of such representative to be a Mr. Rogers.

BERTRAM A. WRIGHT, a witness, called by and on behalf of the plaintiff, being first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

116 A. Bertram A. Wright; age 39; Saginaw, Michigan. Pharmacist. My Pharmacy is located in Saginaw, Mich.

Q. 2. Do you handle a product known as Cuso-Quinine in your store?

A. Yes, sir.

Q. 3. How long have you handled such a product?

A. Approximately six years.

Q. 4. Whose product do you recognize this to be?

A. Eli Lilly & Company.

Q. 5. How is it dispensed by you?

A. Principally on prescriptions but we do sell some over the counter when called for, in our own bottles?

Q. 6. Do you know anything of a product called Quin-Cure? If so, what?

A. Yes, sir, it is a preparation similar to Cuso-Quinine.

Q. 7. Have you ever had prescriptions written for Quin-Cure?

A. No, sir.

Q. 8. Have you ever had calls by customers for Quin-Cure?

A. No, sir.

Q. 9. Have you ever been solicited to purchase Quin-Cure, and if so, by whom?

A. I have by representatives of William R. Warner and Company.

Q. 10. What reasons were given by the representatives of William R. Warner and Company why you should buy Quin-Cure?

A. Well, that it was a preparation of quinine the same as Cuso-Quinine and it was cheaper and we would make more money out of it. That is as near as I can get at it.

Q. 11. Is this what they said to you?

A. I don't think they worded it the same as that, no, sir.

117 Q. 12. State as nearly as you can from memory the words in which Warner and Company's representatives made their statements?

By Mr. Rawle: Objected to as the witness has already testified to what they said "As near as he could get at it."

A. They told me I might just as well have Quin-Coco, and that it was the same as Coco-Quinine and cost me less money.

Q. 15. If you have no calls for Quin-Coco, how did they expect you to sell it?

A. Sell it as sweet quinine or Coco-Quinine.

By Mr. Rawle: Question and answer is objected to as the witness has already stated fully what was said at the interview.

Q. 16. Did or did not Warner and Company's representative tell you that when Coco-Quinine was called for you could supply the same with Quin-Coco?

By Mr. Rawle: Same objection and because the question is grossly leading.

A. Not directly. I told him that I would not supply it on any occasion but when people came in and called for Coco-Quinine I could possibly sell them Quin-Coco.

Q. 17. Did you buy Quin-Coco under these inducements as offered by Warner and Company's representative?

A. I did and also that they should create a demand for it.

Q. 18. Have you sold Quin-Coco when Coco-Quinine has been called for in your drug store?

By Mr. Rawle: Objected to because the act of this witness cannot bind the defendant.

A. Yes, but not on prescriptions.

Q. 17. In doing so were you or were you not following the instructions of the representative of Warner & Company?

18 By Mr. Rawle: Objected to as grossly leading and improper and because the witness has not testified that he had "any instructions."

A. Warner and Company's representative told me I could sell it the same as Coco-Quinine, there was no distinction.

Direct examination closed.

No cross-examination.

BERTRAM A. WRIGHT.

Subscribed and sworn to before me this 24th day of March, 1892.

CHARLES E. KNOWLES,
Special Examiner.

Geo. H. Lucas, a witness called by and on behalf of the plaintiff, being first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Otto Kessel; age 38; Saginaw, Mich.; traveling salesman for the Michigan Drug Company.

Q. 2. Do you know Mr. William H. Martin?

A. Yes, sir.

Q. 3. Were you ever with Mr. Martin in a drug store when any person handed over the counter a slip of paper calling for Coco-Quinine, and in response to which the prescription clerk of the store supplied Quin-Coco?

By Mr. Rawle: Objected to as leading.

A. Yes, sir.

Q. 4. Will you relate the circumstances?

119 Mr. Rawle: Objected to as immaterial and irrelevant because the testimony could not affect the rights of the defendants.

A. If I remember aright this was in the evening and I did not pay much attention to this thing when it happened, but the clerk said that was the only Coco-Quinine he had in the house and he gave him that. Later on I believe that the proprietor came and gave him an order for five pints or a gallon, I have forgotten now. It must have been some time ago.

By Mr. Rawle: The answer is objected to as hearsay.

Q. 5. Do you know the name of this store where this occurred?

A. Yes; W. H. Friar's drug store, of Saginaw, Mich.

Q. 6. Have you any personal knowledge of any other instances of the substitution of Quin-Coco for Coco-Quinine?

By Mr. Rawle: Objected to as not tending to connect the transaction, if any, with the defendants.

A. That is a question that I would have to answer by an experience I had the other evening. A customer asked me what Coco-Quinine was worth. I gave him the price, in pound lots and in gallons. He said " you are too high. I buy Warner's Coco for less money." "Well," I said, "you are not buying the Coco-Quinine, Lilly's." You can't buy this goods for the same money. That was all that was said. A little later on he called me up at the drug store and gave me an addition to his order and included a gallon of Coco-Quinine, Lilly's.

By Mr. Rawle: The answer is objected to as irrelevant and as res inter alia acta and as not binding on the defendant.

Direct examination closed.

120 Mr. Rawle, not waiving his objections, cross-examines as follows:

XQ. 7. You said that you did not pay much attention at that time
the drug store. Did you read the prescription yourself?
A. No, sir. I don't believe it was a prescription. I think it was
note that some child brought in there.
XQ. 8. Did you read the note?
A. No, sir.
XQ. 9. How long ago was this?
A. I don't know, it must have been two or three months ago
ow, probably longer than that. It may be three or four months,
somewhere around there.
XQ. 10. At the time were you standing behind the prescription
unter?
A. I believe we were about the edge of the prescription counter.

Cross-examination closed.

OTTO H. KESSEL.

Subscribed and sworn to before me this 24th day of March, 1914.

CHARLES E. RIORDON,
Special Examiner.

Adjourned until tomorrow, Thursday, March 25th, 1915, at 9 a. m., at the La Salle Hotel, Chicago, Illinois.

Chicago, Illinois,

La Salle Hotel, March 25th, 1915—9 a. m.

Met pursuant to adjournment and notice.
Parties present as before.

RAOUL R. HAAS, M. D., a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Raoul R. Haas; age 35; Chicago, Ill.; physician and surgeon.
Q. 2. Do you know anything concerning preparations for disguising the taste of quinine when administered in liquid form and if so, what?
A. There is one preparation I know of. It is called "Quinimel," and I wrote recently to William R. Warner, pharmaceutical chemist, located at Philadelphia, Pa., and they sent me the following letter with reference to the same. Here is the letter. (The witness here produces the letter.)
Q. 3. What was the substance of your inquiry in response to which you received this letter?

By Mr. Rawle: Objected to as the letter itself is the best evidence, unless its loss is explained.

By Mr. Bradford: The letter having been mailed to the defendant is undoubtedly in its possession and counsel for defendant can produce the same if he cares to. It is manifestly impossible for plaintiff to produce it.

A. On the 8th of March, 1915, I sent a letter worded about as follows:

"William R. Warner & Co.,
Philadelphia, Pa.:

I understand that you have a preparation on the market to disguise the taste of quinine, called 'Quinimel.' If such is the case I would appreciate literature and samples as regards the same.

Hoping to hear from you I beg to remain,

Yours respectfully,

R. R. HAAS, M. D."

122 Q. 4. The letter you have handed in was received in response to this inquiry, was it?

A. Yes, sir.

By Mr. Bradford: The letter in question and the envelope in which it is enclosed are offered in evidence and marked respectively "Complainant's Exhibit, Letter Warner to Haas" and "Complainant's Exhibit, Envelope, Warner to Haas."

Direct-examination closed.

No cross-examination.

RAOUL R. HAAS, M. D.

Subscribed and sworn to before me this 25th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

ROBERT A. HEVENOR, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert A. Hevenor; age 41; Hyde Park Hotel, Chicago, Ill.; sales manager for Fuller-Morrison Company, wholesale druggists.

Q. 2. Comparatively speaking, how extensive is the business of the house you represent?

A. We are the largest house in the Middle West, employing forty-two salesmen, covering Michigan, Wisconsin, Illinois, Iowa, Southern Minnesota and South Dakota.

Q. 3. Does your house handle a product known as Coco-Quinine?

123 A. Yes.

Q. 4. What do you know concerning the product?

A. I have been familiar with the product ever since Eli Lilly & Co. introduced it about fifteen years ago, and it was the first liquid preparation of quinine and chocolate that I have known of and had a very large sale and still is a large seller. It is the only chocolate and quinine liquid pharmaceutical preparation that we carry in stock. And if we were to get an order for a chocolate quinine preparation not specified otherwise, we put in Eli Lilly & Company's Coco-Quinine on that order.

Q. 5. Would you or would you not understand that the Lilly & Company preparation was the preparation ordered?

A. My understanding would be that Eli Lilly & Company's Coco-Quinine was intended.

Q. 6. Do you personally see the orders that come into your store?

A. I see part of them and all doubtful items are referred to me.

Q. 7. Do you have charge of this branch of the business?

A. In a general way. I don't handle all the details of the pharmaceutical business but on any items in which there is any doubt, in the pharmaceutical line particularly, they would be referred to me, that is, they would look to me for instructions as to what items should be used to fill orders of this sort.

Q. 8. Has your store ever received any orders for a preparation known as Quin-Coco to your knowledge?

A. Not to my knowledge.

Q. 9. If an order came into the store for Quin-Coco would it probably be referred to you?

A. Yes, sir.

Q. 10. What is the general reputation in the drug trade of Eli Lilly & Company as manufacturers of pharmaceutical products?

124 By Mr. Rawle: Objected to as irrelevant and immaterial.

A. Second to none.

Direct-examination closed.

No cross-examination.

ROBERT A. HEVENOR.

Subscribed and sworn to before me this 25th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

CORNELIUS P. VAN SCHAAK, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Cornelius P. Van Schaak; age 52; Chicago, Illinois; wholesale druggist; vice-president and secretary of Peter Van Schaak & Sons.

Q. 2. Comparatively speaking, what is the extent of the business of your firm?

A. We have been established since 1844, we are the oldest house in the city of Chicago, in fact one of the oldest in the Mississippi Valley. We are a large house, do a jobbing business in the entire Mississippi Valley and go as far East as the State of Ohio.

Q. 3. Do you handle a product known as Coco-Quinine and if so tell us if you can in reference to its origin, &c.

A. We do handle an item known as Coco-Quinine, so
125 called, that is manufactured by Eli Lilly & Co., of Indianapolis, Indiana. It is the only preparation of the kind that we do carry in stock and we sell quite a large amount during the year.

Q. 4. Did you ever know of a similar preparation prior to the time when this particular product was placed on the market by Eli Lilly & Co.?

A. No.

Q. 5. Have you ever received orders at your store for a product called Quin-Coco?

A. We may have. I don't see all the orders that come into the store. In fact we receive orders for various items, and many of them are outside of our line.

Q. 6. Do you have personal knowledge of any such order having been received at your store?

A. Personally I could not say that I have.

Q. 7. If an order comes to your store for a chocolate quinine liquid preparation by any variation of the name, what would you suppose was intended and what would you supply?

A. We would give Lilly's Coco-Quinine. That is the only item of the kind we carry in stock and it might be ordered by two or three different names.

Q. 8. Do you carry a line of William R. Warner & Company's products?

A. Not an entire line, but their best sellers and specialties.

Q. 9. Do you have a list of such best sellers and specialties?

A. Yes. We embody this list in our annual catalogue on folios 387 and 388. This includes their best sellers and specialties which we have sold for years.

Q. 10. Do you find Quin-Coco listed among the Warner specialties?

A. No, sir.

Q. 11. Do you carry a line of the Searle & Herath products?

A. No, just a few of their specialties.

126 Q. 12. Do you have these listed in your catalogue?

A. We do, yes, at folio 352.

Q. 13. Do you find Quin-Coco in this list?

A. No. I am referring to our catalogue of 1914, latest edition.

Q. 14. Do you object to having the catalogue you hold in your hand offered in evidence?

A. No.

By Mr. Bradford: The catalogue in question is offered in evidence and marked "Complainant's Exhibit, Van Schaack & Sons 1914 Catalogue."

By Mr. Rawle: Objected to as irrelevant.

Q. 15. What is your opinion of the reputation of Eli Lilly & Company as manufacturers of pharmaceutical products?

By Mr. Rowle: Objected to as irrelevant.

A. The highest.

Direct-examination closed.

Cross-examination.

By Mr. Rowle:

X Q. 16. What part does the word "Lilly" in red script upon the labels of Lilly products play as a trade name in the trade?

A. We understand that to be their trade-mark name. Then, too, it more quickly identifies the goods in our stock. I say, "we" speaking for our wholesale house.

X Q. 17. It is well known in the trade and constantly used, is it not, in reference to goods of that concern?

A. As far as I personally know all of their products are identified by that trade-mark, printed on the labels or wrappers, or both.

X Q. 18. The name so printed has a very considerable currency in the trade, has it not? I mean as a trade name.

A. Yes.

Cross-examination closed.

CORNELIUS P. VAN SCHAAK.

Subscribed and sworn to before me this 25th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

By Mr. Bradford: Counsel for complainant produces and offers in evidence a catalogue bearing on the front cover the following inscription:

"The Searle & Hereth Company, Manufacturing Chemists, Chicago, 1906. Like the Scarlet Thread (S. & H. Quality) In Our Bank Notes."

The same being the 1906 trade catalogue of the Searle & Hereth Company, and offers the same in evidence, marking the same "Complaintiff's Exhibit, Searle & Hereth 1906 Catalogue."

Counsel for complainant also produces another copy of a printed list of the products sold by the William R. Warner & Company, headed "Comparative Prices of Special and Miscellaneous Preparations," the same being a list similar to "Complainant's Exhibit, Document No. 3" before introduced, but apparently another edition

thereof, and offers the same in evidence, marking it "Complainant's Exhibit, R. I. Groves Copy of Document No. 3."

By Mr. Rawle: The offer of the S. & H. 1906 catalogue is objected to as irrelevant and not binding on the defendant.

Adjourned to meet at the offices of Bradford & Doolittle, 1451-1455 Lemcke Annex, Indianapolis, Indiana, tomorrow, Friday, March 26th, 1915, at 2.30 p. m.

128 Indianapolis, Indiana,
March 26th, 1915—2.30 p. m.

Met pursuant to adjournment.
Parties present as before.

Dr. WALTER D. HOSKINS, a witness called by and on behalf of the plaintiff having been first duly affirmed, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Walter D. Hoskins; age 43; Indianapolis, Indiana; physician.
Q. 2. Are you familiar with any liquid quinine preparations that include chocolate?
A. Yes, I am.
Q. 3. What?
A. The Lilly's preparation named Coco-Quinine.
Q. 4. Any others?
A. No, I know of no other.
Q. 5. How long have you been familiar with the Lilly preparation referred to?
A. I presume ten or twelve years or since they began to put it on the market.
Q. 6. If your attention were called to a liquid chocolate quinine preparation without any label or other identifying matter, whose preparation would you suppose it to be?
A. I would naturally suppose it to be Lilly's.
Q. 7. Have you prescribed Lilly's Coco-Quinine in your practice?
A. Yes, I have.
129 Q. 8. Have you ever prescribed any other liquid quinine preparation?
A. No, I think not.

Direct-examination closed.

No cross-examination.

WALTER D. HOSKINS.

Subscribed and sworn to before me this 26th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Saturday, March 27th, 1915, at Cape Girardeau, Missouri.

Cape Girardeau, Missouri, March 27th, 1915.

Met pursuant to adjournment, at the Cape Charles Hotel.
Parties present as before.

JOSEPH N. WOLSEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Joseph N. Wolsey; age 30; Cape Girardeau; pharmacist. I am proprietor of the City Drug Store.
Q. 2. Do you handle a product known as Coco-Quinine?
A. Yes, sir.
Q. 3. Whose product do you recognize it to be?
130 A. Lilly's, the Eli Lilly & Company.
Q. 4. How is this product dispensed in your store?
A. As Coco-Quinine and as chocolate quinine. We dispense it on physician's prescriptions and on customers' calls.
Q. 5. In original packages or broken packages.
A. In my own bottles. I dispense it out of the bulk in my own bottles.
Q. 6. If a customer should ask for a chocolate quinine preparation or a Coco-Quinine preparation whose product would you suppose was intended?
A. I would suppose he would want Coco-Quinine, the Eli Lilly Coco-Quinine.
Q. 7. Did you know of any other cocoa or chocolate quinine preparations prior to your knowledge of the Lilly preparation?
A. No, I did not.
Q. 8. Have you ever heard of any other chocolate quinine preparation and if so, whose?
A. Well, yes, the William R. Warner & Co. tried to sell me Quin-Coco, and Milliken has one, too, they both tried to sell me.
Q. 9. Who tried to sell you the Warner preparation?
A. I think his name was Brown. I don't know his initials.
Q. 10. Is he the man who represents William R. Warner & Co. in this territory?
A. Yes, sir.
Q. 11. Do you buy other Warner pharmaceuticals from him?
A. Yes.
Q. 12. What representations did this man make to you in reference to the Quin-Coco?

By Mr. Rawle: Objected to because it does not appear that Brown was the salesman of the defendant, or that he had authority to make representations.

131 A. He said he could sell me the Quin-Coco which was the same as Eli Lilly's Coco-Quinine and at a cheaper price.

Q. 13. Anything else. I mean did he tell you of any other reasons why you should buy it?

By Mr. Rawle: Objected to as leading and improper.

A. That I could make more money on buying it. That it is the same thing and I could dispense it as the same article.

Q. 14. Do you mean that he told you that you could dispense it when the Eli Lilly & Company's Coco-Quinine is called for?

By Mr. Rawle: Objected to as leading.

A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 15. When was this?

A. I can't hardly remember. It was either in November or December, 1914. One of those months.

X Q. 16. Have you ever handled Quin-Coco, Warner?

A. No, sir; I have seen a sample but I have never handled it.

X Q. 17. Ever handled any other chocolate quinine but Lilly's?

A. No, sir. I handled Lilly's only.

X Q. 18. Will you give the exact words this Warner salesman used to you?

By Mr. Bradford: Objected to as immaterial.

A. He said "I would like to sell you a gallon of Quin-Coco. It would be cheaper for you to use than Coco-Quinine and you would make more money off it."

132 X Q. 19. When did you mention this circumstance to the representative of the Lilly Company?

A. I don't remember. It was his next trip around after the Warner man was there. It was J. B. Messenger.

X Q. 20. And he asked you to come here and testify, did he?

A. Yes. He asked me to testify.

X Q. 21. Considering the quantity of Coco-Quinine you dispense, about what proportion do you dispense in your own bottles over the counter and what proportion in prescriptions of doctors?

A. I dispense very little over the counter. I could not tell what proportion. I buy it in gallon lots. A gallon lasts me about sixty days.

X Q. 22. How do you label your bottles when you dispense it in your bottles over the counter?

A. Coco-Quinine, in writing.

X Q. 23. Have you in answer to my questions stated the entire conversation you had with Warner's salesman on the subject of Quin-Coco?

By Mr. Bradford: Objected to as an evident attempt to limit the witness' testimony to what he has said on cross-examination.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 24. Have you ever had a call for Quin-Coco on a physician's prescription?

A. No, sir.

R. D. Q. 25. Have you ever had a call for Quin-Coco by a customer over the counter?

A. No, sir.

R. D. Q. 26. In your direct-examination in answer to my questions you stated that Warner's representative told you that you could use Quin-Coco when Coco-Quinine was called for. In answer to Mr. Rawle's last question you stated that what you said in reference to the conversation between yourself and the Warner representative in response to the question propounded to you by him was all that the Warner representative said. In answer to his cross-question you omitted to say that the Warner representative told you that you could use the Quin-Coco when the Coco-Quinine was called for. Please make any explanation you care to in reference to this seeming discrepancy between what you said in answer to my question and what you said in answer to Mr. Rawle's question?

By Mr. Rawle: The question is objected to as grossly leading and improper for re-direct-examination and because it wrongly quotes the testimony.

A. Well, the Warner man said he wanted to sell me a gallon of the Quin-Coco, that I could make more money out of it than I could selling and dispensing the Eli Lilly's Coco-Quinine.

R. D. Q. 27. In answer to Q. 12 you stated "He said he could sell me the Quin-Coco which was the same as Eli Lilly's Coco-Quinine and at a cheaper price." Do you wish to withdraw this statement?

By Mr. Rawle: The question is objected to as improper re-direct-examination and as an attempt to lead the witness.

A. Where I stated the cheaper product there is what we will let stand.

R. D. Q. 28. By Q. 13 I asked you if he told you of any other reason why you should buy it. You replied "That I could make more money on buying it, that it is the same thing and I could dispense it as the same article." Is this correct?

By Mr. Rawle: The question is objected to as improper for re-direct-examination, the witness having already testified as to

134 what was said at the interview both on direct and on cross-examination.

A. Yes, sir.

R. D. Q. 29. My questions are for the purpose of clearing up a seeming confusion between your direct and your cross-examination. I want to ask you again did or did not the Warner representative tell you that you could furnish Quin-Cocoa when Coco-Quinine was called for?

By Mr. Rawle: The question is objected to as leading and as improper re-direct-examination.

A. Yes, sir.

Re-direct-examination closed.

By Mr. Rawle: I give notice that I shall move to strike out the parts of the testimony of this witness that have been objected to and without waiving his objections re-cross-examines as follows:

Recross-examination.

By Mr. Rawle:

R. X Q. 30. Don't you sometimes have a call for a chocolate quinine preparation?

By Mr. Bradford: Objected to as not re-cross-examination.

A. No, sir; I have none.

R. X Q. 31. Don't you sometimes have a call for chocolate quinine?

Same objection.

A. I don't think so.

R. X Q. 32. Sure you don't?

A. I would not be right sure, no, sir; I could not keep track of all calls.

R. X Q. 33. Think a moment and answer the question

135 whether you don't sometimes have a call for chocolate quinine?

A. I have calls for Coco-Quinine.

R. X Q. 34. But not for chocolate quinine?

A. I may have had calls for chocolate quinine, but not lately.

R. X Q. 35. If the Warner salesman said to you that you could dispense Quin-Coco "as the same article," will you please give the exact words in which he made that statement?

By Mr. Bradford: Objected to as immaterial.

A. He said that I could buy a gallon of it and use it for the same purpose as Coco-Quinine for less money. I think that is the exact words. It is hard to remember when not expecting anything like this.

R. X Q. 36. Then that gives your best recollection, does it?
A. Yes, sir.
R. X Q. 37. And you now state it in that way in preference to previous statements made by you. Is that correct?

By Mr. Bradford: Objected to as another attempt on the part of counsel to twist the meaning of the witness' frank answers.

A. Yes, sir; I guess that is correct.

JOSEPH N. WOLSEY.

Subscribed and sworn to before me this 27th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

JAMES A. KINDER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

136 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. James A. Kinder; age 35; Cape Girardeau; retail druggist; manager of the firm of Miller & Kinder, and a partner.
Q. 2. Do you handle a product known as Coco-Quinine in your store?
A. Yes, sir.
Q. 3. Please state what you know in reference to this product?
A. In my experience as a retail druggist for fourteen years I have regarded Lilly's Coco-Quinine as the pioneer or leader of all chocolate quinine syrups, and naturally when chocolate quinine is called for I supply Lilly's and Lilly's only, which we have carried for years.
Q. 4. By Lilly's do you mean Eli Lilly & Co., the complainant herein?
A. Yes, sir.
Q. 5. How do you dispense Coco-Quinine?
A. On physicians' prescriptions and to the retail trade.
Q. 6. In what kind of containers and under what labels?
A. Ordinary prescription bottles and our ordinary stock labels and prescription labels.
Q. 7. Do you know anything concerning other chocolate quinine preparations and if so what?
A. I know probably two other brands of chocolate quinine; one that has probably been brought to our attention more recently and more forcibly than any of the others is Quin-Coco, which a Mr. Brown, salesman for Warner & Co., showed us. The other which was made by Milliken & Co., of St. Louis, I have not seen for a number of years.
Q. 8. What was the occasion of Mr. Brown showing you the Warner & Co.'s product called Quin-Coco?
137 A. He was making one of his regular trips calling on the

trade, I presume, and upon learning that we were using a great quantity of Lilly's Cocoa-Quinine, he showed us his preparation and called our attention to the fact that it was a preparation that we could easily use in the place of Cocoa-Quinine and save considerable money in our purchases. He stated that his company had by the work on this preparation caused Lilly to thin down their Cocoa-Quinine syrup in order to meet the efforts Warner & Co. were making.

Q. 9. Have you ever received a prescription calling for Quin-Coa?

A. No, sir; we never did.

Q. 10. Have you ever received a call over the counter for Quin-Coa?

A. No, sir.

Q. 11. How did Mr. Brown expect you to sell Quin-Coa if you were receiving no calls for it?

By Mr. Rawle: Objected to as incompetent and as asking the witness to state what the salesman had in his mind and as leading, and because the only proper question is to ask what was said by the salesman.

By Mr. Bradford: I will restate the question.

Q. 12. What did Mr. Brown state, if anything, as his reason in expecting you to sell Quin-Coa, if you had no calls for it?

By Mr. Rawle: Objected to because the witness has already said what was said by the salesman and as leading and as improper.

A. He stated that it had been and was being successfully pushed whenever Cocoa-Quinine was having a good sale; that they were identical preparations and could not be distinguished.

Q. 13. But how could Quin-Coa be sold if Quin-Coa was not called for?

138 By Mr. Rawle: Objected to as leading and as incompetent and because the witness has stated what was said by the salesman.

A. That was the question that was never answered in my mind.

Q. 14. Did Mr. Brown attempt to answer such a question and if so, how?

Same objections.

A. I don't remember that he did.

Q. 15. Did he or did he not explain to you how you could expect to sell Quin-Coa and if so what did he say?

By Mr. Rawle: Objected to as leading, as incompetent and because the witness has already stated the substance of what was said at the interview.

A. He simply suggested that we could use it whenever there was a demand for Cocoa-Quinine, and that it could not be told from Cocoa-Quinine.

Q. 16. How long have you been handling Cocoa-Quinine?

6. About fourteen years.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. Do customers ever call at your counter for a chocolate quinine preparation or a liquid quinine preparation without giving the trade name of the preparation?

A. Yes, sir; I think so.

X Q. 18. It is not uncommon?

A. Yes, it is uncommon.

X Q. 19. And it would be honest in a druggist so far as you know to sell such a customer QuinCoco at least if QuinCoco is as good a preparation as the Warner salesman told you it was?

By Mr. Bradford: Objected to as immaterial.

A. I think so.

X Q. 20. But if a customer calls for CocoQuinine would it, in your opinion, be the part of an honest druggist to sell some other preparation to that customer?

A. I do not.

X Q. 21. You would consider it as not an honest practice, would you not?

A. Yes, sir.

X Q. 22. And you don't do it.

A. I do not.

X Q. 23. And if a salesman suggested to you to do such a dishonest thing you wouldn't like it, would you?

A. I didn't like it, no, sir.

X Q. 24. Would you resent it?

A. I resented it to the extent of refusing to follow his suggestion.

X Q. 25. Did you tell him that you would resent it?

A. No, sir, I did not.

X Q. 26. In answer to Mr. Bradford's question you testified that the Warner salesman "simply suggested that we could use it where ever there was a demand for CocoQuinine."

Is that the suggestion he made?

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. If a customer asks for a chocolate quinine or a chocolate quinine preparation by any other than the trade name, do you understand that any particular preparation is intended, and if so, what?

140 A. I do, I understand them to want Coco-Quinine.

J. A. KINDER.

Subscribed and sworn to before me this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

GEORGE W. WALKER, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. George W. Walker; age, 39; Cape Girardeau; Physician.

Q. 2. In your practice do you ever use or prescribe a pharmaceutical product known as Coco-Quinine?

A. I do.

Q. 3. Whose product do you recognize this to be?

A. I have been in the habit of using only one Coco-Quinine and when I write Coco-Quinine I mean the one which I am accustomed to which is the Lilly preparation.

Q. 4. How do you usually write your prescriptions for Coco-Quinine?

A. I don't specify, I just write Coco-Quinine.

Q. 5. And what does that mean?

A. I mean Lilly's Coco-Quinine.

Q. 6. Have you ever used any other chocolate quinine preparation in your practice?

A. I have never used any other. I have never specified any other. It has been dispensed once or twice I think.

Q. 7. What do you mean by "it?"

141 A. Well I mean the other preparation of Coco-Quinine, other than Lilly's.

By Mr. Rrawle: The answer is objected to as hearsay.

Q. 8. Do you know whose make this other was?

By Mr. Rawle: Objected to as hearsay unless the witness testified to facts known physically by him.

A. I recall one prescription that there was a preparation put up by John T. Milliken. I examined the medicine and preparation and knew it wasn't the preparation to which I was accustomed.

Q. 9. Any others?

A. That is the only time I recall that I ever examined the preparation to know what it was.

Q. 10. How did you determine that it was Milliken's?

A. I asked the druggist who dispensed it.

By Mr. Rawle: Question and answer objected to as irrelevant and hearsay.

Q. 11. In your judgment would any prescription written for Coco-Quinine mean Lilly's product and none other?
A. It would.

Direct-examination closed.

No Cross-examination.

GEORGE W. WALKER.

Subscribed and sworn to before me this 27th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Cairo, Illinois, this evening at 8 o'clock, March 27th, 1915.

142 Cairo, Illinois, March 27th, 1915—8 p. m.

Met pursuant to adjournment at the Halliday Hotel, Cairo, Illinois.

Parties present as before.

HARRY W. SCHUH, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Harry W. Schuh; age, 63; Illinois; Druggist, Wholesale and Retail; that is I have a retail store and am also Manager of the Schuh Drug Company, Wholesale Druggists.
Q. 2. Do you know anything of a product called Coco-Quinine, and if so, will you tell us what you know about it?
A. Coco-Quinine I know to be manufactured only by the Eli Lilly & Co., of Indianapolis, Indiana. It is a tasteless quinine, flavored with cocoa, or chocolate.
Q. 3. Do you handle this product in the wholesale drug house of the Schuh Drug Company?
A. Yes, sir.
Q. 4. Do you also handle it in your retail store?
A. Yes, sir.
Q. 5. What territory do you cover in your wholesale or jobbing business?
A. Southeastern Missouri, Arkansas, Southern Illinois, Kentucky, Tennessee, and Mississippi.
Q. 6. Do you sell a line of pharmaceuticals to the retail trade throughout this territory?
A. Yes, sir.
143 Q. 7. Is the preparation known as Coco-Quinine included in such line?
A. Yes, sir.

Q. 8. Have you ever had a call from the retail trade for a preparation called Quin-Coco?

A. No, sir.

Q. 9. How do you dispense the Coco-Quinine in your retail store?

A. On prescriptions and over the counter, both ways.

Q. 10. In what kind of containers?

A. Our own prescription bottles.

Q. 11. Have you ever had a prescription for Quin-Coco?

A. No, sir.

Q. 12. Have you ever had a call over the counter for Quin-Coco?

A. No, sir.

Q. 13. Suppose a customer asked for a chocolate quinine preparation by some other name than the recognized trade name, what preparation would you suppose was asked for?

A. Eli Lilly's Coco-Quinine.

Q. 14. How long have you handled Coco-Quinine?

A. I should judge fifteen years.

Q. 15. At the time you begun handling Coco-Quinine, was there, to your knowledge, any other chocolate quinine preparation on the market?

A. Not that I know of.

Q. 16. What is your opinion of Eli Lilly & Co. as a manufacturer of pharmaceuticals?

By Mr. Rawlings: Objected to as irrelevant.

A. Very good.

Q. 17. So far as you know has the use of this preparation been satisfactory to the physicians and others who have purchased it?

A. Yes, sir, very satisfactory.

Direct-examination closed.

144 Cross-examination.

By Mr. Rawle:

X Q. 18. I understand that Lilly's Coco-Quinine is the only chocolate quinine liquid preparation you have handled?

A. Yes, sir.

X Q. 19. And when a customer calls for a chocolate quinine liquid preparation he gets Lilly's Coco-Quinine?

A. Yes, sir.

X Q. 20. Might not prescriptions or customers have called for some other liquid quinine preparation at your retail store during your absence?

A. I think not.

X Q. 21. You are what is called a jobber of pharmaceutical preparations, are you not?

A. Yes, sir.

X Q. 22. And Lilly sells only to jobbers and not to retailers?

A. Only to jobbers.

X Q. 23. And Warner & Co. sell only to retailers and not to jobbers?

A. It is my opinion that they sell to jobbers, physicians and retail druggists.

HARRY W. SCHUH.

Subscribed and sworn to before me, this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

HERBERT N. HENCKELL, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

145 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Herbert N. Henckell; age, 36; Cairo, Ill.; Druggist, a partner in Henckell's drug store.

Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine, at your store?

A. Yes, sir.

Q. 3. Who is the manufacturer of this product, if you know?

A. Eli Lilly & Co.

Q. 4. How do you dispense it?

A. On prescriptions and to the trade when they call for it.

Q. 5. How are the prescriptions commonly written?

A. For Coco-Quinine.

Q. 6. How do your customers ask for it when it is asked for over the counter?

A. Coco-Quinine.

Q. 7. How long have you handled this product?

A. Seven or eight years.

Q. 8. About what is the extent of the demands for it at your store?

A. We use about five pints a month.

Q. 10. Do you know of any other chocolate quinine preparation on the market?

A. I have never used any nor seen any, but have had them offered to me for sale.

Q. 11. Please explain as to the offers of other quinine products to you?

By Mr. Rawle: Objected to as inadmissible and irrelevant.

A. I have had a chocolate quinine offered me by the Pfeiffer Chemical Company, by a salesman for them, as being a quinine and syrup preparation.

By Mr. Rawle: The answer is objected to as irrelevant.

146 Q. 12. Who was this salesman?

(Same objection.)

A. Mr. Baldwin.

Q. 13. What did Mr. Baldwin tell you about the preparation he offered you?

(Same objection.)

A. That it was a preparation equal to any other cocoa and quinine preparation on the market and considerably cheaper.

Q. 14. Anything else?

(Same objection.)

A. That it could be used whenever a chocolate quinine preparation was required.

Q. 15. Did he say anything to you about Coco-Quinine?

(Objected to as irrelevant and as leading.)

A. I was asked whose Coco-Quinine preparation I used. I told him Eli Lilly's.

Q. 16. Won't you relate the whole conversation?

A. After I had told him I used Lilly's he told me that his preparation would serve the purpose of the Coco-Quinine, and I could save considerable money by using his.

Q. 17. Was anything said about substituting one for the other?

(Objected to as irrelevant and as leading.)

A. Nothing further was said by him after I told him I would use no other preparation of Coco-Quinine except that made by Eli Lilly & Co.

Q. 18. What was your reason for taking this position with him?

(Objected to as irrelevant, and because the witness' reasons for taking any position are not material to this issue.)

147 A. I don't think when a customer asks for a cocoa or chocolate quinine that they mean any other but that made by Eli Lilly & Co.

Q. 19. Could you identify the Lilly preparation by any other means than its name?

A. No, sir, I don't think I could. I have never tasted nor seen any other and I could not say truthfully that I could identify any other prepartion from the Coco-Quinine.

Direct-examination closed.

No cross-examination.

HERBERT N. HENCKELL.

Subscribed and sworn to before me this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILL J. BRYANT, a winess, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Will J. Bryant; age, 37; Cairo, Ill.; Pharmacist. I am a partner in the Henckell Drug Store.
Q. 2. How long have you been with the Henckell Drug Store and where were you employed prior to that time?
A. I have been with the Henckell Drug Store seven months. Prior to that time I was employed by the Schuh Drug Store.
Q. 3. In what capacity?
A. Well, I was laboratorian, and buyer.
148 Q. 4. Did you have any knowledge of the orders coming into the store for goods?
A. I filled them all.
Q. 5. Did you handle a pharmaceutical product known as Coco-Quinine while you were with the store, and if so, what can you tell us about it?
A. I did. The Schuh Drug Company bought and sold probably ten or fifteen five pint bottles, five to eight one gallon bottles, and I should judge about a dozen pints a week. I did the buying in that department.
Q. 6. The quantity stated is about an average week's business while you were with them?
A. Yes, sir.
Q. 7. Did you ever receive any orders from the retail trade for Quin-Coco while you were with the Schuh Drug Co.?
A. I don't think so.
Q. 8. Did you ever receive any orders for a chocolate quinine preparation by any other name than Coco-Quinine?
A. I did.
Q. 9. Please explain?

(Objected to as irrelevant.)

A. We occasionally received orders for chocolate quinine. I don't remember any other names at present that were given. They were always filled with Lilly's Coco-Quinine. In fact I don't remember of any other preparation of chocolate quinine that we ever had in stock except Lilly's Coco-Quinine. I don't remember of ever having had a call for Quin-Coco, but it is possible I might have had if there is such a preparation on the market as every jobber is liable to have.
Q. 10. Have you ever had anything to do with any other chocolate quinine preparation than Coco-Quinine?
A. I never have.
149 Q. 11. Was this preparation handled by the Schuh Drug Co. all of the time you were with them?
A. Yes, sir.

Direct examination closed.

No Cross-examination. WILL J. BRYANT.

Subscribed and sworn to before me this 27th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

JOHN B. MESSENGER, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. John B. Messenger; age, 42; Cairo, Illinois; Traveling Salesman for Eli Lilly & Co.
Q. 2. How long have you been so employed by Eli Lilly & Co.?
A. Seventeen years.
Q 3. What are your duties in the position you hold with this house?
A. Calling on the retail trade and jobbers, and detailing physicians with samples of Lilly's products.
Q. 4. Do you know anything concerning the product Coco-Quinine, when it was put on the market, &c.? Please state in narrative form what you know on this subject.
A. I was in the employ of Eli Lilly & Co. when the article was first introduced to the trade and I sold Coco-Quinine quite a number of years before there ever was a substitute offered to the
150 trade, that is to my knowledge, never in my territory, but frequently had the druggists often say to me that Eli Lilly & Co. had such a fine article there and are creating such a demand for it that it will be only a question of time that the preparation will be greatly substituted, which it has been.

I know it to be a fact that lots of druggists carry a substitute of Coco-Quinine called Quin-Coco that they use on prescriptions where the physicians have written for Coco-Quinine. I have also had doctors state to me that in using the substitute for Coco-Quinine it has caused the patient to become nauseated and sick at the stomach owing to the fact that the preparation contained so much cocoa butter and starch and that they had fallen out with Coco-Quinine thinking that was the article they were using and when it was brought to their attention that it was not Coco-Quinine that was being used and finally got some of the original Coco-Quinine that the results were very much different in favor of the patient. And I know it to be a fact that this substitution has cost the original article of Eli Lilly & Company's Coco-Quinine a great loss in favor with the physicians.

I have taken the matter up, I have taken issue with the druggists that have told me that they bought a substitute for Coco-Quinine and asked them why they would not give us the business on the original and invariably their reply was that it was more money to them to sell the substitute than the original Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay and as inadmissible.

Q. 5. Will you give the name of the physician who had this experience with a substitute for Coco-Quinine?

By Mr. Rawle: Objected to as calling for hearsay evidence.

151 A. H. R. Read, Charleston, Missouri.

Q. 6. What territory do you cover as the representative of Eli Lilly & Co.?

A. Southern Illinois, Southeast Missouri, Northeast Arkansas, and Western Kentucky.

Direct-examination closed.

Cross-examination, without waiving objection.

By Mr. Rawle:

X Q. 7. Do you consider that "lots of druggists" who "carry a substitute of Coco-Quinine, called Quin-Coco that they use on prescriptions that physicians have written for Coco-Quinine," are, in so doing, acting as honest druggists?

A. I would not consider it being honest, no.

X Q. 8. Then you are impugning the honesty of "lots of druggists" in your territory, are you not?

A. His honesty on that one proposition, I would, yes.

X Q. 9. Do you mean by "would" that you "do" impugn their honesty?

A. On that one proposition.

X Q. 10. Give me an approximate statement of the number of retail druggists in your territory?

A. I would say that there are two hundred and fifty druggists.

X Q 11. Do you mean retail druggists?

A. I will say I call on two hundred and fifty retail druggists approximately. There may be more. That is a very close estimate.

X Q. 12. By the words "lots of druggists" used in your answer to Q. 4, how many druggists do you mean?

A. Well, I don't believe that there are over twenty druggists in my territory that use anything but Coco-Quinine, Lilly.

X Q. 13. And do these twenty retail druggists constitute the class whom you have designated in your answer to Q. 4 as "lots of druggists?"

152 A. Yes, I do.

X Q. 14. (Question repeated.)

A. Yes.

X Q. 15. Then I understand that in respect of all the retail druggists in your territory, some twenty in number who handle and sell Quin-Coco made by Warner & Co., you impugn their honesty in their business?

By Mr. Bradford: The question is objected to as not justified by the witness' previous testimony on this subject.

A. I wouldn't say that they all handle Quin-Coco. There are other substitutes besides Quin-Coco.

X Q. 16. What do you mean by "substitutes?"

A. Something to take the place of Coco-Quinine.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 17. What do you mean by "take the place of" in your last answer?

By Mr. Rawle: Objected to as not proper redirect-examination.

A. Any preparation that will take the place of Coco-Quinine when Coco-Quinine is prescribed.

JOHN B. MESSENGER.

Subscribed and sworn to before me this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned until Monday, March 29th, 1915, at Hotel Hermitage, Nashville, Tenn., at 9:00 a. m.

153 Nashville, Tenn.,
Hermitage Hotel, March 29th, 1915—9.00 a. m.

Met pursuant to adjournment, at the Hermitage Hotel, Nashville, Tenn., Monday, March 29th, 1915, at 9.00 a. m.

Parties present as before.

CHESLEY W. JENNINGS, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Chesley W. Jennings; age, 45; Nashville, Tenn.; Druggist, Proprietor of the Jennings Pharmacy of Nashville, Tenn.

Q. 2. Please state if you handle a pharmaceutical product known as Coco-Quinine, and if so, tell us what you can about it?

A. We have it in stock. It is a preparation made by Eli Lilly & Co., prescribed by physicians and also called for by the public. We have been handling this product for ten years or more.

Q. 3. How is this product dispensed in your store?

A. Mostly in our own prescription bottles, filled from the original packages.

Q. 4. How is this product called for on the prescriptions you receive?

A. Sometimes it would be Coco-Quinine, say about four ounces, then sometimes Coco-Quinine (Lilly).

Q. 5. Do the physicians designate the product on their prescriptions by any other name than by Coco-Quinine?

154 By Mr. Rawle: Objected to as irrelevant.

A. No, sir.

Q. 6. How do customers call for it over the counter?

A. Coco-Quinine.

Q. 7. Ever by any other names?

A. Sometimes by "Chocolate Quinine."

Q. 8. What product do you understand to be intended when it is asked for by any of these names?

A. Coco-Quinine.

Q. 9. What is the comparative extent or size of your business?

A. Prescription business?

Q. 10. Yes, prescription business?

A. Our prescriptions run from something like fifteen to twenty thousand a year.

Q. 11. Do they come from all parts of this particular locality?

A. Yes, sir.

Q. 12. Have you ever had a prescription come into your store written for Quin-Coco?

A. If I have I don't remember it.

Q. 13. Would you be likely to know?

A. Yes, sir.

Q. 14. Have you ever had a customer come into the store and ask for Quin-Coco?

A. No, sir. If I have I don't know it. I have four or five clerks.

Q. 15. So far as your personal knowledge goes then your store has never received a prescription calling for Quin-Coco or a call for Quin-Coco from a customer?

By Mr. Rawle: Objected to as already answered.

A. I never have, not that I know of.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 16. When a customer calls for a preparation of chocolate quinine you sell them Coco-Quinine, Lilly?

155 A. Yes, sir.

X Q. 17. You have no knowledge of what they want, but you merely state that that is what you do?

A. We ask them if it is Coco-Quinine and they say "Yes, I guess it is, it is that chocolate quinine, and is labeled Coco-Quinine."

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 18. When a customer asks for chocolate quinine, why do you understand that they mean "Lilly's Coco-Quinine?"

A. That is the only one we ever knew of being a chocolate quinine.

R. D. Q. 19. Do you handle any other tasteless or sweet liquid quinine preparation?

A. Yes, sir.

R. D. Q. 20. What?

A. A preparation called Febreline. I don't remember the manufacturer's name.

R. D. Q. 21. What is its flavor?

A. I think it is orange.

R. D. Q. 22. What is its color?

A. A cloudy syrup. It is nearly white.

By Mr. Rawle: These questions and answers are objected to as irrelevant and immaterial.

CHESLEY W. JENNINGS.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

ALVA LEE KELTON, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows,
156 in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Alva Lee Kelton; age, 40; 1517 Forrest Avenue, Nashville, Tenn.; Assistant General Manager Phœnix Mutual Life Insurance Co.

Q. 2. How long have you been in your present business?

A. Sixty days.

Q. 3. In what business were you engaged prior to that time?

A. I was a commercial traveler, for the S. Pfeiffer Manufacturing Company, of St. Louis, Missouri, for two years previous. For ten years previous I represented Pfeiffer Chemical Company, of St. Louis, Missouri, as a commercial traveler. They manufacture a line of non-secret preparations, pharmaceuticals, patent medicines, toilet articles, perfumes and so forth.

Q. 4. Among such preparations in the line mentioned was or was not there one called Quin-Coco?

A. Yes, sir.

Q. 5. Did you sell Quin-Coco among the other products which you handled?

A. I did.

Q. 6. What territory did you cover when representing the Pfeiffer Chemical Company?

A. Kentucky and Tennessee for five years and Tennessee alone the balance of my experience as a salesman for the Pfeiffer Chemical Company.

Q. 7. What were your usual representations to the trade when soliciting orders for Quin-Coco?

By Mr. Rawle: Objected to as irrelevant and inadmissible and because no acts of the company named by the witness could bind the defendant and affect his rights. And also because the acts
157 of the witness called for by the question are not in any way connected with the defendant.

A. I always demonstrated Quin-Coco as a preparation similar to Coco-Quinine, showing to them that the Pfeiffer Chemical Company (or the Searle Hereth Company) product was even a better preparation to my mind than the Coco-Quinine which the trade had formerly sold. I demonstrated this by showing that Quin-Coco would not coagulate in the bottom of the container as easily as the Coco-Quinine.

I also showed the difference in price invariably quoting our gallon price against the Eli Lilly & Co. five pound price. In big buyers I tried to induce them to take advantage of our five gallon deal, thus reducing the price to five cents lower per gallon than the Coco-Quinine is in five pound lots. This, of course, was only to dealers who could handle that quantity and always to retail druggists only.

I made a specialty of Quin-Coco from the fact that I found it to be the very best "repeater" we had in the pharmaceutical line. When a customer began buying this product in five pound lots he invariably bought it later in larger quantities, almost invariably.

I would state that "five pints" and "five pounds" are synonymous in pharmaceutical terms.

Q. 8. When did you begin the sale of Quin-Coco to the trade?

A. In 1907.

Q. 9. Do you know anything about the early history of the manufacture of Quin-Coco, and if so, will you relate it?

By Mr. Rawle: A general objection upon the ground above stated is made to the foregoing questions and answers and all others along this line, counsel agreeing that it may be considered as made to all such questions.

A. Mr. H. Pfeiffer who was the original Pfeiffer of the
158 Allan-Pfeiffer Chemical Company was later the founder of the Pfeiffer Chemical Company which firm I represented during the best years of my life. Mr. Pfeiffer and I were warm personal friends, besides my being a representative of his company. He often spoke to me about getting up a Quin-Coco, and same was listed in an old Pfeiffer Chemical Company catalogue, but they did not perfect the preparation. Later when they purchased the Searle & Hereth Company, Chicago, Quin-Coco was floated on the market. It was a winner from the start, from the fact that the trade was accustomed to a preparation of this kind and were eager to buy something at a cheaper price, quality being considered. As stated in a

former answer I considered then and do now consider Quin-Coco a superior preparation to Coco-Quinine.

Q. 10. In your experience with the Pfeiffer Chemical Company, did you learn of any Quin-Coco preparation manufactured by the Searle and Hereth Company prior to the date it was taken over by the Pfeiffer Chemical Company?

A. I did not.

Q. 11. In the work of selling Quin-Coco did you tell the druggists that Quin-Coco could be supplied when Coco-Quinine was called for, or to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to because the witness has shown no connection with the defendant and no authority from the defendant in the matters called for by the question.

A. I did. Not only so, but as stated in a former answer I demonstrated the difference in price and quality, urging upon him to at least give Quin-Coco a fair trial. That my experience with the trade was almost invariably that Quin-Coco was a most excellent "repeater."

Q. 12. For the benefit of the court will you not explain
159 what is understood in the trade by the term "repeater?"

A. By the term "repeater" in the sense used concerning Quin-Coco I have reference to the fact that it would be reordered time and again. I also used the word "replacer" which is a phrase used by pharmaceutical houses and salesmen when placing an article on the market at a cheaper price than the one which is called the "original." Quin-Coco therefore was a "replacer" in the salesman's mind (I speak of my own experience) for Eli Lilly & Company's former manufactured product known to the trade the country over as Coco-Quinine.

Q. 13. Was Quin-Coco ever sold by you to the trade with the understanding that it should be sold only when Quin-Coco should be called for by prescriptions or the retailers' customers?

By Mr. Rawle: The question is objected to on the ground that the witness cannot testify to understandings but to what was said at any given time.

A. Not by any means. I invariably sold Quin-Coco with the idea that it was to give the retail druggists whose profits are few and far between anyway a larger profit, demonstrating as above stated that if Coco-Quinine was called for to influence the customer to take the Quin-Coco instead. If the consumer gets a better product in my mind and the druggists make a better profit, both are thereby benefited.

Q. 14. From your experience in the sale of this product and your knowledge of the trade conditions when you were engaged in this business what proportion of the Quin-Coco you sold would you say was resold to the customers to supply the demand for Quin-Coco and what proportion to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to because calling necessarily for
160 hearsay and for the witness' guess on a subject in which he

could not base his answer upon facts, but only upon estimates, or inferences.

A. I would most positively state that in my long experience in selling Quin-Coco that it was resold as it was bought—to replace Coco-Quinine, and that in almost every instance, at my suggestion, and demonstration, it was bought for the purpose of replacing Coco-Quinine. Therefore, it was almost in toto, according to various letters and personal talks with druggists, sold as a substitute for Coco-Quinine. In fact I sold a great deal more Quin-Coco in my territory than any three representatives, I would judge, representing Eli Lilly & Co. I say this without fear of successful contradiction.

Q. 15. Do you know anything about William R. Warner & Co., and what relations exist between that company and the Pfeiffer Chemical Company?

By Mr. Rawle: Objected to because the question asks for facts of which the witness cannot have a complete understanding having legal value.

A. The consolidation of the William R. Warner & Co. with the Pfeiffer Chemical Company took place while I was a representative of the latter concern. Mr. H. Pfeiffer, as stated in previous answers, and I were warm personal friends. Consequently he told me much concerning the business of the company. I knew that when the Pfeiffer Chemical Company took hold of any concern they always secured a controlling interest in same before they would make a final trade between the companies.

Q. 16. Can you state when or about when this consolidation took place?

Q. My recollection is that it was in 1908.

Q. 17. Following such consolidation was the Warner line added to the other lines of products you were selling?

161 A. It was. When any concern was bought over by the Pfeiffer Chemical Company, this line was added to the peddler's pack carried by the salesman.

Q. 18. To this extent, then, you represented the William R. Warner & Co., as well as the Pfeiffer Chemical Company, did you not?

A. I did.

Q. 19. I call your attention to a paper marked "Complainant's Exhibit No. 3," and ask you if you recognize it and what it is?

A. It brings tears of pleasure and regret and several other "res" to see this familiar paper before me. It seems like shaking hands with an old friend. It is, as before stated, what was known to me as our "replacer" list, and I always invariably tried to knock the eye out of every product known on this "replacer" list as the original and sell our own "replacers," which were printed on said list.

Q. 20. What information does that list give you relative to Coco-Quinine and Quin-Coco?

A. The paper was always used by me to demonstrate the difference in the price between Quin-Coco and Coco-Quinine.

Q. 21. Were these lists sent to their traveling salesmen by the Pfeiffer Chemical Co., and the William R. Warner Co.?

By Mr. Rawle: Objected to unless the witness states that he knows that they were sent to each and to how many other traveling salesmen than himself, and unless the witness confines himself to such statement of actual facts known to him.

A. They most positively were. The Pfeiffer Chemical Company (and William R. Warner & Co.) never did anything by halves. When one salesman got a loaf all got loaves. When one salesman got anything added to the line, each and every salesman got
162 the same thing. Circular letters were sent out every week, showing what was going on over the entire territory, so that I am sure I am in a position to answer above positively.

By Mr. Rawle: Answer is objected to as hearsay.

Q. 22. Do you have any knowledge of the number of items listed by the Pfeiffer Chemical Company—William R. Warner Company combination, and if so, about how many?

A. When I severed my connection with the Pfeiffer Chemical Company and William R. Warner Company the entire combined lines amounted to approximately sixteen thousand items.

Q. 23. What is your opinion of the standing of the house of Eli Lilly & Co.?

A. I have always heard Mr. Pfeiffer (and I trust I will be pardoned for referring to him so often) refer to Eli Lilly & Co. as the most ethical pharmaceutical house in the United States. I heartily coincide with him for I have never seen anything derogatory to his opinion, and, as I was tutored by Mr. Pfeiffer I naturally imbibed some of his good judgment.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 24. Were you tutored by Mr. H. Pfeiffer in the ethics of your business as salesman for his houses?

A. I was.

X Q. 25. Were his teachings ethical in your opinion?

A. Absolutely.

X Q. 26. Did you invariably conduct the business as salesman in according with those ethics?

A. As near as possibly, that is, I most certainly had ideas of my own as a salesman, for no man can be truly successful by
163 taking another man's ideas and following them in toto.

X Q. 27. I need hardly ask you whether you considered your own ideas of the ethics of the business as being truly ethical? Do you so consider them?

A. In the strictest sense of the word "ethics" as used by Mr. H. Pfeiffer concerning Eli Lilly & Co., I do not consider the Pfeiffer Chemical Company and William R. Warner & Co., as ethical as they should be. Mr. H. Pfeiffer while he was president of the Pfeiffer Chemical Company adhered to his own ideas of ethics which, as above stated, were correct. Later on, when the business grew to such immense proportions—even far beyond his own expectations, the idea of ethics strictly speaking passed from under the personal supervision of Mr. H. Pfeiffer.

X Q. 28. By the word "repeater" used by you I understand you to mean a preparation which, once sold to a druggist, would probably be so approved by him as to lead him to buy it a second time and thereafter?

A. That is my meaning.

X Q. 29. By "replacer" I understand you to mean a preparation similar to another preparation, in medical effect, which could be used in place of that other preparation with like medical effect with that other preparation. Is that correct?

A. By the term "replacer" as above stated, I always had reference to a preparation which in class and quality was similar to the original, the price however, invariably being lower than the original manufactured article.

X Q. 30. Is the element of a lower price an essential element of the term, necessarily?

A. Absolutely. This was one talking point I always used to induce the trade to buy the "replacer" instead of the original. The old term "just as good" was used when the Pilgrim Fathers 164 landed at Plymouth Rock in 1620. Unfortunately for me, my experience was in the whirlwind campaign of the twentieth century where brighter and newer terms must always be produced in order to induce a buyer or make him susceptible to the power of suggestion.

X Q. 31. Might not the term "replacer" be used in respect of a similar preparation with which your preparation came in competition, notwithstanding the fact that the other preparation with which yours competed might not have preceded yours on the market?

A. The term "replacer" as I used it invariably has reference to a preparation which has been manufactured at a later date than a similar preparation manufactured and introduced prior to the one termed "replacer."

X Q. 32. If you came into competition with another article which had been first introduced on the market subsequently to the introduction of your article, have you any similar term to apply to your article in such case?

A. I would call our article in that instance the original and the subsequent article the "replacer."

X Q. 33. Then in making sales of Quin-Coco to the retail druggists your effort was to induce them to influence their customers to use Quin-Coco, Searle & Hereth, in place of Coco-Quinine, Lilly?

By Mr. Bradford: Objected to as not justified by the witness' testimony on direct-examination.

A. Invariably so.

X Q. 34. And that is all that you attempted to do?

Same objection.

A. That was not all I attempted to do, but it was the foundation for getting an order from the fact that I could never have sold any Quin-Coco had it not been for the former birth of Coco-Quinine. I have previously stated that I believed then and believe now
165 that Quin-Coco was and is a superior preparation to the Coco-Quinine manufactured by Eli Lilly & Co. The price also, as above stated, was the chief club I used with which to hammer against Coco-Quinine.

X Q. 35. I hope you will excuse me for asking you this question. I will ask you whether it was your practice to suggest to retail druggists that when they received a physician's prescription specifying Coco-Quinine, Lilly, they could, without the physician's consent, or knowledge, fill that prescription with Quin-Coco, S. & H.?

A. Not for one instant did I suggest anything clandestine. If the druggist could induce the physician to permit the said substitution I always suggested that this was right so to do. But there were so many instances where the customer came in and called for Coco-Quinine and the druggist could show him the large bottle S. & H., the color being the same, and he would usually say, "Yes, that is what I want."

X Q. 36. What I am asking you about is whether you, in selling Quin-Coco, suggested such a thing to the druggist? Or suggested that he could do such a thing?

A. I always suggested as above stated in previous answers that in giving the customer Quin-Coco he was not only making a better profit (which was his prime idea in being in the drug business) but also, as above stated, that he was giving the customer a superior article to the one called for, namely Coco-Quinine.

X Q. 37. You have said that "Not for one instant did I suggest anything clandestine" as to filling a prescription specifying Coco-Quinine with Quin-Coco. Now I ask you whether you suggested anything clandestine to the druggist in retailing over the counter Quin-Coco for Coco-Quinine?

A. I certainly do not think so. In fact, I know I did not suggest anything clandestine thereby. When a man buys a better article than the one called for he certainly is none the loser. I once
166 went into a hat store to buy a Knox hat, but there happened to be a salesman in that store and I walked out with some off-brand hat, to use the phrase, but perfectly satisfied.

X Q. 38. Did you, in so many words, tell retail druggists that they could buy Quin-Coco and clandestinely sell it to customers over the counter who called for Coco-Quinine?

A. On the other hand, as above stated, I always suggested to the druggist to show the customer what he was buying, telling him that this preparation would not coagulate. At the same time the customer

called for Coco-Quinine, but if he succeeded in showing him that he had a better preparation whether the customer knew it to be Coco-Quinine or not, that I do not consider clandestine. It is a matter of business, pure and simple and the poor retail druggist needs all the extra cash he can get. As stated several times I have always believed that when a man buys a better article than the one for which he calls he is none the loser.

X Q. 39. Did you tell the druggists that they should tell customers over the counter that Quin-Coco would not coagulate and that it was a better preparation than Coco-Quinine?

A. I always suggested, as above stated, my idea of selling Quin-Coco in the place of Coco-Quinine, but I did not lay down any set rule by which I demanded the druggist should follow.

X Q. 40. What I wanted to ask you is merely as to what you suggested to the retail druggists. Did you suggest to them that they should tell their customers over the counter that your preparation would not coagulate and that it was a better preparation than Coco-Quinine? Was that your suggestion?

By Mr. Bradford: Objected to as the witness has already answered the same question several times.

A. If I have not made the matter clear before this I fail to
167 know how to make anything clearer. I have always suggested to the trade in buying Quin-Coco they were buying it strictly as a "replacer" for Coco-Quinine.

X Q. 41. In answer to X Q. 29 you have specified that by "replacer" you mean a preparation "which in class and quality was similar to the original." Could not a druggist honestly use Quin-Coco as a "replacer" for Coco-Quinine by getting the consent of a physician who has prescribed Coco-Quinine, to use Quin-Coco? And, when a customer over the counter called for Coco-Quinine, explaining to such a customer that Quin-Coco was a better preparation and did not coagulate?

A. That would be a matter left entirely with the druggist. My business was to sell Quin-Coco in the place of Coco-Quinine. How he sold the preparation was entirely optional with him. My own sales to the druggists were open and above board and nothing whatever in the way of a clandestine nature was between us.

As above stated I invariably demonstrated the difference between Quin-Coco and Coco-Quinine, stating as I have time and time again that I believed and still believe that Quin-Coco is a superior preparation to Coco-Quinine. If the druggist obtained the consent of the physician to substitute Quin-Coco when the physician had written Coco-Quinine that would be a matter entirely between the druggist and physician, for by mutual consent the Quin-Coco, as in this instance, could be substituted for Coco-Quinine.

X Q. 42. My questions are intended to bring out, not what the druggist might thereafter do, but what it was that you would suggest to him to do?

You have said in answer to X Q. 41 "My own sales to the druggists

were open and above board and nothing in the way of a clandestine nature was between us."

What I want to know is whether you suggested to the druggist any clandestine method of selling Quin-Coco to customers over the counter. I call your attention to X Q. 33, where you said
168 that your invariable effort was to induce druggists to influence their customers to use Quin-Coco in place of Coco-Quinine.

A. I still state and continue to state and will restate all day, all night, all week, or all the year, that a druggist in inducing a customer to buy what is, to my mind, a superior preparation, is doing the customer a favor, instead of trying to "palm off" an inferior article. I have fully stated that in the sale of Quin-Coco all I could do was to try to induce the druggist to buy same. My suggestion to him was, as above stated several times, that his profit was not only better, but that his repeat sales would prove that my idea in connection with the experience I have had with former customers, would be that the sales would repeat and continue to repeat in future.

X Q. 43. If you will pardon me, I now ask you whether you suggested to retail druggists that they could buy Quin-Coco and handle it and "palm" it off over the counter to customers calling for Coco-Quinine?

A. If you call buying a better preparation and making more profit on said preparation than the one called for I answer that I invariably suggested to the druggist to show the Quin-Coco in place of Coco-Quinine, but at no time, as above stated, did I ever suggest to "palm off" said Quin-Coco instead of the original product known to the trade as Coco-Quinine.

X Q. 44. Will you state what S. Pfeiffer Manufacturing Company was in reference to Pfeiffer Chemical Company?

A. There was no relation whatever either by tie of consanguinity or in a business way. It was an entirely different concern. My connection with the Pfeiffer Chemical Co. covered the period of about twelve years from 1901 to 1912 inclusive.

X Q. 45. When you speak of the consolidation of the Warner Company and the Pfeiffer Company, I suppose you mean nothing more than a consolidation of the business, and you are not referring to any legal corporate consolidation?

169 A. I meant the mutual organization as it was presented to me while I was representing the company that the Pfeiffer Chemical Company bought controlling interest in the William R. Warner and Company.

X Q. 46. And the identity of the two corporations thereafter continued to exist, so far as you know?

By Mr. Bradford: Objected to as incompetent.

A. Every firm the Pfeiffer Chemical Company bought or of which they bought a controlling interest retained its own identity so far as the manufactured product of said concerns were labeled, but the entire supervision during my connection with the firm was under the Pfeiffer Chemical Company officials.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 47. Referring to "replacers," as the term is used in the drug trade, are any other elements than quality essential to make a good replacer?

A. As above stated quality and price, the latter always being lower, is what is meant by the term "replacer."

R. D. Q. 48. Would the color and flavor have anything to do with enabling one product to be sold as a "replacer" for another?

By Mr. Rawle: Objected to as irrelevant.

A. The color and flavor should be as near identical as possible.

ALVA LEE KELTON.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

170 JEROME B. SAND, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Jerome B. Sand; age, 53; Nashville, Tenn.; Pharmacist, President of the Sand & Sumpter Drug Company, Retail Druggists.

Q. 2. Please state comparatively the character and extent of your business?

A. It is just a general drug business, about $35,000 a year.

Q. 3. Do you do a large prescription business?

A. We are just about the average of what the up-town drug stores do.

Q. 4. Do you handle a pharmaceutical product known as Coco-Quinine?

A. We do.

Q. 5. How do you dispense it?

A. Principally on prescriptions. Sometimes on call from the laity.

Q. 6. How are the prescriptions written that come into your store for this product?

A. Either Coco-Quinine or Coco-Quinine, Lilly.

Q. 7. How is it asked for by customers over the counter?

A. Almost invariably for Coco-Quinine.

Q. 8. How long have you been handling this product?

A. Not less than ten years, probably more. We have been handling it ever since they have been putting it on the market.

Q. 9. Whose product do you recognize Coco-Quinine to be?

A. Eli Lilly & Co.

171 Q. 10. Have you ever received a prescription calling for Quin-Coco?

A. Not to my knowledge.

Q. 11. Have you ever received a call over the counter for Quin-Coco?

A. I have not.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. How many clerks do you employ?

A. At present I have two prescription men besides myself. In addition I have a prescription man who works at night.

I have two stores, one in this hotel and the other at Union Street and Fifth Avenue. At the latter I work with one prescription man. There is one prescription man at the Hotel store. We do very little prescription business at the hotel, not more than a fifth of what we do at the other store.

Redirect examination.

By Mr. Bradford:

R. D. Q. 13. If a prescription or an order for Quin-Coco came to your store would you probably have it called to your attention?

A. I would.

Recross-examination.

By Mr. Rawle:

R. X Q. 14. And what would you fill it with?

A. Quin-Coco if I could obtain it in the city.

R. X Q. 15. And if not.

A. I would not fill it at all.

R. X Q. 16. Would you consider it dishonest to fill it with anything else?

172 A. I most certainly would. In fact I don't know what Quin-Coco is. I never saw it in my life. I may have heard of it, but it is an article I am not at all familiar with.

JEROME B. SAND.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

CHARLES L. KOELLEIN, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Charles L. Koellein; age, 31; Nashville, Tenn.; Drug Clerk, Wholesale. I have charge of the Order Department for Berry De Movile & Co., Wholesale Druggists.
Q. 2. What territory does your house cover?
A. We cover part of Kentucky, most of Tennessee, and Northern Alabama.
Q. 3. Do you handle a pharmaceutical product known as Coco-Quinine, and if so, whose product is it?
A. We do. It is Eli Lilly's.
Q. 4. Do you have knowledge of the orders that come into your store for pharmaceuticals from the retail drug trade throughout the territory named?
A. I do.
Q. 5. How long have you been in this position?
A. About nine years.
Q. 6. Have you handled Coco-Quinine during all of this
173 time?
A. Yes.
Q. 7. During this period has your store ever received an order for a product called Quin-Coco?
A. Not that I remember.
Q. 8. Would such an order be called to your attention if it had been received?
A. It would have.
Q. 9. Do you receive a good many orders for Coco-Quinine?
A. We do.
Q. 10. And have during all these years?
A. Yes, sir.

Direct-examination closed.

No Cross-examination.

CHAS. L. KOELLEIN.

Subscribed and sworn to before me this 29th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Gus A. Blodau, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Gus A. Blodau; age, 45; Nashville, Tenn.; Druggist, I am in the Drug business for myself.
Q. 2. Do you handle at your store a pharmaceutical product known as Coco-Quinine, and if so, what can you tell us about it?

A. Well, I have handled Coco-Quinine for a number of years, and Lilly's product is the one I have always used.

174 Q. 4. Do you know of any other product by this name, Coco-Quinine?

A. I understand Warner & Company put up a preparation known as Quin-Coco. It was a chocolate preparation of quinine supposed to be in tasteless form and the representative asked me if I was using Coco-Quinine. I stated "Yes." And he recommended to me this preparation which he said I could buy at a much less figure, in fact, a gallon would cost me about the same price as a five pint bottle of Lilly's preparation of Coco-Quinine. I told him that irrespective of the fact whether it was the identical formulæ or not and would answer in its place that I had been working for one man John G. Greener, for twelve years and he had always been very bitterly opposed to the substitution of any preparation.

I am not positive what he said that follows. I am however under the impression that he said that the Quin-Coco, or whatever it was he was selling in place of the Coco-Quinine, was on the market before the Coco-Quinine was.

I told him further that Mr. Maddan, the representative of Eli Lilly & Co., lived in my neighborhood and I bought considerable Coco-Quinine from him and could not accept any substitute for his preparation, or anything he was selling as a substitute.

Q. 5. In your last answer you say "I told him that irrespective of the fact whether it was the identical formulæ or not and would answer in its place." Will you kindly explain more fully what you mean by this language?

By Mr. Rawle: The question is objected to as improper and because the only proper question to ask the witness is as to what was said and not the witness's understanding of what was said.

A. He gave me to understand that by the use of this preparation it would be a saving of money for me and why pay the price I did for Coco-Quinine. Naturally the impression to be made on

175 me was that I should use his preparation in place of Coco-Quinine.

By Mr. Rawle: I object to the answer, so far as he states the salesman gave him to understand so and so, and so far as he states that the impression made upon his mind was so and so, and because the witness has not testified or been asked to testify as to what was said.

Q. 6. Did the representative of William R. Warner and Company say anything in reference to the formulae and if he did, what?

A. He didn't give me the formulae but he wanted to show the sample to me which I didn't care to see as I had already stated I would not buy, and he further told me that they had a man that formerly worked with Lilly & Company, and he had sold to a number of druggists this preparation, and they were using it right along for chocolatae quinine and like preparations.

By Mr. Rawle: Objected to as hearsay and irrelevant.

Q. 7. Did the Warner representative say anything in reference to the comparative virtues of the two preparations Coco-Quinine and Quin-Coco? And if he did, what did he say?

A. I can't recall anything further than I have just recorded, except that the Coco-Quinine and his preparation were about identical, but owing to the fact that I gave no encouragement in regard to purchasing same, the matter was virtually dropped.

Q. 8. Did you know of any other Coco-Quinine or chocolate quinine preparation on the market prior to the time the Eli Lilly & Company's Coco-Quinine was brought to your attention?

A. I did not. I have been in business 25 years at least, that is, either as clerk or proprietor.

Q. 9. How is Coco-Quinine dispensed in your store? On call over the counter or on prescriptions or both?

176 A. Both.

Q. 10. Have you ever had a prescription for Quin-Coco?

A. I have not.

Q. 11. Have you ever had a customer call for Quin-Coco?

A. No.

Q. 12. What was the name of William R. Warner & Company's representative who called on you?

A. Mr. Devall, I think his name is.

Q. 13. Do you buy other items of the Warner line from him?

A. I do.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. Do you mean by "substitute" an article which is like another article and can be used in place of it?

A. Substitution covers quite a broad field. In this case I speak of it in the use of one preparation to take the place of another preparation made by a different firm under a different name although they may claim to be identical.

I mean, that is, in case a preparation of a certain make is called for, either on prescription or over the counter, and another preparation supposed to be identical in formulæ of a different manufacture than called for is dispensed is substitution. This substitution is allowable or is really not substitution when agreeable to both parties and known to both parties that the exchange has been made.

X Q. 15. By both parties you mean the druggist and the physician or the druggist and the customer, do you?

A. If it is a direct call from a customer then the agreement to substitute one for the other must be between them. How-

177 ever, on a prescription the exchange of one for the other must be made with the writer and the dispenser.

X Q. 16. And that is the only way you would make a substitution?

A. That is not a substitution. It is a legitimate agreement whereby one party agrees to eliminate one preparation and use another. The purchaser if called over the counter or the physician if written on a prescription are the only ones who have the right to give me permission to make this change. Therefore if the call is for another article it is not a substitution, where the exchange is made in this way.

X Q. 17. In your opinion would a perfectly honest druggist use one article for another called for, without the consent of the physician who wrote the prescription or the customer who was buying over the counter?

A. A perfectly honest druggist who would use one article for another called for without the consent of the physician who wrote the prescription or the customer who was buying over the counter would cease to be an honest druggist.

X Q. 18. Did the salesman suggest to you that when Coco-Quinine was specified in the prescription or called for over the counter, you should dispense Quin-Coco dishonestly in either case, in place of Coco-Quinine.

A. He did not state that I should use Quin-Coco dishonestly either on prescriptions or over the counter but that I could use the same.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 19. Did Warner's representative claim that the Warner preparation is identical with the Lilly preparation, and if he did, what reasons did he give for such a claim?

By Mr. Rawle: Objected to as repetition.

178 A. I can't say that he stated it was the identical same product but he gave me to understand it was a good substitute for Coco-Quinine at quite a saving of price.

By Mr. Rawle: Objected to because the witness states what the salesman gave him to understand and not what the salesman said.

R. D. Q. 20. Did he say anything about who compounded their preparation for them?

A. He did not say who compounded the preparation but stated that they had a man that was formerly with Eli Lilly & Company. This is to the best of my knowledge that I can remember of now.

Redirect-examination closed.

GUS A. BLODAU.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Tuesday, March 30th, 1915, at 10 a. m., at Hotel Peabody, Memphis, Tenn.

Memphis, Tenn.,
Peabody Hotel, March 30th, 1915—10 a. m.

Met pursuant to adjournment, at the Peabody Hotel, Memphis, Tenn.

Parties present as before.

CARL O. MANNING, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

179 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Carl O. Manning; age, 32; Memphis, Tenn.; Druggist, my Pharmacy is located at 825 Thomas Street, Memphis, Tenn. I am the Proprietor. I have been a registered Pharmacist for about six years.

Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine at your store, and if so, whose product do you recognize this to be?

A. Yes, sir. It is Eli Lilly & Company's product.

Q. 3. How do you dispense this product?

A. We dispense it on prescriptions and on call from the customer over the counter, in our own bottles under our own labels.

Q. 4. Do you ever receive prescriptions calling for Quin-Coco?

A. No, sir.

Q. 5. Do you ever receive calls from customers over the counter for Quin-Coco?

A. No, sir.

Q. 6. Have you ever heard of Quin-Coco, and if so, will you please relate the circumstances?

A. Yes, sir. It was introduced at that time by the Pfeiffer Chemical Company, their representative, as a chocolate quinine identical with the product of Lilly.

Q. 7. What did the representative say to you in reference to this product?

By Mr. Rawle: I object to the question as relating to the Pfeiffer Chemical Company and, therefore, not calling for testimony which could affect the defendant's rights.

A. That it was the same product as Coco-Quinine.

Q. 8. Is that all?

A. Yes, sir.

Q. 9. Did he say anything to you about the price?

By Mr. Rawle: Objected to as the question has been already
180 answered by the witness in his statement that "That is all" and as leading.

A. Yes, sir.
Q. 10. What did he say about the price?

(Same objection.)

A. That it was much cheaper than Coco-Quinine. That it was $3.25 a gallon in five gallon quantities.
Q. 11. How are prescriptions for Coco-Quinine written by physicians, as received at your store?
A. As Coco-Quinine.
Q. 12. How do customers call for it over the counter?
A. The majority call for Coco-Quinine, and occasionally for chocolate quinine.
Q. 13. When a customer calls for chocolate quinine, what product do you understand is intended?
A. Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. That is because you do not carry Quin-Coco, Warner, is it not?
A. Before the Quin-Coco came out we had no other chocolate quinine.
X Q. 15. Do you now handle both?
A. Not just at present, I have.

Cross-examination closed.

CARL O. MANNING.

Subscribed and sworn to before me this 30th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

181 JOHN R. TAGUE, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. John R. Tague; age, 55; Memphis, Tenn.; Druggist, employed by the Van Vleet Mansfield Drug Company, as Manager. It is a wholesale house.
Q. 2. What territory does this house cover in its trade?
A. Well, we travel within a radius of two hundred and fifty or three hundred miles.

Q. 3. Do you handle a product known as Coco-Quinine?
A. Yes, sir.
Q. 4. How long have you handled this product?
A. I should say some fourteen or fifteen years.
Q. 5. Do you have a considerable demand for it from the trade?
A. Yes, sir.
Q. 6. Is the demand continuous and constant?
A. Yes, sir.
Q. 7. Do you know anything of a product called Quin-Coco, and if so, what?
A. Yes, we stocked Quin-Coco some four or five years ago, at the solicitation of one of their salesmen. At that time they were making a push on the preparation and desired that we might have the stock with which to fill the orders that the salesmen might turn to us. At that time we sold a few packages in that way, but after this particular salesman left their employ I don't recall having sold any of the goods.
Our present stock of these goods was gotten some two or three years ago. Recently a couple of bottles were sold or disposed 182 of in some way as their absence was indicated by the dust marks on the shelves.

By Mr. Rawle: Objected to as irrelevant and immaterial, as volunteered and hearsay.

Q. 8. Did you inspect your stock of Quin-Coco before coming here to testify? And if you did is your last answer based upon what you saw on such inspection?

By Mr. Rawle: Objected to as immaterial.

A. I looked at the stock from the floor below, it being on a gallery above, and it seemed to be in the shape that it has been for quite a long while.
Q. 9. You spoke of their salesman. Whose salesman do you mean?
A. The salesman of the concern that was marketing the product. I feel sure that it was William R. Warner & Co.
Q. 10. You also stated that at that time you sold a few packages "in that way." Won't you explain more fully what you mean by the words "in that way?"

By Mr. Rawle: Objected to as irrelevant.

A. Through the efforts of their salesman.
Q. 11. Whose product do you recognize Coco-Quinine to be?
A. That of Eli Lilly & Co.
Q. 12. Did you ever know of any other chocolate quinine preparation prior to the time Coco-Quinine was offered to the trade by Eli Lilly & Co.?
A. No, sir.

Direct-examination closed.

No Cross-examination.

J. R. TAGUE.

Subscribed and sworn to before me this 30th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

183 ROBERT L. WINCHESTER, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert L. Winchester; age, 49; Memphis, Tenn.; Salesman, representing the Eli Lilly & Co., of Indianapolis, Indiana.

Q. 2. How long have you been representing Eli Lilly & Co. in this territory?

A. Four and three-quarter years.

Q. 3. What territory do you cover?

A. West Tennessee.

Q. 4. What are your duties?

A. To sell Lilly's goods to the retail trade through the wholesale trade; to detail physicians and the usual duties of a traveling salesman of a pharmaceutical house. I sell Lilly's goods to the retail trade through the wholesale trade.

Q. 5. Will you explain what you mean by the term "detail" referring to detailing physicians?

A. To call upon physicians for the purpose of giving them samples of the various products manufactured by Lilly, explaining the purposes for which such products should be prescribed and to create a demand for Lilly's goods in this manner by prescriptions written by the physicians.

Q. 6. What can you tell us, if anything, relative to the Lilly product known as Coco-Quinine?

A. Lilly's Coco-Quinine is offered by me as a palatable preparation for the administration of sulphate of quinine. I call attention to its being able to be administered to children especially, by this means. I explain to the physician that this product was devised by Eli Lilly & Co. and that each average teaspoonful contains

184 two grains of quinine sulphate, in a palatable menstrum.

Q. 7. How long have you had knowledge of this Coco-Quinine?

A. For a number of years before I went to work for Eli Lilly & Co. I knew of the fact that Eli Lilly & Co. manufactured it.

Q. 8. What was your employment before you went to work for Eli Lilly & Co.?

A. I was manager of the St. Louis branch of Sharpe & Doehme of Baltimore, Md., before I went to work for Eli Lilly & Co.

Q. 9. What can you say of Lilly's Coco-Quinine in respect to it being a preparation original with that house?

By Mr. Rawle: Objected to as the witness has not qualified as to his knowledge on that subject.

A. I knew for years before I went to work for Eli Lilly & Co. that they were the first to produce such a combination of quinine with chocolate and while in Sharpe & Doehme's employ, I suggested to them that they should get out a preparation along similar lines, but Sharpe & Doehme refused to consider the matter.

Q. 10. Do you know anything of a product called Quin-Coco, and if so, what can you state in reference thereto?

A. Quin-Coco is a preparation that has been offered for sale in the territory that I cover in West Tennessee for Eli Lilly & Co. as the same thing as Coco-Quinine. Numerous retail druggists have told me that it was offered to them as such by representatives of the Pfeiffer Chemical Company, of St. Louis, now known as William R. Warner & Co., I believe.

By Mr. Rawle: The answer is objected to as hearsay, and because statements as to the Pfeiffer Chemical Company do not affect the rights of the defendant.

185 Q. 11. Have you ever seen this product so called Quin-Coco in the stores of retail druggists in your territory?

A. Yes, I have found it in the stocks of the Majority of the retail drug stores.

Q. 12. In appearance is it the same as Coco-Quinine?

A. Very much so.

Q. 13. In taste or flavor is it the same as Coco-Quinine?

A. I never tasted it. I have been told so.

By Mr. Rawle: The last sentence is objected to as hearsay.

Direct-examination closed.

No Cross-examination.

ROBERT L. WINCHESTER.

Subscribed and sworn to before me this 30th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Recess until 3 o'clock p. m.

After Recess.

March 30, 1915—3 o'clock p. m.

WILLIAM M. SCOTT, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

186 A. William M. Scott; age, 37; Memphis, Tenn.; Pharmacy. Up to the first of this year I was the proprietor of the drug store located at 902 Chelsea Avenue, and since then

I have been doing relief work, at Lavison's Pharmacy, at McLemore & Patton Sts., and am now permanently located at 333 Poplar St., J. G. Duncan's Drug Store.

Q. 2. Are you familiar with a pharmaceutical product known as Coco-Quinine, and if so, what can you tell us about it?

A. My first knowledge of it was at Brownsville, Tenn., where I was located in the retail drug business. It was detailed to physicians by the representative of Eli Lilly & Company. That was some fifteen or sixteen years ago. Their representative called on me and the labels showed it to be Coco-Quinine, Lilly, two grains of sulphate of quinine to each teaspoonful of syrup. I was manager for the E. D. Davis Pharmacy in Greenville, Miss., for one year and dispensed and sold Coco-Quinine, Lilly. After that I came to 902 Chelsea, in the retail drug business for myself, in Memphis. Mr. Devall, representing William R. Warner and Company, called on me either in last September or October and stated that Quin-Coco could be dispensed and sold as Coco-Quinine, Lilly's. On December the 24th, 1914, at that time, I was manager of Lavison's Pharmacy, McLemore & Patton Sts., Memphis, Mr. Devall called on me and stated that I could put up and dispense Quin-Coco on specified prescriptions for Lilly's Coco-Quinine.

Q. 3. When did you first hear of this product you have referred to as Quin-Coco?

A. In 1912 or '13.

Q. 4. And when was it next introduced to you?

A. Why nearly every time one of their representatives came to me, I couldn't say when.

Q. 5. What arguments were used by the representative of William R. Warner & Co. in soliciting your order for Quin-Coco?

187 A. To use their words "It was the same thing as Coco-Quinine, Lilly's as sold by Mr. Winchester."

Q. 6. How about the price, was anything said about that?

A. They made the remark that it was much cheaper.

Q. 7. How do you dispense Lilly's Coco-Quinine?

A. On doctor's prescriptions and we put it up in one ounce, two and three different size bottles to sell over the counter, calls for it.

Q. 8. Have you ever seen a prescription written by a physician, calling for Quin-Coco?

A. Not to my knowledge.

Q. 9. Have you ever had a customer call for Quin-Coco over the counter?

A. No, sir.

Q. 10. As I understand it, you have been selling and dispensing Coco-Quinine at various places and stores for the past fifteen years or so. Is this correct?

A. Yes, sir.

Q. 11. Did you ever know of any other similar pharmaceutical preparation before Eli Lilly & Co. introduced Coco-Quinine to the trade?

A. I did not, I never did.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. Mr. Scott, at the time or times that Du Vall called on you, were you employed in a drug store or were you the owner of the drug store?

A. I was the owner of the drug store twice, the last time he called on me I was not, I was manager. The last time was December 24th, 1914.

X Q. 13. How do you fix the date?

A. I went to work and took charge as manager on the 24th of December and Mr. Du Vall happened to be in the store and
188 made the statement to me, and that is why I remember the date.

X Q. 14. Was anybody present and hearing the conversation?

A. Not that I recall.

X Q. 15. Are you in doubt about somebody being present?

A. Yes, sir.

X Q. 16. You don't remember whether anybody was present or not?

A. No, sir.

X Q. 17. Are you now speaking of the third interview?

A. Yes, sir, and last.

X Q. 18. Was anybody present during the conversation, at the first interview?

A. No, not that I know of. I couldn't be positive.

X Q. 19. Was anybody present during the conversation at the second interview?

A. No, sir, not that I know of.

X Q. 20. Do you mean by that that you do not distinctly remember about any one being present at the second interview?

A. Yes.

X Q. 21. Did Mr. Du Vall, at the first interview try to sell you any other preparations or pharmaceuticals?

A. He did.

X Q. 22. Did that store at that time handle any of Warner's products?

A. They did.

X Q. 23. To a considerable extent?

A. For that sized store.

X Q. 14. On Du Vall's first call did you buy any of his products?

A. No, sir, not on his first call. At that time I was in business for myself, located at 902 Chelsea Ave., Memphis, and had just gone into business at that place.

X Q. 15. How long did his call last the first time?

189 A. I guess he was in there perhaps three-quarters of an hour. I don't remember. I couldn't say. He stood around and talked socially.

X Q. 16. Do you remember about how many Warner products approximately he talked to you of at the first interview?

A. His specialties of course and the first one he mentioned was the Quin-Coco and his statement was to be that it could be sold and dispensed on physicians' prescriptions specifying Lilly's Coco-Quinine and he added that it was a much better profit.

X Q. 17. Would a perfectly honest druggist receiving a prescription which specified Coco-Quinine, fill it without the consent of the physician by using Quin-Coco?

A. He would not.

X Q. 18. In your opinion such act would not be honest?

A. It would not be ethical or honest.

X Q. 19. And I need hardly ask whether or not you would do such a thing?

A. I would not, most positively.

X Q. 20. Likewise, if a perfectly honest druggist had a customer who was asking for Coco-Quinine would he dispense Quin-Coco and still in your opinion be considered honest?

A. He would not.

X Q. 21. And that I take it is a thing which you would not do?

A. I would not. He would be a substituter, in my opinion.

X Q. 22. If a prescription called for Coco-Quinine and you had none in stock but you had Quin-Coco in stock, would you if possible reach the physician and ask leave to use the Quin-Coco in place of the Coco-Quinine?

By Mr. Bradford: Question objected to as immaterial to any issue in this case.

190 A. I would.

X Q. 23. And if a customer came in and called for Coco-Quinine and you had none, but you had Quin-Coco, what would you do?

A. I would explain to them, to the customer, that I did not have the Coco-Quinine, Lilly's, that I had a substitute known as Quin-Coco, represented to me as a chocolate or cocoa quinine.

X Q. 24. And you would offer to sell them the Quin-Coco in place of the thing called for?

A. I would suggest it to the customer.

X Q. 25. Will you please state in the exact words of Mr. Du Vall at the first interview, what he said to you, using what is called in grammar, the direct form of narration? And also state what you said to him during the conversation which took place about Quin-Coco and Coco-Quinine?

A. Why he first came in to me at 902 Chelsea Ave., spoke to me in a friendly way, and asked me if I would not give him some business and made the statement that he was glad to see me in business for myself and believed that was a good stand and wanted to sell me a line of Warner's preparations, non-secrets, &c., and remarked "Scott, you know we have the Quin-Coco which is the same as Lilly's Coco-Quinine, sold to you by Winchester; shall I show you the preparation or have you ever seen it? You can use it on specified prescriptions for Lilly's Coco-Quinine. I have the old reliable line of non-secrets. Will come out to see you in a very short time. Mak

me out an order and I will give you satisfactory terms. Hoping you will do well." That is all the conversation that I recall.

X Q. 26. You have testified that it is dishonest and unethical for a druggist when receiving a prescription which specifies Coco-Quinine, to fill it without the consent of the physician by using Quin-Coco. It appears to me from your answer that Mr. Du Vall, if your memory is correct, was proposing to you, as a druggist, 191 that you should do or commit this dishonest and unethical act. Is that not so?

A. If I may be allowed to express this, I don't think Mr. Du Vall intended that reflection upon me as according to Mr. Du Vall's statement so many were using and substituting this so called Quin-Coco, and my opinion was that Mr. Du Vall wanted to let me in on a close substitute. That is the way I felt about Mr. Du Vall's suggestion to me in regard to Quin-Coco. I feel sure that Mr. Du Vall never had any reason to reflect upon me, and would not have done so.

X Q. 27. But have you not testified that he suggested to you that you should use Quin-Coco in prescriptions calling for Coco-Quinine?

A. He did not suggest that I should use them. He said it could be done, and was being done.

X Q. 28. Didn't he mean that you could do it?

A. I didn't take it that way. I took it that it could be done if I was disposed to do so, that is the impression the interview had on me.

X Q. 29. Then if any one wished to bribe a member of the legislature you think he would say to him "If you are disposed to take a bribe I will give you one." Would you consider that an attempt to bribe?

By Mr. Bradford: Objected to as immaterial.

A. I don't know anything about that sort of thing at all. I am not familiar enough with it to answer it.

X Q. 30. Haven't you said that Du Vall suggested to you that you could use his Quin-Coco in prescriptions calling for Coco-Quinine?

A. No, sir, not me. That it could be used. He did not specify me.

X Q. 31. Wasn't he talking to you at the time?

A. Yes, sir, he was leaving me under the impression that it could be done and was being done by others.

X Q. 32. But what I don't understand is this: Wasn't he trying to sell you Quin-Coco and giving you as a reason for buying 192 Quin-Coco that you could use it in place of Coco-Quinine in prescriptions?

A. That it was being used and offering me the opportunity to buy it and use it if I so desired.

X Q. 33. Wasn't that the same thing as his suggesting to you that you should be dishonest if you so desired?

A. I didn't take it that way or feel so about it at the time Mr. Du Vall mentioned same to me. I looked upon it as a matter of

gossip or suggestion, not any reflection whatever upon me, personally.

X Q. 34. But wasn't he suggesting to you that you do a dishonest thing?

A. He was not, and I did not feel that he was.

X Q. 35. If that be so, may not Du Vall believing you to be an honest druggist, have meant or said to you in effect that you could, by getting the physician's consent, use Quin-Coco when a prescription called for Coco-Quinine and in this way honestly dispense Quin-Coco?

A. Mr. Du Vall never stated his opinion of my honesty or being ethical. As I have stated Mr. Du Vall only spoke of Quin-Coco being used in place of Coco-Quinine, Lilly's being used.

X Q. 36. It seems to me that he either made an immoral suggestion to you or that he didn't, which was it?

A. It didn't impress me as being an immoral suggestion, and I feel sure that Mr. Du Vall would not have any cause to offend me in any way. I considered his suggestion in regards to Quin-Coco being substituted for Lilly's Coco-Quinine as a matter of gossip and more so than suggestion, no reflection upon my being ethical or my honesty as a pharmacist or man.

X Q. 37. How could an honest druggist, as you are, handle and dispense both Coco-Quinine and Quin-Coco?

By Mr. Bradford: Objected to as wholly immaterial and as having been fully answered.

193 A. My explanation is that I never, when I was in the retail drug business for myself, handled but one preparation of Coco-Quinine, that being Lilly's. When I was employed by other houses that had this Quin-Coco in stock I used same upon consent of physicians only. I have called the attention of several physicians to this Quin-Coco asking them to prescribe same to enable me to dispose of it so I could buy the original Lilly's Coco-Quinine to use on their prescriptions.

X Q. 38. Then, on the whole, you believe that Du Vall by what he said to you at the first interview, had no intention of impugning your honesty or of suggesting to you that you do a dishonest act?

A. The impression his interview had on me was that he had no reflection upon my being an honest or ethical pharmacist.

X Q. 39. Is it not possible that he said or gave you to understand that in using Quin-Coco in prescriptions in place of Coco-Quinine you should first obtain the doctor's consent?

By Mr. Bradford: Objected to as having been previously fully and completely answered many times.

A. I have answered the above question to the best of my ability.

X Q. 40. Question is repeated.

By Mr. Bradford: I object further to the unnecessary repetition of this question when the witness has already answered and has

shown no disposition to evade any question at any time and the question therefore being apparently without purpose.

By Mr. Rawle: The objection is objected to.

Mr. Rawle requests the Examiner to instruct the witness that Mr. Rawle is entitled to an answer to his question without regard to whether it has been answered before.

194 The Examiner: In reply the Examiner states that as he understands the practice and his duties he cannot instruct the witness but that the witness can answer the question in his own way.

A. I have answered this question to the best of my ability heretofore.

X Q. 41. I repeat the question and ask you if you decline to answer?

A. I do not.

X Q. 42. Will you please answer the question numbered X Q. 39?

A. Why to the best of my knowledge and belief he did not mention the doctor's consent, the physician was not mentioned, only in the way that it could be used on specified prescriptions.

X Q. 43. Used by you on specified prescriptions?

A. No, he left me under the impression that it was being used and could be used. He did not say that I could.

X Q. 44. Why do you think he wasted your time by telling you that it could be so used unless he meant to convey the impression that you could so use it?

By Mr. Bradford: Objected to because the witness has said on several occasions, both in direct and cross-examination, that Mr. Du Vall did say that it could be so used.

A. As I have stated before my opinion is that it was in the way of gossip more than suggestion, no reflection whatever upon my honesty or as an ethical pharmacist.

X Q. 45. Will you please give in the direct form the conversation with respect to your buying Quin-Coco, which took place between you and Du Vall at the second interview?

A. I did not buy any Quin-Coco from Mr. Du Vall.

X Q. 46. Have you not testified that there was a second interview with Du Vall, at which he tried to sell you Quin-Coco?

195 A. Yes, sir, there was.

X Q. 47. Will you please state in direct form the words of Du Vall and yourself at the second interview on this subject?

A. Why Mr. Du Vall called on me at the second interview. I was then manager of Lavason's pharmacy, McLemore & Patton Sts. Mr. Du Vall—I don't recall the exact conversation that took place previous to his mentioning the Coco-Quinine proposition. Then Mr. Du Vall said to me that this Quin-Coco of theirs was being used and substituted, to use his words, for Lilly's Coco-Quinine sold by Mr. Winchester.

I can't recall much of that conversation at the last part of this answer.

X Q. 48. Can't you give the words he used with reference to his efforts to sell you Quin-Coco?

A. Yes, he left the impression upon me that it was being used and substituted for Lilly's Coco-Quinine.

X Q. 49. What words did he use in creating this impression?

A. Well, he says "It's being used in the majority of the drug stores as you are aware of use it and the majority of them in my territory use it." He also called my attention to various and sundry druggists over the State and in his territory, that were using and buying from him in large quantities.

X Q. 50. Did he give you the impression that by this statement he intended to impugn the honesty of druggists in his territory who were buying Quin-Coco? And did he give you the impression that all those who bought Quin-Coco from him would use it dishonestly?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant.

A. It did not impress me that way and I feel sure that he did not mean to leave me under that impression.

X Q. 51. I now call your attention to the third interview in which Du Vall endeavored to sell you Quin-Coco. Did he at this
196 interview give you the impression that he intended to impugn the honesty of druggists in his territory who were buying Quin-Coco and did he give you the impression that all those who bought Quin-Coco from him would use it dishonestly? Do you make the same answer to this question that you did to the last question?

A. I do.

X Q. 52. The Examiner will read you X Q. 23. Please state if by "substitute" in your answer to that question you mean an honest substitute or substitution?

A. If I understand it right a substitution is not honest, if I understand the meaning of the word "substitution."

X Q. 53. I call your attention again to X Q. 23 and ask you if you did not in your answer refer to a perfectly honest action? Namely, one in which you explained to the customer that you did not have Coco-Quinine, Lilly, but had Quin-Coco. That would be honest business, wouldn't it?

A. Yes, sir. That would be my mode or form of suggesting a substitute to the customer, not to recommend same.

X Q. 54. And you are now using the word "substitute" in connection with an honest transaction? Please answer yes or no?

A. Yes.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 55. In what sense do you use the word "honest" and "dishonest" in this cross-examination?

A. To give a man a substitute for what is specified on prescription.

R. D. Q. 56. You evidently do not catch the meaning of my question. Would a man who was guilty of this practice, I mean
197 substitution, necessarily be a dishonest man in the common acceptation of that term?

A. I do not mean that he would be a dishonest man but not an ethical pharmacist.

R. D. Q. 57. Are you acquainted with the jobbing house of Van Vleet-Mansfield Drug Co. If so can you tell us their comparative standing in the trade?

A. It is said to be the second largest wholesale drug store in the South.

I have been informed two years ago they were the largest quinine buyers in the world.

Recross-examination.

By Mr. Rawle:

R. X Q. 58. Do you know whether malarial diseases have of late years decreased in the Southwest and in parts adjacent to Memphis?

By Mr. Bradford: Objected to as not re-cross-examination.

A. I have been informed they have decreased.

R. X Q. 59. And has not this lessened the demand for quinine?

(Same objection, and for the further reason that it is not material to any issue in this case.)

A. It has.

WM. M. SCOTT.

Subscribed and sworn to before me this 30th day of March, 1915.

CHARLES E. RIORDON.
Special Examiner.

Adjourned to meet tomorrow, Wednesday, March 31, 1915, at 10 a. m., at the Marion Hotel, Little Rock, Arkansas.

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Little Rock, Ark.,
Marion Hotel, March 31st, 1915—10 a. m.

Met pursuant to adjournment, at the Marion Hotel, Little Rock, Arkansas, Wednesday, March 31st, 1915.

Parties present as before.

JOHN R. BOND, JR., a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John B. Bond, Jr.; age, 46; Little Rock, Ark.; Wholesale Druggist. My store is located at 113 East Markham St.

Q. 2. What territory does your store serve?

A. Arkansas and Southeast Oklahoma.

Q. 3. Do you sell a general line of pharmaceuticals to the retail trade?

A. Yes, sir.

Q. 4. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, what can you tell us about it?

A. Yes. We handle Coco-Quinine and have ever since it was first marketed and it is one of the most popular preparations on the market. It is here to stay. We cannot do business without it, any more than we could postage stamps. It is a product of the Eli Lilly & Company. Our sales are very large and I would judge it to be a very meritorious preparation from the amount of our sales of it.

Q. 5. How long have you been handling Coco-Quinine?

A. I would judge about fifteen years as long as it has been
199 on the market. I have handled it ever since it has been marketed for about fifteen years. I was formerly in the retail drug business in this city for seventeen years previous to the wholesale business which I have been in for the past five years.

Q. 6. Did you ever have an order while you were in the retail business or since you have been in the wholesale business for a product known as Quin-Coco?

A. Not to my knowledge, no, sir.

Q. 7. Would you be likely to have knowledge of an order for such a product if it was received at your jobbing house or had been received at your retail store?

A. Yes, because everything passes over my desk before same leaves the house, invoices and the like.

Q. 8. While you were in the retail business did you ever receive a physician's prescription calling for Quin-Coco?

A. No, sir.

Q. 9. Did you receive many prescriptions calling for Coco-Quinine?

A. Yes, sir, a good many.

Q. 10. Do you sell a considerable quantity of Lilly's Coco-Quinine, and is the demand a continuous and constant one?

A. Yes, it is continuous and constant, and we sell large quantities of it all over our territory.

Q. 11. When you were in the retail business how did you dispense Coco-Quinine?

A. On doctors' prescriptions and also on calls from customers over the counter, in our own bottles, under our own labels.

Direct-examination closed.

No cross-examination.

JOHN B. BOND, JR.

Subscribed and sworn to before me this 31st day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

200 CARL BORDEAUX, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and ocupation?

A. Carl Bordeaux; age, 33; Little Rock, Ark.; Druggist. My store is located at Markham and Louisiana St., Little Rock.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, manufactured by Eli Lilly & Co., of Indianapolis, Indiana?

A. I do.

Q. 3. How do you dispense this product in your store?

A. Both by prescriptions and by orders over the counter.

Q. 4. How are the prescriptions written?

A. Usually "Coco-Quinine." Sometimes the manufacturer's name is added.

Q. 5. How do customers call for the product over the counter?

A. Coco-Quinine.

Q. 6. How long have you been handling Coco-Quinine?

A. To the best of my knowledge for about between eight and ten years.

Q. 7. Did you ever know of another similar preparation on the market before Coco-Quinine was introduced by Eli Lilly & Co.?

A. Well, your question is not specific enough. I speak in this regard: There was no other cocoa syrup, there had been syrup of quinine on sale, Febreline, for instance.

Q. 8. Do you know of any product called Quin-Coco, and if so, what do you know about it?

201 A. Well, I have never seen the product, no, sir.

Q. 9. Have you heard of it?

A. Indirectly, yes, sir.

Q. 10. Has it ever been offered to you?

A. No, sir.

Q. 11. Have you ever received a prescription at your store, for Quin-Coco?

A. No, sir.

Direct-examination closed.

No cross-examination.

CARL BORDEAUX.

Subscribed and sworn to before me this 31st day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

SAMUEL V. BRACY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Samuel V. Bracy; age, 43; Little Rock, Ark.; Druggist, member of the firm of Snodgrass & Bracy, Retail Druggists.

Q. 2. Does your store handle a pharmaceutical product known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose product do you recognize this to be?

A. Eli Lilly & Co.

Q. 4. How long have you handled this product?

A. Since it was first put on the market in Little Rock, since it was first *detailed* in Little Rock. About sixteen or eighteen years
202 ago.

Q. 5. Is the demand for Coco-Quinine at your store of considerable proportions and is it continuous and constant?

A. Yes, we consider it a staple article and always keep it in stock in good supply and sell a good deal of it.

Q. 6. How do you dispense it?

A. We dispense it on doctors' prescriptions and also keep twenty-five and fifty cent bottles put in labels and supplied to consumers as called for. We put it up in our own bottles and typewrite the labels.

Q. 7. Does your store do a large prescription business?

A. Well, we do an average prescription business for a retail drug store, from forty to seventy-five a day.

Q. 8. Have you ever had a prescription received at your store calling for Quin-Coco?

A. I do not remember having seen one written that way.

Q. 9. Have you ever had a call over the counter for Quin-Coco?

A. No, sir, I have not.

Q. 10. Would you be likely to know if your store had received a prescription for Quin-Coco?

A. Yes, I believe I would have remembered it if we had calls for Quin-Coco.

Q. 11. Have you made any inquiry or investigation of others in the store to determine this fact?

By Mr. Rawle: Objected to as hearsay.

A. Yes, on request of the present gentlemen, I did, I asked two of the druggists. Neither remembered having had a prescription for Quin-Coco.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. How many clerks have you in your employ?
A. We have one night prescription clerk, three day pre-
203 scription clerks and myself and partner fill prescriptions when necessary.

Cross-examination closed. SAM V. BRACY.

Subscribed and sworn to before me this 31st day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Recess until 2.30 this afternoon.

After Recess.

2.30 o'clock p. m.

STEPHEN D. KNOX, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

Q. 1. Please state your name, age, residence and occupation?
A. Stephen D. Knox; age, 47; Little Rock, Ark.; Druggist. I am the Proprietor of Knox' Drug Store, at 209 West Second St., Little Rock.
Q. 3. Do you handle a product known in the trade as Coco-Quinine?
A. Yes, sir.
Q. 4. Whose product do you recognize this to be?
A. The Eli Lilly Company's.
Q. 5. How long have you handled Coco-Quinine?
A. I would say ten years.
Q. 6. Do you know of any chocolate or cocoa quinine preparation on the market prior to the time this product was introduced by Eli Lilly & Co.?
A. I did not.
Q. 7. How do you dispense Coco-Quinine in your store?
A. On physician's prescriptions in my own prescription bottles, under my own labels.
204 Q. 8. Do you know of a product called Quin-Coco, and if so, what can you tell us about it?
A. I do. I have bought it on the representations that it was about the same and as good as Coco-Quinine.
Q. 9. Who did you buy it of?
A. The representative of Pfeiffer Chemical Company and the William R. Warner Company, of St. Louis and Philadelphia.

Direct-examination closed.

No cross-examination. STEPHEN D. KNOX.

Subscribed and sworn to before me this 31st day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned until tomorroy, Thursday, April 1, 1915, at 10 a. m., at Hotel Bentley, Alexandria, Louisiana.

Alexandria, La.,
Bentley Hotel, April 1, 1915—10 a. m.

Met pursuant to adjournment, at the Bentley Hotel, Alexandria, Louisiana.

Parties present as before.

WALTER L. BOLDEN, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
205 A. Walter L. Bolden; age, 28; Alexandria, La.; Druggist. I am in charge of the Retail Department of the Rapides Drug Company, of Alexandria, La.

Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine, in your store?

A. Yes, sir.

Q. 3. Whose product do you recognize this to be?

A. Eli Lilly & Co.

Q. 4. How do you dispense it?

A. Both on physician's prescriptions and direct to customers in our own bottles.

Q. 5. Have you ever had a prescription calling for Quin-Coco, in your store?

A. No, sir, I have not.

Q. 6. Have you ever had a customer call for Quin-Coco?

A. No, sir, I don't recollect ever having had a call for Quin-Coco.

Q. 7. How long have you been handling Coco-Quinine?

A. About ten years.

Q. 8. Do you have ocnsiderable call for it?

A. Yes, sir.

Q. 9. Do you ever receive calls for a product by any other name than Coco-Quiinine?

A. Sometimes have calls for chocolate quinine.

Q. 10. Whose product do you understand is intended when chocolate quinine is called for?

A. I understand that they want Coco-Quinine, Lilly's Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 11. Have you ever handled and dispensed Quin-Coco made by Warner & Co.?

A. I don't remember ever to have handled Quin-Coco?

206 X Q. 12. So if you have a call for a chocolate quinine preparation you have nothing to fill it with except Coco-Quinine, Lilly?

A. Yes, sir.

X Q. 13. You say your sales of Coco-Quinine have been considerable. Is there much malarial fever or malaria around this country?

A. Yes, sir, we have considerable malaria.

X Q. 14. Is it less than it was ten years ago?

A. I think it is less, although I have only lived here eight years.

X Q. 15. What is quinine sulphate in its various combinations with chocolate or anything else, used for? I mean what diseases.

A. It is used as an antidote for malaria, colds, &c. I would say fevers but that comes under the head of malaria, too.

X Q. 16. Is not most of it sold for malaria or malarial fevers?

A. I think so.

Cross-examination closed.

WALTER L. BOLDEN.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

ALFRED L. SOULIER, a witness called by and on behalf of the plaintiff, having being first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

207 A. Alfred L. Soulier; age, 37; Alexandria, La.; Druggist, Retail Druggist, Proprietor of the Soulier City Drug Store.

Q. 2. How long have you been in the drug business and where?

A. Well, about twenty years. I was connected with Estorde Drug Company at New Iberia up to 1902. That was a jobbing house with a retail department. I then went with the Rapides Drug Company, of Alexandria, La. This is also a jobbing house with a retail department. For the last two years I have been in the retail drug business as proprietor of the Soulier City Drug Store.

Q. 3. What do you know about a pharmaceutical product known as Coco-Quinine?

A. I understand it to be a quinine preparation with a chocolate base with a certain percentage of quinine.

Q. 4. How long have you known of this product and whose product do you recognize it to be?

A. About eighteen years, the product of Eli Lilly & Co.

Q. 5. While in the employ of the two jobbing houses with reta departments mentioned in your former answer, were you in a positio to know of the orders and prescriptions that came into the respecti stores?

A. Yes, sir.

Q. 6. Did both of these stores handle the product known as Coc Quinine?

A. Yes, sir.

Q. 7. Did they have a considerable trade in such product?

A. Yes, sir.

Q. 8. In both the wholesale and retail departments?

A. Yes, sir.

Q. 9. How is such product dispensed?

A. On prescriptions and on calls, in our own bottles.

208 Q. 10. Have you ever seen a prescription written by physician for a product called Quin-Coco?

A. No, sir.

Q. 11. Have you ever received an order from a customer eith wholesale or retail, for a product called Quin-Coco?

A. I can't say that I remember having.

Q. 12. Do you mean that you do not remember ever having r ceived such a call?

A. Yes, sir.

Q. 13. Do you handle the product called Quin-Coco in your store

A. No, sir.

Q. 14. Why don't you handle it?

By Mr. Rawle: Objected to as irrelevant.

A. For the reason I consider it a substitute for the Coco-Quinine.

Q. 15. What is the policy of your store concerning so called sub stitutes?

(Same objection.)

A. Well, we don't substitute at all.

Direct examination closed.

No Cross-examination.

ALFRED L. SOULIER.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

R. L. RANDOLPH, a witness called by and on behalf of the plaintif having been first duly sworn, deposes and says as follows, in answe to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation

209 A. R. L. Randolph; age, 51; Alexandria, La.; Physician.

Q. 2. Are you familiar with a pharmaceutical produc

known as Coco-Quinine, and if so, what do you know of it and whose product is it?

A. As I understand it is a product manufactured by Eli Lilly & Co., containing two grains of sulphate of quinine to the dram. I have known and used it for many years.

Q. 3. Do you prescribe it for your patients in your practice?

A. I do.

Q. 4. How do you commonly write your prescriptions?

A. Coco-Quinine, so much a dose, as necessary.

Q. 5. Do you ever prescribe a product called Quin-Coco?

A. No, I know of no such product. Never heard of it.

Direct-examination closed.

No Cross-examination.

R. L. RANDOLPH, M. D.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

FIELD V. GREMILLION, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Field V. Gremillion; age, 34; Alexandria, La.; Physician and Surgeon.

210 Q. 2. Do you know of a pharmaceutical product known as Coco-Quinine, and if you do, will you state whose product it is, and what you know about it?

A. It is the product made by Eli Lilly & Co., and contains chocolate and quinine sulphate, two grains of quinine sulphate to the teaspoonful.

Q. 3. Do you prescribe this product for your patients in your practice?

A. Yes, sir.

Q. 4. How long have you been so using it?

A. Since I have been practicing medicine, four years.

Q. 5. How do you write your prescriptions for this product?

A. Just "Coco-Quinine," followed by the directions suitable for the case.

Q. 6. Did you ever hear of a product called Quin-Coco?

A. No, sir.

Direct examination closed.

No Cross-examination.

FIELD V. GREMILLION.

Subscribed and sworn to before me this 1st day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

CAMILLE F. GRAVEL, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Camille F. Gravel; age 38; Alexandria, La.; I am Sec-
211 retary and Treasurer and General Manager of the Rapides Drug Company, Limited, Wholesale Druggists of this City. We also have a Retail Department.

Q. 3. Do you handle a product known in the trade as Coco-Quinine?

A. Yes, sir.

Q. 4. Whose product do you recognize it to be?

A. Eli Lilly & Co.

Q. 5. How long have you handled this product?

A. Ever since I have been in the drug business, ten or twelve years.

Q. 6. What territory does your wholesale store serve?

A. Approximately seventy-five to a hundred miles around Alexandria.

Q. 7. Do you sell considerable Coco-Quinine, and are the sales general throughout your territory?

A. We sell quite a quantity, several gallons a month, and sell it generally throughout our territory.

Q. 8. Did you ever receive an order for Quin-Coco?

A. Not that I remember.

Q. 9. Did you ever see a physician's prescription written for Quin-Coco?

A. I never have.

Q. 10. If any order was received at your store for Quin-Coco would it be likely to be called to your attention?

A. It would, for the reason that it would be put on "short" list, and I order all the goods and see all the "short" lists.

Q. 11. Do you handle Quin-Coco?

A. We do not.

Q. 12. Why do you not?

A. Because we have no demand for it and we consider it a substitute for Coco-Quinine.

By Mr. Rawle: Question and answer objected to as irrelevant.

Direct-examination closed.

212 Cross-examination.

By Mr. Rawle:

X Q. 13. How long have you been selling any drugs in this general territory?

A. About twelve years.

X Q. 14. Is not quinine sulphate, in whatever form, used chiefly for malaria or malarial fevers?

By Mr. Bradford: Objected to as immaterial.

A. I am not a registered pharmacist and I am not posted as to the physiological effect of drugs.

X Q. 15. Do you mean that you do not know what diseases quinine sulphate is used for?

By Mr. Bradford: Same objection.

A. I know that it is used for malaria and fevers, but have made no study of pharmacy.

X Q. 16. By "fever" do you mean malarial fever?

(Same objection.)

A. I think so.

X Q. 17. Have you any idea whether malaria and malarial fevers are less prevalent in your territory than they were when you first sold drugs here?

By Mr. Bradford: Objection repeated and this and the previous questions are further objected to on the ground that they are not proper cross-examination.

A. I have no way to ascertain that.

Cross-examination closed.

CAMILLE F. GRAVEL.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Hotel Majestic, Lake Charles, La., at 8 o'clock p. m., this day.

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Lake Charles, La.,
Majestic Hotel, April 1st, 1915—8 p. m.

Met pursuant to adjournment at the Majestic Hotel, Lake Charles, Louisiana.

Parties present as before.

ALLEN J. PERKINS, a witness, called by and on behalf of the plain-

tiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Allen J. Perkins; age, 49; Lake Charles, La.; Physician and Surgeon.

Q. 2. In your practice do you use a pharmaceutical preparation known as Coco-Quinine, and if so, whose product do you recognize this to be?

A. Yes. I recognize it to be a product put upon the market by Eli Lilly & Co. I use a good deal of it.

Q. 3. How do you write your prescriptions for this product?

A. "Coco-Quinine," and sometimes I specify Lilly's, and when I don't it is understood that my intention is to prescribe Lilly's product, that being the one I have learned to recognize as the originator of the medicine.

Q. 4. How long have you used this product, if you remember?

A. Four or five years, I can't recall exactly, perhaps more. In ninety-nine cases out of a hundred when I use it I write the prescriptions for it or phone the druggist to send out so many ounces as needed to the patient.

214 Q. 5. You say that when you write the prescriptions for Coco-Quinine that it means Lilly's product. What would you say if a druggist should fill such a prescription with some other product?

A. To tell you the truth I never knew that there was any other product that was used as a substitute for it.

Q. 6. I mean from an ethical standpoint, how would you regard the filling of such a prescription with another product?

A. I should regard it as a substitution.

Q. 7. How do you feel or what is your opinion of the practice of substitution and what are your reasons for your opinion?

By Mr. Rawle: Objected to as irrelevant.

A. I always think that substitution should be condemned because a physician is not always in a position to know what drug is being substituted and whether it has the same medicinal value as the original which he intends to prescribe.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Doctor, if a druggist about to dispense one of your prescriptions, happens to be out of some ingredient and has to substitute therefor, it is al- right for him to make a substitution by getting your specific assent to it, is it not?

A. Well, if he hadn't an ingredient in a prescription that I write

he should not fill that prescription until he got my consent to make the substitution.

X Q. 9. And that would be a substitution, would it?

A. Well, it wouldn't be a substitution if he got my consent to do it. It wouldn't be a substitution in the strict sense of the word.

X Q. 10. But it wouldn't be very unusual would it to use
215 "substitution" in the broad sense to cover a change of ingredient both with or without your consent?

A. No druggist substitutes where he gets the consent of a physician to make a change of ingredients in a prescription, because that then becomes my intended prescription.

My idea of a substitution is where he uses without my consent some ingredient other than I write in the prescription.

X Q. 11. Does the druggist in such cases sometimes use the telephone?

A. Yes.

X Q. 12. And he perhaps would say to you "Dr. I am out of such and such a drug, can I substitute such and such another drug in your prescription?"

A. If it met with my approval I consent to the change.

X Q. 13. Is that about the conversation that takes place?

A. That is about the conversation.

X Q. 14. For what diseases do you chiefly prescribe Quinine Sulphate, or any form of quinine or quinine in any combination?

By Mr. Bradford: Objected to as immaterial and as not cross-examination.

A. I use quinine for malaria, for la grippe, for intestinal intoxication and whooping cough and parasitical diseases, and in small doses as a tonic.

X Q. 15. For which of these diseases do you have the most frequent cause for prescribing the drugs I have mentioned in my last question? In answering this question, consider that I am inquiring as to your use of Cinchona and its derivatives, either alone or combined with some other drug or a vehicle?

By Mr. Bradford: Same objection.

A. Malaria.

X Q. 16. Without desiring to injure the value of real
216 estate in this part of the world, has malaria been somewhat prevalent here and hereabouts?

(Same objection.)

A. There is not a great deal of malaria in this part of the country. We are getting pretty free of malaria.

X Q. 17. Has there been a diminution of malaria in late years and down to the present time and to what extent? I refer to the surrounding territory that you are familiar with.

By Mr. Bradford: Same objection.

A. I consider there has been a very great diminution of malaria in this country in the last fifteen years and notably so in the last two or three years.

As to the actual percentage I could not state.

Cross-examination closed.

Redirect-examination.

By Mr. Bradford:

R. D. Q. 18. Has any druggist ever obtained your consent to change one of your prescriptions calling for "Coco-Quinine" to "Quin-Coco?"

A. No.

A. J. PERKINS, M. D.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

CHARLES C. BROUSSARD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

217 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Charles C. Broussard; age, 27; Alexandria, La.; Traveling Salesman for Eli Lilly & Company, of Indianapolis, Indiana.

Q. 2. How long have you been in your present employment and where were you employed prior thereto?

A. I have been in the employ of Eli Lilly & Co. since October 1913, and prior to that time I was connected with the Rapides Drug Company, of Alexandria, La.

Q. 3. What can you tell us about Coco-Quinine?

A. Coco-Quinine is a product offered by Eli Lilly & Co. to the trade as a tasteless syrup of quinine, put up in a chocolate form.

Q. 4. Do you sell it, and if so, what kind of a demand is there for it?

A. Yes, sir; I do sell it and there is a large demand for it.

Q. 5. What territory do you cover?

A. Southern Louisiana.

Q. 6. What do you know about Quin-Coco and what can you tell us in reference thereto?

A. Quin-Coco is a preparation offered by William R. Warner & Co. as a substitute for Coco-Quinine.

By Mr. Rawle: Objected to as hearsay.

Q. 7. Do you meet much of it in the retail drug stores of your territory?

A. Quite a lot of it.

Q. 8. Tell us anything you know in regard to the extent of it

use and as to its being used as a substitute for Coco-Quinine, and when Coco-Quinine is called for on prescriptions or otherwise at the retail stores?

By Mr. Rawle: Objected to as necessarily calling for hearsay.

A. Well, I know that it is substituted for Coco-Quinine
218 in prescriptions and sold over the counter as a substitute for Coco-Quinine, because I have seen it sold. As to what extent I don't know just how much of it is being done.

By Mr. Rawle: The answer is objected to as hearsay, and because the act of a druggist in such case does not in any way affect the rights of the defendant and because the evidence is irrelevant and immaterial.

Q. 9. Have you seen prescriptions calling for Coco-Quinine filled with the product called Quin-Coco? If so, please relate the circumstances?

By Mr. Rawle: Objected to because no act of the druggist under the circumstances stated in the question can affect the rights of the defendant, and as irrelevant and immaterial.

A. I have seen prescriptions calling for Coco-Quinine filled with Quin-Coco in two or three instances.

I can't recall just who the parties are that have done the substituting.

Q. 10. Do you recall any circumstances bearing upon this subject whatever? If so, please relate?

By Mr. Rawle: Objected to for the same reasons and because the witness has already fully answered the question.

A. I remember calling on a druggist about two weeks ago and while there I saw him fill a prescription for Coco-Quinine out of a bottle labeled "Quin-Coco."

I took up the matter with him and told him that he was doing the wrong thing by substituting and he said he didn't think that he was substituting inasmuch as he thought that Quin-Coco was the same preparation as Coco-Quinine.

I asked him if he sold the preparation altogether for Coco-Quinine and he said he did, buying the preparation in five gallon lots enabling him to get a much better price on this product than on Coco-Quinine.

219 Q. 11. Can you give the name of this druggist?

By Mr. Rawle: Same objection.

A. No, sir, I wouldn't like to do it.

Q. 12. Please give your reasons for wishing not to give his name?

A. Well, in the first place, after explaining the situation to this party he stated that not being a druggist himself his pharmaceuticals were bought by his prescription clerk, and that he supposed that his prescription clerk was buying just what was called for and what

was in demand. He promised, however, that he would fill his prescriptions with Coco-Quinine only from and after that date, and believing the man to be conscientious, I would not like to give his name.

Direct examination closed.

By Mr. Rawle: I give notice that unless the witness states the name of the druggist referred to and asked in the question of opposing counsel, he will move the court to strike the deposition from the record.

Mr. Rawle, not waiving his objections, cross-examines as follows:

X Q. 13. State the name of the druggist you have just referred to?
A. I have already said I didn't care to state the name.
X Q. 14. Question repeated.
A. Same answer.
X Q. 15. In what city or town or parish or political district was his drug store?
A. If I was to tell the name of the town in which he is located I would be naming him as there is only one drug store in the town.
X Q. 16. When was this?
A. I don't understand the question?
X Q. 17. When did the circumstance take place to which you have been referring?
220 A. About two weeks ago.
X Q. 18. Did you have the prescription in your hand at the time?
A. The prescription was on the file and while I did not take it off the file, I handled it, while referring to the druggist to the fact that it was for Coco-Quinine and not for Quin-Coco.
X Q. 19. Where were you standing at the time?
A. I was standing right opposite the man across the counter from him. He had his prescription file on the counter making a charge for this prescription.
X Q. 20. Did you read the prescription?
A. I must have read it since I say it was written "Coco-Quinine."

(Mr. Rawle requests the Special Examiner acting as an officer of the court to instruct the witness that he is legally bound to answer X Q. 13.)
(The Special Examiner replies that he does not understand that it is his duty or authority to instruct the witness in this regard.)

X Q. 21. I repeat X Q. 13 and ask you to give the name of the druggist you have referred to in answer to Q. 10?

By Mr. Bradford: Counsel for plaintiff expresses his entire willingness to have the name of this particular druggist given. Otherwise he would not have asked the question originally. He is in ignorance of the witness's reason for declining to answer and without knowing this reason refrains from advising the witness as to his duty. He asks counsel for defendant if he has any objection to a

private consultation between the witness and counsel for plaintiff, on this subject only, before the witness again answers.

By Mr. Rawle: Mr. Rawle pointing out that the witness having already given his reason for not answering prefers not to
221 consent to the somewhat unusual course suggested by opposing counsel.

A. I cannot give the name of the druggist because I promised him that in case anything should come up about this substitution I wouldn't say anything about it.

X Q. 22. Did you report the matter to the home office at Indianapolis or to any person connected with your employer?

A. Not any more than I have said here.

X Q. 23. Question repeated.

By Mr. Bradford: I object to this question as the witness's previous answer was full and complete to the inquiry propounded in X Q. 22.

A. I haven't reported any more of this matter and not even as much as what I have stated in my previous statement.

X Q. 24. Have you mentioned to anybody the name of the druggist?

A. No, sir.

X Q. 25. Did you mention it to opposing counsel before you testified?

A. Mention the name?

X Q. 26. To this gentleman (indicating Mr. Bradford)?

A. I mentioned the name to no one.

X Q. 27. Have you at any time informed opposing counsel that you would not divulge the name of this druggist to him?

A. Well, in conversation I told him about this incident and he asked me whether or not I would have any objection in stating the name of this party and I told him I would rather not.

By Mr. Bradford: In justice to the witness, counsel for plaintiff desires to state that the witness did not tell him the name of the druggist and that he had entirely forgotten that the witness
222 had expressed a desire not to do so. Otherwise he should not have asked the original question.

(Mr. Rawle gives notice that he will at the proper time move to strike out the deposition of this witness, because of his recalcitrancy in refusing to answer X Q. 13, X Q. 14, X Q. 15 and X Q. 21.)

Cross-examination closed.

CHARLES C. BROUSSARD.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Friday, April 2, 1915, at Hotel Mahaffey, Jennings, La., at 9.30 a. m.

Jennings, La.,
Hotel Mahaffey, April 2, 1915—9.30 a. m.

Met pursuant to adjournment, at the Hotel Mahaffey, Jennings, La.

Parties present as before.

RICHARD D. BOWDEN, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

Q. 1. Please state your name, age, residence and occupation?
A. Richard D. Bowden; age, 34; Jennings, La.; Druggist, Manager for Parker-Blake Company, Retail Drug Store in this City.
223 Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine?
A. Yes, sir.
Q. 3. Whose product do you recognize Coco-Quinine to be?
A. Eli Lilly & Company.
Q. 4. Did you know of any other cocoa or chocolate quinine preparation before Eli Lilly & Co. put Coco-Quinine on the market?
A. No.
Q. 5. How do you dispense Coco-Quinine in your store?
A. Both on prescriptions and on call, in our own bottles.
Q. 6. Have you ever purchased a product called Quin-Coco, and if so, from whom?
A. Yes, from B. F. Jones, I believe is his name, representing William R. Warner & Co.
Q. 7. For what purpose do you purchase Quin-Coco?
A. For the purpose of sale.
Q. 8. How do you dispense Quin-Coco?
A. In the ordinary manner.
Q. 9. Do people come into your store and ask for Quin-Coco?
A. No, I have not had any calls for that.
Q. 10. On what calls do you supply Quin-Coco, what kinds of calls?
A. Usually on a call for Coco-Quinine.
Q. 11. In your opinion is Quin-Coco a good substitute for Coco-Quinine?

By Mr. Rawle: Mr. Rawle here objects to the testimony of this witness on the ground that it is between third parties and does not affect the rights of the defendant.

A. I have never had any kicks about it.

Direct-examination closed.

224 Cross-examination.

By Mr. Rawle, without waiving his objections:

X Q. 12. Would you, as an honest druggist, consider it honest, when a customer over the counter calls for one drug or preparation to sell him a different drug or preparation, without explaining to him? I am merely asking your point of view of such a transaction.

By Mr. Bradford: Objected to as immaterial.

A. Why I consider that just as honest as the man who sold it to me.

X Q. 13. I am asking you whether, as an honest druggist, it would be, in your opinion, man to man, an honest transaction? Please give your own point of view without regard to anybody else.

By Mr. Bradford: Same objection.

A. I consider neither of those transactions honest.

X Q. 14. Then, if you don't consider the transaction honest, I shall assume that the transaction you referred to of supplying Quin-Coco "usually on a call for Coco-Quinine," has not been done by you in any dishonest or unfair way. Am I correct?

By Mr. Bradford: Same objection.

A. No, you are wrong. I simply supply it because I get a better price on it and dispense it to save a little money. The preparation called for was Coco-Quinine and I should have dispensed Coco-Quinine.

X Q. 15. And you say that wasn't an act of an honest druggist, do you?

A. I must say that.

X Q. 16. Did you give the customer in such cases any understanding at all of what he was getting?

A. I gave him to understand by implication that he was getting Coco-Quinine, in fact it was labeled "Coco-Quinine."

X Q. 17. You have at times handled and sold both Coco-
225 Quinine and Quin-Coco, have you not? I mean had them in stock at the same time.

A. Yes, sir.

X Q. 18. When you have had them both in stock at the same time, for what reasons or reason, do you decide to sell the customer the one or the other?

A. Why, I suppose it is a matter of convenience at times. At other times it is probably just a little thought of price, of gain.

X Q. 19. Who owns this drug store of which you are the manager?

A. Parker-Blake Company, Limited, of New Orleans, La.

X Q. 20. Are they wholesale or retail sellers of drugs?

A. They are retailers in Jennings.

X Q. 21. Have they retail stores in New Orleans?

A. No, sir.

X Q. 22. Then so far as New Orleans business is concerned, they are wholesale druggists, are they not?

A. I only have to do with their store here. I don't know anything about their New Orleans or any other business.

X Q. 23. Do they do a wholesale drug business?

A. They do.

X Q. 24. Have you charge of their retail drug business in this town?

A. I have.

X Q. 25. You have said that you have made these sales of Quin-Coco in place of Coco-Quinine. Please state if you have done this by the instructions or with the knowledge of your employers, the Parker-Blake Company, Limited, of New Orleans, La.?

By Mr. Bradford: Objected to as immaterial.

A. I don't refer to them for every individual transaction. I run the store to suit myself.

X Q. 26. Have your employers had any knowledge of such transactions on your part?

By Mr. Bradford: Same objection.

226 A. No, they haven't.

X Q. 27. Did they ever give you any instructions to do that sort of thing or suggest to you that you should do it?

By Mr. Bradford: Same objection.

A. I don't think that the conditions of affairs between my employers and myself have any bearing on the present question.

X Q. 28. You are here as a witness and Mr. Riordon is an officer of the court and it is your obligation to answer questions put to you. Unless they tend to incriminate you or render you liable to criminal prosecution.

Do you consider that an answer to this question would render you liable to criminal prosecution?

By Mr. Bradford: Same objection. The further objection to this question is made that in view of the witness's answer to X Q. 23, wherein he stated that his employers had no knowledge of such transactions on his part being a full and frank answer to the inquiry propounded, any further questioning along this line is improper. It is further objected to as not cross-examination and as wholly irrelevant, incompetent, and immaterial.

A. Under the laws of the State of Louisiana the manager of the store is absolute manager and conducts the same in his own way and as his own place.

X Q. 29. Question X Q. 28 repeated?

By Mr. Bradford: Same objection.

A. No, I don't think it would, yet I have considered the question

irrelevant as it is matter left personally between my employers and myself and does not embrace the subject of this examination.

X Q. 30. I repeat X Q. 27. Please answer it.

By Mr. Bradford: Objection repeated.

227 A. I am not going to answer that any other way unless I am told to.

Mr. Rawle gives notice that for the refusal of the witness to answer a proper question he will, at the proper time, move the court to strike his entire deposition from the record, and also for other reasons.

Mr. Bradford acknowledges the notice with pleasure.

X Q. 31. Would your employers approve of the kind of transaction you have testified to?

By Mr. Bradford: Objected to as incompetent and immaterial.

A. I will ask them the next time I see them.

X Q. 32. Do you do the buying for your store in Jennings?

A. Yes, sir.

Cross-examination closed. R. D. BOWDEN.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

BERNA C. FRY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Berna C. Fry; age, 37; Jennings, La.; Physician.

228 Q. 2. Are you familiar with a phramaceutical product known as Coco-Quinine, and if so, what can you tell us about it?

A. I am familiar with it from the fact that I have been prescribing it for the last twelve or fourteen years.

Q. 3. Whose product do you recognize it to be?

A. Lilly's, of Indianapolis.

Q. 4. Did you know of any other cocoa or chocolate quinine preparation before Coco-Quinine was introduced to the profession by Eli Lilly & Co.?

A. No, sir.

Q. 5. How do you write prescriptions for Coco-Quinine?

A. I write simply for "Coco-Quinine."

Q. 6. Whose product do you intend when you write a prescription for "Coco-Quinine?"

A. The product of Lilly & Co.

Q. 7. Did you ever write a prescription for a product called "Quin-Coco?"

A. Not that I remember.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. In your professional work do you usually prescribe medicines by giving written prescriptions to be filled by a druggist or do you mostly or sometimes yourself furnish the article to the patient?

A. In city work I always prescribe. In country calls I sometimes take with me the medicines that I may need.

X Q. 9. Approximately about what would be the relative proportion of instances in which you prescribe, and on the other hand in which you carry the medicines with you and furnish them yourself to the patient?

A. I don't suppose I furnish drugs in more than ten per
229 cent of my practice. That is a question I cannot answer with any degree of accuracy.

X Q. 10. But you consider ten per cent a fair approximation?

A. It may be a fair approximation. I cannot say that I consider it a fair approximation as I have no data.

X Q. 11. What do you consider as a fair approximation?

By Mr. Bradford: Objected to as immaterial and for the further reason that the witness has already answered the question.

A. It is simply guess work, it is simply a guess proposition.

X Q. 12. Then what is your best guess?

A. Possibly five per cent of my calls I furnish some medicine. I don't furnish all medicine in any case.

X Q. 13. Are you in the habit of carrying Coco-Quinine into the country and dispensing it to patients? I mean on your visits to patients?

A. The only time that I carry bulky preparations of that character is when I suspect that I may have occasion to use it. Then I get it from the drug store and take it with me to the individual case.

X Q. 14. In furnishing yourself with any preparations for the purpose of dispensing them to patients in the cases or class of business that you have mentioned do you buy from the drug store or from the jobber or the manufacturer or which?

A. Local druggist.

X Q. 15. In your professional opinion have malaria and malarial diseases diminished during the last five years in and about this town? Or wherever you have an acquaintance with the subject?

By Mr. Bradford: Objected to as not cross-examination and as an attempt by counsel to make the witness his own.

230 A. They have, yes, sir.

X Q. 16. Give your opinion as to the extent of such diminution?

By Mr. Bradford: Same objection.

A. It is hard to answer that question accurately, but I should say about fifty per cent diminution.

X Q. 17. Is it not true that the chief demand for cinchona derivatives either alone or in any preparation is, in your practice, for malaria and malarial diseases?

By Mr. Bradford: Same objection.

A. It is.

Cross-examination closed. BERNA C. FRY, M. D.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

VALLEIX B. RICHARD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Valleix B. Richards; age, 35; Jennings, La.; Retail Druggist, Proprietor of the Phenix Drug Store.

Q. 2. Do you handle a product known as Coco-Quinine, and if so, whose product do you recognize this to be?

A. I do. Eli Lilly & Company's.

Q. 3. How do you dispense this product in your store?

A. Both on prescriptions and on call, in our own bottles.

231 Q. 4. Do you handle a product called Quin-Coco? And if so, where do you buy it?

A. I do. From William R. Warner & Co., St. Louis.

Q. 5. What were your reasons for buying Quin-Coco?

By Mr. Rawle: Objected to as irrelevant, and as calling for evidence that could not affect the rights of the defendant.

A. The principal reason was to get a cheaper preparation of chocolate quinine.

Q. 6. What representations were made to you by the representative of William R. Warner & Co. when your order was first solicited for this preparation?

A. He asked me if I handled much Coco-Quinine and said he had a preparation that he thought was better and asked me to get some of it and show it to my doctors and ask them if they would use this instead of Coco-Quinine and that it would be more money in it for me.

Q. 7. Would you have purchased Quin-Coco if Coco-Quinine had not been on the market?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I suppose not.

Q. 8. Was it understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to as irrelevant and as leading and as immaterial, and because what was understood is not evidence.

A. Yes.

Q. 9. Have you so used it?

A. Yes.

Q. 10. Is there any demand for Quin-Coco by that name at your store?

232 A. A little.

Q. 11. Do customers ever ask for Quin-Coco over the counter?

A. They ask for a chocolate quinine and sometimes Coco-Quinine, but never Quin-Coco.

Q. 12. How long have you been selling Coco-Quinine, the product of Eli Lilly & Co.?

A. I should say about ten years.

Q. 13. So far as you know was this product an original product with Eli Lilly & Co.?

A. I think it was.

Q. 14. Is Quin-Coco of the same color and the same flavor as Coco-Quinine?

A. I never tasted either one, but they seem to be about the same preparation, in appearance. Quin-Coco may be a little darker in color than Coco-Quinine.

Q. 15. Do you think you could tell the difference if shown the respective products in separate bottles at different times? I mean not side by side.

A. I am not positive that I could.

Q. 16. If Quin-Coco was of a different color and a different flavor would it then be possible to use it as a substitute for Coco-Quinine, or to supply it when Coco-Quinine was called for without detection?

A. Certainly not if it was not a similar preparation.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. I take it that you are an honest druggist, in your own opinion of what an honest druggist should be?

A. About the average I expect.

X Q. 18. Have you dishonestly passed off Quin-Coco for Coco-Quinine with the effect of deceiving the customer?

233 By Mr. Bradford: Objected to in the form stated as tending to ask the witness for an answer that might incriminate himself.

By Mr. Rawle: Mr. Rawle seriously objects to the objection of the opposing counsel which is meant for the witness and not for the court.

By Mr. Bradford: Mr. Bradford denies and resents the imputation of the objection of counsel for defendant.

A. I have sold Quin-Coco when Coco-Quinine was called for, not with the intention to defraud the customer but believing I was giving him as good a preparation as what he asked for, which, of course, was wrong.

X Q. 19. What do you mean by saying that it was understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. My attention was called to the preparation Quin-Coco by William R. Warner & Company's salesman and he told me that it was very similar to Coco-Quinine which I saw it was. He didn't advise me to substitute it for Coco-Quinine; but said it could be done without detection.

X Q. 20. When was this?

A. I can't remember the date.

X Q. 21. About when was it? Months ago or years ago?

A. Possibly three or four years ago.

X Q. 22. What was his name?

A. B. F. Jones, I think that was his name.

X Q. 23. I ask you to state the exact words he used when he made such a statement to you? State them just as he said them, and what you said.

A. Of course a person can hardly remember a conversation that occurred three years or so ago. But to the best of my recollection this was the conversation: Mr. Jones asked me "Do you use much
234 Coco-Quinine?" I said "Yes." He said "Why don't you try our preparation of Quin-Coco." I said "Is it like Coco-Quinine?" He said "You can't tell the difference." And after looking over the sample I bought some. He said "You will find this a much better preparation than Coco-Quinine."

X Q. 24. Is that all he said on the subject, during the entire interview?

A. As I said before it is very difficult to remember a conversation which occurred over three years ago and, as I answered in the earlier part of this examination he advised me to show it to physicians and ask them to prescribe it.

X Q. 25. Anything else said? If so, give his exact words?

A. That is all that I can remember pertaining to this subject.

X Q. 26. In answer to my questions you have now stated, as I understand you to say, the entire conversation that took place between you and Warner's salesman on this subject?

By Mr. Bradford: Objected to as a misstatement of the witness's testimony.

A. I don't understand exactly what you mean?

X Q. 27. I have been asking you to state exactly what was said on this occasion by the Warner salesman to you and what you said to the Warner salesman, giving the language used by each of you. I am now asking you whether you have now stated in answer to my questions, all that passed between you. If there is anything more that passed between you that you have not stated in answer to my questions, please proceed to state it?

By Mr. Bradford: Objection repeated.

A. I don't remember anything more of this conversation.

X Q. 28. And your belief is that there was nothing more
235 said except what you have stated in answer to my questions, is that correct?

A. No doubt there was more said on the subject but as it occurred so long ago I cannot recall exactly what was said by either of us. But if you will ask me some definite question regarding the conversation I may be able to recall it.

X Q. 29. You have said that Jones requested you to show it to doctors and ask them to use it instead of Coco-Quinine. Is that right?

A. He did.

X Q. 30. What did he say about your selling it over the counter, if he said anything give his exact words?

A. I can't recollect.

X Q. 31. Did he say anything on that subject?

A. I do not remember.

X Q. 32. Did he make you any dishonest proposition?

A. I am positive he did not.

X Q. 33. Do your doctors in treating patients chiefly do it by prescriptions or do they dispense their own preparations or drugs to the patient?

By Mr. Bradford: Objected to as immaterial.

A. Chiefly by prescriptions. Nearly entirely so.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 34. Was anything said in the conversation between yourself and Mr. Jones relative to the comparative cost of the two preparations Coco-Quinine and Quin-Coco?

By Mr. Rawle: Objected to as not proper re-direct-examination as the subject has already been fully developed by counsel.

236 A. Yes, he showed that his preparation was cheaper than Coco-Quinine. Naturally, I could make more money by selling his than Coco-Quinine.

Deposition closed. VALLEIX B. RICHARD.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Beaumont, Texas, this afternoon, at 5.30 o'clock, at Hotel Crosby.

Beaumont, Texas,
Crosby Hotel, April 2, 1915—5.30 p. m.

Met pursuant to adjournment, at the Crosby Hotel.

Parties present as before.

WILLIAM C. CHESTNUTT, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William C. Chestnutt; age, 32; Port Arthur, Texas; Druggist, in the employ of the Caswell-Preston Drug Company, Retail Druggists, of Beaumont, Texas. I was formerly Proprietor for three years of the Corner Drug Co., of Port Arthur, Texas. I have been here one year. I have been in the Drug business about fifteen years, in various places.

237 Q. 2. Do you handle and have you handled in various drug stores where you have been either as proprietor or as clerk, a pharmaceutical product known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. Yes, sir, I have and recognize it to be the product of Eli Lilly & Company.

Q. 3. How long have you been familiar with this product?

A. I have been at least acquainted with it for ten years, and have been using it regularly.

Q. 4. Did you know of any other Coco-Quinine or chocolate quinine preparation on the market prior to the time Coco-Quinine was introduced by Eli Lilly & Co.?

A. I did not.

Q. 5. Do you recognize Coco-Quinine to be a preparation original with the Eli Lilly & Co.?

A. Yes, sir.

Q. 6. How have you been accustomed to dispense this product?

A. Both on prescriptions and over the counter, both ways, and to a great extent. There is a constant demand for it.

Q. 7. How are prescriptions for this product usually written by physicians?

A. They are written for "Coco-Quinine" and are specified in some cases by the doctors until they get acquainted with the druggist and after that they don't deem it necessary.

Q. 8. How do customers ask for Coco-Quinine when they ask for it over the counter?

A. Ninety-five per cent. ask for Coco-Quinine and sometimes they say give me a bottle of cocoa or chocolate quinine or whatever it is, they use both names. Most of those that ask that way want to be put right. They say give me a bottle of cocoa or chocolate quinine.

Q. 9. Whose product do you understand is intended when it is asked for in this way?

238 A. Lilly's. Not knowing or recognizing any other Coco-Quinine that is the only one that I would give them.

Q. 10. Have you ever seen a prescription written for a product called Quin-Coco?

A. I never have.

Q. 11. Have you ever had a customer call for a product called Quin-Coco?

A. I never have.

Q. 12. Have you ever heard of the product called Quin-Coco, and if so, will you please relate the circumstances?

A. The first time it was represented to me it was claimed to be the same as Coco-Quinine. I did not buy it because I didn't care to substitute and being accustomed to using the other I considered it the original.

Q. 13. Who made the representations to you referred to in your last answer, and what were these representations in full?

By Mr. Rawle: I object because the only proper question is as to what was said at the time.

A. Mr. Richards, who was traveling for William R. Warner & Co. He asked me if I "didn't sell quite a lot of Coco-Quinine?" I told him "Yes" and he told me that he had something the same but cheaper. I didn't buy it.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. You have testified to a constant demand for Coco-Quinine at your store and to the great extent of your sales. What are cinchona derivatives either by themselves or in combination sold for?

By Mr. Bradford: Objected to as not cross-examination and wholly immaterial, incompetent and irrelevant.

239 A. Quinine is for chills and fever and for the malaria that they have here. It is absolutely necessary to give it.

X Q. 15. Hasn't there been a falling off in chills and fever and malaria in Beaumont and surrounding territory in the last five years?

By Mr. Bradford: Same objection.

A. I should say from the amount of prescriptions that it had been on an increase.

X Q. 16. Do the doctors in and around Beaumont furnish [illegible]

and preparations to their patients through prescriptions to be filled by druggists or do they keep a stock of such and furnish them direct to the patients themselves?

By Mr. Bradford: Same objection.

A. I would say that ninety-eight percent. is given by prescriptions.

X Q. 17. What is your own personal idea of the meaning of the word "substitute" as used above?

A. Well, Coco-Quinine is represented to the doctor by the detail man of the manufacturer. He tells the doctor the formulæ. The doctor prescribes it and specifies the same. And to use any other brand recommended to be the same would be, in my judgment, substituting.

X Q. 18. And it would be dishonest business on the part of the druggist?

A. Yes, sir. It would not give the patient the proper amount that the doctor had figured for him to take.

X Q. 19. You don't mean to say, do you, that Mr. Richards made a dishonest proposition to you, do you?

A. I do not. I only say that Mr. Richards offered me a cheaper preparation that he claimed to be the same. I did not know his formulæ. Perhaps it might have been the same.

240 X Q. 20. Is that all that passed between you on this subject?

A. I suppose that ended it when I told him that I wouldn't have anything else but Lilly's Coco-Quinine.

X Q. 21. Have you been in the habit of buying drugs and preparations from Mr. Richards?

A. I have bought from him, yes, sir.

X Q. 22. Rather steadily?

A. Not being the buyer now, I do not, but did while I was in actual business for myself. The buyer of the store I am now with buys some from him, I think. I am not positive.

Cross-examination closed.

Deposition closed.

W. C. CHESTNUTT.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

ROBERT L. GRIGSBY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert L. Grigsby; age 50; Beaumont, Texas; traveling salesman for Southern Drug Company, wholesale druggist, of Houston, Texas.

Q. 2. What territory do you cover?
A. Southeast Texas.
Q. 3. You sell a general line of pharmaceuticals?
A. I do.
241 Q. 4. Do you sell for your house a pharmaceutical product known as Coco-Quinine, and if so, whose product, if you know, is it?
A. I do. It is the product of Eli Lilly & Co., of Indianapolis.
Q. 5. How long have you handled this product?
A. Well as long as it has been on the market. I should say thirteen or more years.
Q. 6. Is there much demand for this product in your territory?
A. There is.
Q. 7. Give us an idea of the extent of your sales?
A. I sell approximately thirty to forty gallons a month.
Q. 8. Did you ever have any inquiry or demand for a product called Quin-Coco?
A. Never.
Q. 9. Are you familiar with the product called Quin-Coco, or or know anything about it?
A. Not further than seeing it on the shelves of a number of country drug stores and in dispensing physicians' offices.
Q. 10. Did you know of any cocoa or chocolate quinine preparation on the market before Coco-Quinine was offered by Eli Lilly & Co.?
A. I did not.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 11. Does your house stock a full Eli Lilly & Co. pharmaceutical line?
A. We do.
X Q. 12. On unspecified orders for pharmaceuticals to whose line of pharmaceuticals do you give a preference in filling the orders for a given drug or pharmaceutical?
242 A. Eli Lilly & Co., of Indianapolis.
X Q. 13. Why do you give them a preference over all other pharmaceutical manufacturers?
A. I am not in a position to state except from my own standpoint. We give Eli Lilly & Co., a preference on all pharmaceutical products on account of the Lilly policy. Eli Lilly & Co. ship nothing direct to the retail trade, but all orders are filled through the jobbers.
X Q. 14. To whom do Lilly & Co. sell their goods in all cases?
A. As far as I know to the jobbers.
X Q. 15. And so far as you know none are sold by Lilly & Co., to anybody but the jobbers?

By Mr. Bradford: Objected to as incompetent and immaterial.

A. As far as my territory is concerned they do not.

X Q. 16. If you had an order for a chocolate quinine preparation you would fill it with Coco-Quinine, wouldn't you?

A. I most certainly would.

X Q. 17. You have said that giving a preference to Lilly is the policy of your house. Do you know whether it has a contract to that effect with the Lilly Company?

By Mr. Bradford: Objected to as incompetent and immaterial.

A. I do not.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 18. Do you know whether the Southern Drug Company stocks pharmaceutical products of other manufacturers in general lines?

A. We do.

243 R. D. Q. 19. Do you sell the products of other manufacturers when there is any demand for them in your territory?

By Mr. Rawle: Objected to as irrelevant and not re-direct-examination.

A. We do.

R. D. Q. 20. How do you regard the Lilly pharmaceutical products as to quality in comparison with those of other manufacturers?

By Mr. Rawle: Objected to as irrelevant.

A. In the general line I recognize three pharmaceutical houses, namely, Eli Lilly & Company, Parke, Davis & Co., and Sharpe & Doehme, with specialties from other pharmaceutical manufacturers. I consider the Eli Lilly products equal to any on the market.

Re-direct-examination closed.

Deposition closed.

ROBERT L. GRIGSBY.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN S. FOSTER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

244 A. John S. Foster; age 28; Beaumont, Texas; druggist;

prescription clerk for the Caswell-Preston Drug Company, of this city.

Q. 2. Does your store dispense a product known as Coco-Quinine, and if so, whose product is it?

A. We do. We use Lilly's Coco-Quinine altogether.

Q. 3. How is this product dispensed in your store?

A. On prescriptions and we dispense it over the counter in our own bottles.

Q. 4. Do you have much of a demand for Coco-Quinine on prescriptions?

A. Yes, sir.

Q. 5. Do you sell much of it on call over the counter?

A. Yes, sir.

Q. 6. Are both demands constant with you?

A. Yes, sir.

Q. 7. Have you ever seen a prescription written for Quin-Coco?

A. No, sir.

Q. 8. Have you ever had a call over the counter for Quin-Coco?

A. No, sir.

Q. 9. How extensive is the prescription business of your store?

A. It is very large. We fill more prescriptions than any two stores in Beaumont.

Direct-examination closed.

No cross-examination.

Deposition closed.

JOHN S. FOSTER.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

245 EDWARD C. FERGUSON, a witness called by and on behalf of plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edward C. Ferguson; age 30; Beaumont, Texas; physician.

Q. 2. Are you familiar with a pharmaceutical product known as Coco-Quinine and if so, whose product is it?

A. Yes. I consider it to be Lilly's product.

Q. 3. Do you prescribe it in your practice?

A. Yes, frequently.

Q. 4. How do you write your prescriptions?

A. "Coco-Quinine."

Q. 5. Whose product do you intend when your prescriptions are so written?

A. Lilly & Company.

Q. 6. Have you ever written a prescription for a product called Quin-Coco?

A. No.

Q. 7. Did you know of any other cocoa or chocolate quinine product before the Lilly Coco-Quinine was introduced to the profession?

A. No.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Do your patients usually receive the medicine from your prescriptions filled at a drug store or direct from you?

A. From a drug store.

246 X Q. 9. About what per cent, if any, direct from you?

A. None.

Cross-examination closed.

Deposition closed.

EDW. C. FERGUSON.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Houston, Texas, Hotel Rice, tomorrow, Saturday, April 3, 1915, at 10.30 a. m.

Houston, Texas,
Hotel Rice, April 3, 1915—10.30 a. m.

Met pursuant to adjournment, at Hotel Rice, Houston, Texas.

Parties present as before.

GEORGE H. SPURLOCK, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. George H. Spurlock; age 38; Houston, Texas; physician.

Q. 2. How long have you been in the practice in Houston?

247 A. Since December, 1913.

Q. 3. Where were you prior to that time?

A. I started in practice in 1902 at Spurger, Texas; in 1903 and 1904 up to September, 1905, I was at Doucette, Texas; from that time until 1912, September, at Kirbyville, Texas. From that time, first of September, 1912, up until October, 1913, I was doing school and post-graduate work and from December, 1913, up to this time I have been in practice in Houston, Texas.

Q. 4. Have you in your practice used a pharmaceutical product known as Coco-Quinine, and if you have, whose product do you recognize it to be?

A. I have. I recognize it to be the product of Eli Lilly & Co.

Q. 5. How do you write your prescriptions for Coco-Quinine?

A. "Coco-Quinine."

Q. 6. When you write a prescription for Coco-Quinine, whose product do you intend to be used in filling such a prescription?

A. I recognize it as Eli Lilly & Company's.

Q. 7. Did you ever write a prescription for a product called Quin-Coco?

A. I have not.

Q. 8. Did you ever know of a cocoa or chocolate quinine preparation in the profession before Coco-Quinine was introduced by Eli Lilly & Co.?

A. Not that I remember.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 9. Do your patients receive their medicines from you through prescriptions chiefly or are they furnished directly to them by you?

A. I have had experience both ways in the past.

X Q. 10. Take your Texas practice other than in Houston,
248 what proportion of such medicines was furnished by you to patients through prescriptions and what proportion direct by you?

A. I could not say.

X Q. 11. Please approximate the proportions as nearly as you can, by percentages?

A. I can not give even an approximate estimate.

X Q. 12. Which method was commonest in your practice?

A. I could not answer that, because for seven years I was contract physician for the Kirby Lumber Company and at the same time carried on an extensive private practice. In my work for the Kirby Lumber Company medicines were dispensed by me direct to the patient from supplies furnished by the company. In my private practice medicines were furnished on prescriptions exclusively.

X Q. 13. When did you come to Houston to practice your profession?

A. December, 1913.

X Q. 14. In your Houston professional work, have your patients received their medicines through your prescriptions filled at drug stores, or direct from you?

A. Through prescriptions filled at drug stores.

X Q. 15. Is your practice large?

A. It is not. I have been here only a little over a year. It was large in the other places. It is entirely satisfactory to myself here.

X Q. 16. You say you have prescribed Coco-Quinine. Approximately to what extent?

A. I prescribed it over that period of time and found it a very useful preparation.

X Q. 17. From your experience and knowledge in Texas has there been a diminution of malaria and malarial diseases in the parts of the country where you have practiced your profession? I refer to the last five years.

By Mr. Bradford: Counsel for plaintiff gives notice to
249 counsel for defendant that he shall move to strike from the record all questions and answers not strictly cross-examination.

A. I can not say.

X Q. 18. Have you no opinion or belief on the subject, based upon your professional experience?

A. No definite opinion.

Cross-examination closed.

Deposition closed.

GEO. H. SPURLOCK.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILLIAM A. SCHAEFER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William A. Schaefer; age, 33; Houston, Texas; retail druggist; proprietor of Schaefer's Post Office Pharmacy.

Q. 2. How long have you been in the retail drug business and where?

A. About seventeen years; Cuero, Texas; and in Houston, Texas.

Q. 3. Please state whether or not during all of this period you have been in business as proprietor, or if not in what capacity?

A. I have been proprietor in Cuero up to 1908. I then came to Houston, and went to work for Heyer's Drug Store. I was
250 there until about 1910 and then went to Lewyn's Drug Store, and was there until 1912, when I opened up the Post Office Pharmacy and have been there three years.

Q. 4. During this period of experience as a retail druggist in various places have you handled a pharmaceutical product known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. I have. I recognize it to be Eli Lilly's product.

Q. 5. How is this product dispensed?

A. On prescriptions chiefly, and also on call over the counter, in the store's own bottles.

Q. 6. How are prescriptions for Coco-Quinine which you have seen, written by physicians?
A. Just "Coco-Quinine."
Q. 7. What does this mean to you as a druggist?
A. Lilly's Coco-Quinine.
Q. 8. Did you have any knowledge of any other cocoa quinine or chocolate quinine preparation before Coco-Quinine was introduced by Eli Lilly & Co.?
A. No, sir.
Q. 9. How long have you handled Coco-Quinine?
A. Since I started in the drug business.
Q. 10. Do you know anything about a product called Quin-Coco, and if so, what?
A. I know of such a product, a substitute for Coco-Quinine.
Q. 11. Whose product is it?
A. Searle & Hereth.
Q. 12. By whom is it sold?
A. The Pfeiffer Chemical Company of St. Louis.
Q. 13. By any other concern?
A. William R. Warner and Company, which is the same as the Pfeiffer Chemical Company.
Q. 14. Have you ever dispensed Quin-Coco and if so relate the circumstances?
A. I have, because I didn't have any other kind to dispense and was told that it was the same as Coco-Quinine.

251 By Mr. Rawle: I object because the action of the witness as stated by him can not affect the rights of the defendant and the question and answer are objected to as irrelevant and immaterial, and hearsay.

Q. 15. Was this on a prescription or on a call over the counter?
A. Both.

By Mr. Rawle: Same objection to question and answer.

Q. 16. More than once?

By Mr. Rawle: Same objection.

A. Yes.
Q. 17. How were the prescriptions written and which you filled with Quin-Coco?

Same objection.

A. "Coco-Quinine."
Q. 18. Was this when you were employed by another or when in your own store?

Same objection.

A. While employed by another.
Q. 19. Have you ever been solicited to purchase Quin-Coco?
A. I have.

Q. 20. On what representations were you asked to buy this product?

By Mr. Rawle: I object because the question does not connect the transaction with the defendant nor has the witness so connected it; because the question is improper, the only proper question being as to what was said.

A. It being Coco-Quinine, the same as Coco-Quinine.

Q. 21. Can you relate the conversation that occurred at
252 the time, or the substance of it, and if so will you please do so?

Objected to as no connection with the defendant has been shown.

A. I just stated that I didn't think it was fair to Eli Lilly to buy a substitute, the same as I would in buying a substitute for Horlick's malted milk, Welch's grape juice, or Coco-Cola.

Q. 22. You have stated what you said. What did the other man say?

By Mr. Rawle: Same objection.

A. That it was the same as Coco-Quinine, the same product.

Q. 23. Did he tell you that it could be used to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to for the same reason and as leading.

A. I presume he did, but he knew my position on substitution.

Q. 24. Who was the party who made these representations to you?

A. Mr. Gill. I don't know his initials.

Q. 25. What house or houses does Mr. Gill represent or did he represent at that time?

A. Pfeiffer Chemical Company and William R. Warner and Company.

Q. 26. Have you ever seen a prescription in all of your experience in the various places and stores where you have been, written for Quin-Coco?

A. I have not.

Q. 27. Have you ever had a customer over the counter call for Quin-Coco?

A. I have not.

Direct-examination closed.

253 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 28. What is your understanding of the word "substitute" as you use it? Does it mean something that can be used for another thing, or does it necessarily imply a dishonest use, by which a customer is deceived?

A. If a customer calls for an article, specifies the article, and is given something else it would necessarily mean substitution.

X Q. 29. Couldn't you handle a substitute for another original preparation and do it honestly as a druggist, always honestly explaining to the customer what he was getting?

A. You could if you practiced it.

X Q. 30. Then a perfectly honest druggist can carry in stock a substitute for an original preparation, and it is perfectly possible for him to sell it in an honest way, is it not?

A. I see no objection to a druggist stocking a substitute for a nationally advertised article, providing the customer is informed that he is not selling it as a substitute for what was really wanted.

X Q. 31. Then you think a perfectly honest druggist could carry what you call a substitute and sell it honestly and without deceiving customers. Is that correct?

By Mr. Bradford: This question and the others along the same line objected to as not cross-examination, as immaterial and irrelevant.

A. Well, my position with reference to substitutes is that they should not be sold on prescriptions, or over the counter.

X Q. 32. If you are filling a prescription and had run out of an ingredient called for by it, wouldn't you telephone the doctor and get his consent to substitute another ingredient for the one specified?

254 By Mr. Bradford: Question is objected to as a plain attempt of counsel for defendant to use witness for his own purposes, there being no justification for this or the preceding question in the direct-examination.

A. That would not constitute substitution then. I would call up the physician, if the drug specified was not obtainable.

X Q. 33. You have spoken of a "nationally advertised article" and I think you have spoken of an "original." By these terms do you mean substantially the same thing, that is, would a preparation like Coco-Cola in your mind be both a nationally advertised article and an original, in that field of beverages?

A. Yes.

X Q. 34. Is it your opinion that an original article is entitled to the business and that it is not fair for a druggist to dispense an article coming later on the market and having substantially the same qualities?

By Mr. Bradford: Objected to as immaterial.

A. I think it is unfair if sold as a substitute.

X Q. 35. Do you mean that it is unfair if the druggist passes off the later article for the original without telling the doctor or the customer?

A. Yes, sir.

X Q. 36. But it is not unfair if you inform the physician or the customer?

A. In my opinion it is not substitution then.

X Q. 37. You have testified that it was unfair for a druggist to put off an article on a doctor's prescription or on a customer without telling them. Do you mean that a perfectly honest druggist does not do that sort of thing?

A. I can't answer for other men there.

X Q. 38. Do you consider it honest?

A. I wouldn't do it.

X Q. 39. Please state exactly what was said by the salesman, Gill, to you and what you said to him, giving the words of both, just as they were spoken, and beginning with the beginning of the conversation?

A. I think that question has been asked before and has been answered.

X Q. 40. X Q. 39 repeated.

A. I don't recall the exact conversation, but it was represented the same as Lilly's Coco-Quinine.

X Q. 41. What else was said?

A. This is a matter of some three years and I could not recall the conversation exactly.

X Q. 42. I ask you to state if anything else was said, and what was said?

A. I simply told Mr. Gill that I did not care to stock Quin-Coco.

X Q. 43. Is that all you remember?

A. Except telling him that he knew my position on handling substitutes for the original.

X Q. 44. Was that all?

A. Yes, sir.

X Q. 45. Give the words in which you so stated to him what your position was as to handling substitutes?

A. I told him that the physician only knew one Coco-Quinine and that was Eli Lilly's.

X Q. 46. Is that all that you said?

A. I may have said more, but this is the substance.

X Q. 47. Do you wish to add anything else?

A. I do not except that I should like to have some dinner.

X Q. 48. You have said that you yourself would not pass off an article for the original on a doctor's prescription or on a customer without telling them, and you said in effect that you did not consider it the part of an honest druggist. That is correct, is it not?

A. Yes.

X Q. 49. Now what I want to know is whether Gill made you any dishonest proposition or asked you to do this dishonest thing?

A. I don't know that that would constitute dishonesty on the part of Mr. Gill.

X Q. 50. My question is whether Gill asked you to do a thing which you have just told us you consider dishonest in a druggist?

A. I would consider it dishonest if he told me to give them Quin-Coco instead of Coco-Quinine.

X Q. 51. What I am asking you is whether Gill asked you to do a dishonest thing?

A. He asked me to buy something that I did not want.

X Q. 52. When Gill called on you were you working for Lewyn?

A. I have known Gill for a number of years. I had no authority to buy at Lewyn's.

X Q. 53. Were you working for Lewyn at the time referred to in your answer to Q. 19, etc.?

A. That was not the only time he called on me. I have known him for many years; since I was in Cuero, in 1903. I know I bought goods from him there while I was with the Cuero Drug Company, I don't remember the year now.

X Q. 54. I have been asking you to state the language used in the conversation you had with Gill and you have testified as to that conversation. When was that conversation?

A. I do not recall.

X Q. 55. Can you give me any idea, whether it was three years or more than three years?

A. It was over three years. Gill has not been with the Pfeiffer Company for three years and a few months.

X Q. 56. Was it more than four years?

A. No, sir.

X Q. 57. Were you working for Lewyn then or were you in business for yourself?

A. I was working for Lewyn the last conversation I had with Mr. Gill.

257 X Q. 58. Was that the conversation you have been testifying to?

A. It was not.

X Q. 59. When was the conversation you have been testifying to?

A. Prior to that.

X Q. 60. How long prior?

A. I do not recall.

X Q. 61. As much as a year?

A. Yes, sir.

X Q. 62. Two years?

A. Say approximately four years ago.

X Q. 63. When you had that conversation were you in business for yourself and buying drugs for yourself?

A. I was not buying drugs for myself.

X Q. 64. Were you buying for Lewyn?

A. I was simply making out the order.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 65. At the time or times you furnished Quin-Coco for Coco-Quinine did you inform the physician or the customer and get their consent to do so?

By Mr. Rawle: I object because the matter called for is res inter alios acta and not relevant.

A. I did not, but was following instructions of my employer.

Deposition closed.

WM. A. SCHAEFER.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

258 BRYAN B. GILMER, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Bryan B. Gilmer; age 38; Houston, Texas; wholesale druggist. I am president of the Southern Drug Company.

Q. 2. What territory does your company serve?

A. Large part of Texas, part of Louisiana and a very small part of Mexico.

Q. 3. Do you handle a full line of pharmaceuticals and drug products?

A. Yes, sir; such as is ordinarily stock by a well equipped wholesale drug house.

Q. 4. The products of all the leading manufacturers?

A. Not of all the leading manufacturers, but of most of the leading manufacturers.

Q. 5. Does your house handle a pharmaceutical preparation known as Coco-Quinine and if so, whose product do you recognize it to be?

A. We do. It is the product of Eli Lilly & Co.

Q. 6. How long have you handled this product, and is there much demand for it in your trade?

A. We have handled it since the beginning of our business, some eight or nine years ago. There is a large demand for it.

Q. 7. Throughout the entire territory served by your store?

A. Yes, sir.

Q. 8. Have you ever received an order so far as you know for a product called Quin-Coco?

259 A. To the best of my knowledge and belief we have not.

Direct examination closed.

No cross-examination.

Deposition closed.

BRYAN B. GILMER.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Recess until 2:30 o'clock.

After Recess.

2:30 o'clock.

WILLIAM O. SCHULER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. William O. Schuler; age 37; Houston, Texas; city salesman for the National Biscuit Company.
Q. 2. Have you ever purchased a medicine or pharmaceutical product known as Coco-Quinine?
A. Yes, sir; I bought this bottle from the Hardy Street Drug Store today.

The witness here hands counsel a bottle labeled "Coco-Quinine (Shake) Hardy Street Drug Store R. H. Fonville, Prop. 2102 Hardy St. Both Phones. Houston, Texas."

Q. 3. Are you sure that this is the identical bottle and contents that you personally bought of this store?
260 A. Positive, yes, sir; because I have had it in my possession ever since I bought it.

By Mr. Bradford: The bottle in question is offered in evidence and marked "Complainant's Exhibit Houston Sample."

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 4. How did you happen to buy it?
A. At the request of a friend of mine, Mr. W. L. Griffin.

Mr. Rawle: The testimony of the witness and the exhibit are objected to as inter alios acta and as not binding on the defendant, and as irrelevant and immaterial.
Plaintiff's counsel agrees that the objection may have the same force and effect as though made in direct-examination.

Cross-examination closed.

Deposition closed. WILLIAM O. SCHULER.

Subscribed and sworn to before me this 3rd day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

WALTER L. GRIFFIN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

261 A. Walter L. Griffin; age 35; Houston, Texas; traveling salesman representing Eli Lilly & Company.

Q. 2. What territory do you cover for Eli Lilly & Co., Mr. Griffin?

A. I cover the territory adjacent to Houston, including the town of Houston, representing about eight counties, I think, eight or ten. I mean the territory which runs south to the Gulf, northeast to Timpson, Texas, and all the territory east and south of Timpson to the Louisiana line.

Q. 3. Please explain your duties in your position?

A. My duties are saleswork and detail work. I mean by saleswork soliciting orders for the products of our manufacture from the retail and wholesale trade also from physician. By detail work I mean visiting physicians and endeavoring to interest them in the products of our manufacture.

Q. 4. What do you know or what can you tell us relative to the product known as Coco-Quinine?

A. I know Coco-Quinine is a palatable preparation of quinine sulphate, manufactured by Eli Lilly & Co., and enjoys a large sale in my territory.

Q. 5. Do you know anything concerning a product called Quin-Coco, and if so, what?

A. I know that Quin-Coco is a product that is sold very extensively in my territory and is used instead of Coco-Quinine. In a great many instances I know it to be used as a substitute for Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay, and as not connecting any transaction with the defendant.

Q. 6. By whom is Quin-Coco sold?

A. By the William R. Warner Company of Philadelphia and St. Louis, I believe.

Q. 7. How do you know that Quin-Coco is used in any instances as a substitute for Coco-Quinine?

262 By Mr. Rawle: Objected to as irrelevant and immaterial, and because no ground is laid for connecting any transaction with the defendant.

A. Well, I have seen it dispensed in a good many instances when Coco-Quinine was ordered.

Q. 8. How did you happen to see these transactions?

Same objection.

A. By simply being on hand when the sale was made, at a druggist's store.

Q. 9. Can you tell us anything more definite relative to such instances or such transactions?

A. I have witnessed instances where a customer asked for Coco-Quinine and have seen the druggist dispense Quin-Coco from the original package of the Warner & Company product, in Houston.

One instance that I have in mind is at Mr. R. H. Fonville's drug store.

By Mr. Rawle: The answer is objected to because it is vague and does not state the facts constituting the transaction.

Q. 10. Have you ever seen prescriptions written for Coco-Quinine and seen them filled with Quin-Coco?

By Mr. Rawle: The question is objected to as calling for transactions between third parties which do not bind the defendant and as irrelevant and immaterial.

A. I have, yes, but I would not be able to give you any specific time. I have seen them in numbers of instances, but specific times and places I would not be able to give you.

Q. 11. Have you seen quantities of the product called Quin-Coco in drug stores in your territory?

A. Yes, sir; large quantities in some instances.

Q. 12. By R. H. Fonville's drug store do you mean the Hardy Street Drug Store, R. H. Fonville, Proprietor, No. 2102 Hardy St., Houston, Texas?

Same objection.

263 A. Yes, sir.

Q. 13. State anything further that you can in reference to these transactions that you have seen at Mr. Fonville's store and what you have said to him about them, if anything?

By Mr. Rawle: Same objection and because what the witness has said to any one is hardly evidence to bind the defendant.

A. I can just state that I have observed Mr. Fonville when he was dispensing a bottle of the product Quin-Coco to a customer who had asked for Coco-Quinine and Mr. Fonville remarked "Here goes a bottle of good Coco-Quinine." I have seen as high as three unopened gallon packages of Quin-Coco in Mr. Fonville's store at a time. Mr. Fonville has voluntarily stated frequently that he supplied it regularly on a demand for Coco-Quinine.

By Mr. Rawle: The answer is further objected to as hearsay.

Q. 14. Has Mr. Fonville, to your knowledge, any of the Lilly product, Coco-Quinine, in his store?

A. I am quite positive he has not.

Q. 15. Have you made any recent investigation to find out?

By Mr. Rawle: Same objection.

A. I examined his stock today and am quite positive that he has none in stock at the present time.

Q. 16. How long has it been since you sold him any Coco-Quinine?

By Mr. Rawle: Same objections.

A. I haven't sold him any Coco-Quinine within a year or two, I

can't remember when I did sell him any, not within the last two years.

Q. 17. Are such conditions relative to the Coco-Quinine trade, as you have described as prevailing at Mr. Fonville's store
264 found in other drug stores in your territory?

By Mr. Rawle: The question is objected to as calling for matter between third parties and not binding on the defendant, as irrelevant and immaterial, and as asking the witness to state the prevalent conditions, instead of asking him to state facts known to him to exist, which might or might not constitute those conditions.

A. A great many other drug stores, yes, sir.

Direct-examination closed.

By Mr. Rawle: The entire deposition beginning with Q. 5 is again objected to for the reasons above stated.

No cross-examination.

Deposition closed.

WALTER L. GRIFFIN.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at 7.35 p. m., this day, in Drawing Room A, Car 11, Train No. 8, East Bound, Southern Pacific, Houston to New Orleans.

Houston, Texas—On train No. 8
en route Houston to New Orleans,
April 3, 1915—7.25 p. m.

Met pursuant to adjournment.

Parties present as before.

265 JULIUS R. PROCHNOW, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Julius R. Prochnow; age 34; San Antonio, Texas; retail druggist; I am a member of the firm of Prochnow & Donnell.

Q. 2. Do you know of the product known to the trade as Coco-Quinine and if so what can you tell us about it?

A. Yes, I know about it; it is mostly prescribed by physicians and occasionally called for over the counter. It is the product of Eli Lilly & Co.

Q. 3. Do you have a considerable call for it at your store in San Antonio?

A. Yes, sir; it is called for frequently and we have a good many prescriptions for it.

Q. 4. How are the prescriptions written?

A. "Coco-Quinine, Lilly." Sometimes only "Coco-Quinine."

Q. 5. When a prescription is received written only for "Coco-Quinine", whose product do you understand is intended by the physician?

A. Eli Lilly's.

Q. 6. Do you know of any other similar product that was on the market before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No, sir.

Q. 7. How do customers call for Coco-Quinine when they ask for it over the counter?

A. "Coco-Quinine."

Q. 8. How long have you been in the retail drug business?

A. About thirteen years.

265 Q. 9. Does your store do a large prescription business in San Antonio?

A. Not very large.

Q. 10. How does it compare with other drug stores?

A. Just about the same as other outlying drug stores, that is, suburban drug stores.

Q. 11. Have you ever received a prescription or a call for Quin-Coco?

A. No, sir.

Q. 12. Have you ever been solicited to buy Quin-Coco and if so by whom and what inducements were held out as a reason for such a purchase?

By Mr. Rawle: Objected to as the witness should be asked only what was said.

A. Yes, William R. Warner & Company's salesman solicited my order and the inducement was the price.

Q. 13. What else was said by William R. Warner & Company's salesman?

A. He told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper.

Q. 14. Did he say anything about what use you could make of it?

By Mr. Rawle: Objected to as leading.

A. He intended me to use it instead of Coco-Quinine.

By Mr. Rawle: The answer is objected to as not stating what the salesman said.

Q. 15. What do you mean by "instead of Coco-Quinine"?

Same objection as to the last question and as not calling for testimony as to what was said.

A. When I got a call for Coco-Quinine or a prescription, that it could be used instead.

Q. 16. When was this? Or about when?

267 A. Some time ago, I don't remember when, probably three months.

Q. 17. What was the name of the salesman if you remember?

A. His name was Richards, I think, I don't know his initials. It has also been offered to me by a man named Gill, but that has been longer ago. He used to make that territory before Mr. Richards.

Q. 18. Did Gill represent the same house?

A. Yes, sir.

Q. 19. Did he offer it to you on the same representations?

By Mr. Rawle: Objected to as leading and as not asking for what was said.

A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 20. Tell me just where you were standing when Richards called on you some three months ago?

A. Back of the prescription counter.

X Q. 21. What did he first say to you about your buying Quin-Coco? Give his exact language in the very way that he said it?

A. Well, he told me that—he asked me whether I was using much Coco-Quinine, if I did he could save me some money on it. He said that he had Quin-Coco which was the same thing as Coco-Quinine and he then gave me the different prices between Coco-Quinine and Quin-Coco.

X Q. 22. Do you mean that he didn't say any more than what you have just stated to me?

A. He went on and talked about other preparations.

X Q. 23. What I want to know is if you have now stated in answer to my questions the conversation which took place between

268 you and Richards on the subject of Coco-Quinine and Quin-Coco?

A. I have given it to you.

X Q. 24. How long ago did Gill call on you?

A. That has been—I don't remember how long ago that has been—but it has been probably two years I am guessing at that.

X Q. 25. It might have been four?

A. No, not that long. Between two and three years.

X Q. 26. Were you in your store?

A. Yes, sir.

X Q. 27. Did you buy from him at that time?

A. I bought some once, but I don't know whether that was Richards or Gill.

X Q. 28. State just what Gill said to you when he asked you to

buy Quin-Coco. Give his language in the way he used it and what you said just as you said it?

A. Gill said that I would be very foolish for paying the price for Coco-Quinine, that he had an identical preparation and he named the prices, which I don't remember, I don't remember prices.

X Q. 29. Anything else?

A. That is all; just about that price and that preparation.

X Q. 30. I understand then that you have now stated in answer to my questions all that Gill said to you about buying Quin-Coco. Is that right?

By Mr. Bradford: Objected to as an improper question in an equity proceeding?

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 31. Did Mr. Gill say anything to you about using Quin-Coco to supply the demand for Coco-Quinine, and if he did, what did he say on this subject?

269 By Mr. Rawle: Objected to as leading. Also because the witness has been fully examined in chief and in cross-examination and the question is improper for re-direct.

A. Well, after leaving me under the impression as I stated before, on the difference in the price and the product being the same, that I was very foolish to keep on using the Coco-Quinine at a higher price.

By Mr. Rawle: Mr. Rawle here states that the question was at this point re-read to the witness.

After leaving me under the impression that the preparations were similar, were the same, that I was very foolish to supply the demand with the high priced preparation.

R. D. Q. 32. Did Mr. Richards say anything to you on this same subject, and if so, what did he say, if you remember?

By Mr. Rawle: Objected to as leading, as the witness has already been fully examined by counsel on the subject and as improper re-direct.

A. He represented the preparation to be the same as Coco-Quinine, only, if I remember right, he was not as insistent as Mr. Gill in his efforts to sell.

R. D. Q. 33. I believe you have testified that you have never had any demand for Quin-Coco. If you had no demand for Quin-Coco how did Mr. Richards or Mr. Gill justify soliciting your order for it?

By Mr. Rawle: Objected to as improper, irrelevant and immaterial, and because it does not call for a statement of what was said at the interview with Richards but calls for a justification and as argumentative.

A. They knew there was a demand for Coco-Quinine, and
270 claimed to have a similar preparation or a preparation that in every way resembled it, and intended for the same purpose, so far as color and taste are concerned.

R. D. Q. 34. What has the demand for Coco-Quinine to do with this matter?

By Mr. Rawle: Objected to as improper redirect-examination, as irrelevant and immaterial and because the witness has already been fully examined.

A. What matter?

R. D. Q. 35. With the sale of Quin-Coco?

A. I suppose that William R. Warner & Co. were making money out of their preparation. That is evidently what they made it for.

R. D. Q. 36. You don't seem to understand my question. Will you please state why, if you know, the demand for Coco-Quinine should control or influence the sale of Quin-Coco?

By Mr. Rawle: Objected to as tending to lead the witness; because the witness has already been fully examined in chief; as not redirect-examination.

By Mr. Bradford: I will withdraw the question and put it in a different way.

R. D. Q. 37. In your judgment would there be any sale for Quin-Coco if Coco-Quinine was not in demand?

By Mr. Rawle: Objected to as irrelevant and immaterial, because the witness has already been examined in chief and this is not proper re-direct-examination, and as immaterial and irrelevant.

A. I don't think so.

Re-direct-examination closed.

271 Recross-examination.

By Mr. Rawle:

R. X Q. 38. Don't you think William R. Warner & Co. had a right to offer for sale any preparation which they think to be a good medicine, even if it does compete with another like preparation on the market?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I don't know about that. They may have a right to offer it for sale, but I don't know about it.

Deposition closed. J. R. PROCHNOW.

Subscribed and sworn to before me this 3rd day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

FRED A. BURNS, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Fred A. Burns; age 43; San Antonio, Texas; traveling man for Eli Lilly & Co.
Q. 2. What territory do you cover?
A. San Antonio territory. Part of Southwest Texas.
Q. 3. Do you handle the full line of Eli Lilly & Co. products?
A. Yes, sir.
Q. 4. What can you tell us about the demand for their product known as Coco-Quinine in your territory?
272 A. There is a large demand for it.
Q. 5. How long have you been selling it?
A. Since 1904.
Q. 6. Has the demand been continuous?
A. Yes, sir.
Q. 7. Please state from whom you solicit orders?
A. From the retail druggists. I also detail physicians. The reason I did not say at first "sell physicians" is because there are very few physicians in my territory who dispense. They are mostly prescription writers. The orders I take are filled through the jobbers.
Q. 8. What do you know if anything concerning a product called Quin-Coco?
A. I know that it is sold in my territory. It is sold through William R. Warner & Co., bearing the Searle & Hereth label.
Q. 9. How is it sold and to whom?
A. It is sold to the retail druggists and to anybody who will buy it.
Q. 10. By whom?
A. By the salesmen of William R. Warner & Co.
Q. 11. How do you know that this product is sold to retail druggists in your territory?
A. Because I have seen it on the shelves of retail druggists and I have seen invoices of it from William R. Warner & Co.

Direct-examination closed.

No cross-examination.

Deposition closed.

FRED A. BURNS.

Subscribed and sworn to before me this 3rd day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at St. Charles Hotel, New Orleans, La., Monday, April 5, 1915, at 9 a. m.

273 New Orleans, La.,
St. Charles Hotel, April 5, 1915—9 a. m.

Met pursuant to adjournment at the St. Charles Hotel, New Orleans, La.

Parties present as before.

HOWARD S. SMITH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Howard S. Smith; age 34; Crowley, La.; traveling salesman for the Finlay-Disks & Co., wholesale druggists, of New Orleans, La.
Q. 2. Do you canvas the retail trade for this house?
A. Yes.
Q. 3. In what territory?
A. Southern Pacific Railroad from New Orleans to Beaumont, Texas, and adjacent territory.
Q. 4. Do you know a Mr. B. F. Jones, traveling salesman for William R. Warner & Co.?
A. I do.
Q. 5. I understand from Mr. C. Broussard that you know something about his sales of a product called Quin-Coco, or at least concerning an instance of such sale. Will you please relate anything you may know of this subject?
A. I suppose that you refer to a conversation that took place between Mr. Jones and Broussard at Houma, La., in my presence. Mr.
274 Broussard and myself were sitting in the hotel at Houma when Mr. Jones came in and Mr. Broussard asked him how business was. He replied "Pretty good." I just sold five gallons"—I don't recall whether he said "I have just sold" or "have sold"—"five gallons of Coco-Quinine." Mr. Broussard replied, "No, you haven't sold any Coco-Quinine," and Mr. Jones replied, "Well, Quin-Coco, what's the difference."

Direct-examination closed.

By Mr. Rawle: The answer is objected to as irrelevant and immaterial and as stating no fact which can affect the rights of the defendant.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 6. I should like to know when this incident occurred?

A. Why, I couldn't give the exact date without being at Houma and seeing on the hotel register when we were there. It was the early part of this year, though.

X Q. 7. At that meeting between the three persons named, had you just been talking about Coco-Quinine, or had the words been mentioned?

A. We had not.

X Q. 8. What had you been talking about?

A. Mr. Jones had just walked into the hotel when this conversation took place. I don't recall just what Broussard and myself had been discussing at the time.

Cross-examination closed.

Deposition closed.

HOWARD S. SMITH.

Subscribed and sworn to before me this 5th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

275 CHARLES H. PORTER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Charles H. Porter; age 35; Henning, Tenn.; retail druggist, under the name of R. S. Porter & Co., but I am the proprietor.

Q. 2. Please tell us if you handle a pharmaceutical preparation known as Coco-Quinine, and, if you do, whose product it is?

A. Yes; we handle Coco-Quinine, made by Eli Lilly & Co.

Q. 3. How long have you handled this preparation?

A. Ever since it was put on the market, probably about fifteen years.

Q. 4. Did you know of any other cocoa or chocolate quinine preparation before Coco-Quinine was introduced by Eli Lilly & Co.?

A. I did not.

Q. 5. How do you dispense Coco-Quinine at your store?

A. We dispense Coco-Quinine on physicians' prescriptions and on call when customers ask for it by that name over the counter.

Q. 6. What preparation, I mean the preparation of what manufacture, do you always understand is meant when "Coco-Quinine" is written on the prescription or called for by a customer?

A. The preparation of Eli Lilly & Co.

Q. 7. Have you ever received a prescription written for "Quin-Coco" at your store?

A. I have not and I have never had a call for "Quin-Coco" over the counter.

Q. 8. Have you ever been solicited to purchase Quin-Coco,
276 and if you have, will you relate the circumstances?

A. I have. Some five or six years ago when Warner & Co. first put this on the market I was asked to buy Quin-Coco by Mr. Kelton, their representative, he telling me that it was the identical formulæ of Lilly's Coco-Quinine, and could be used as a substitute. He further told me that practically all of the druggists were using it in place of Coco-Quinine, and when Coco-Quinine was called for.

By Mr. Rawle: The answer is objected to as stating only inferences and not what was said.

Q. 9. Did you purchase Quin-Coco of Warner & Company's salesman, and if so, what use have you made of it?

By Mr. Rawle: The second clause is objected to as irrelevant and immaterial.

A. I did. I have sold it as chocolate quinine. We have educated them up to call for chocolate quinine believing it to be the identical preparation as Coco-Quinine, relying upon the statement of Mr. Kelton, before referred to. We have some times sold the Quin-Coco when they called for Coco-Quinine, believing it was the identical thing.

By Mr. Rawle: The last part of the answer is objected to as irrelevant and not binding on the defendant.

Q. 10. What product do you regard as intended by a customer when such customer asks for "chocolate quinine"?

A. I would judge that they wanted Coco-Quinine, because I have never had a call for Quin-Coco.

Q. 11. How do you justify the furnishing of Quin-Coco in filling orders where "Chocolate quinine" is specified?

277 By Mr. Rawle: Objected to as immaterial and irrelevant and as not binding on the defendant.

A. Relying on the statement of Mr. Kelton that it was the identical formulæ of Lilly's Coco-Quinine.

Q. 12. You state that you have educated your customers to ask for "chocolate quinine." By what methods?

A. Well, they used to call for "Coco-Quinine," and I would say "You want the chocolate quinine for children," and they would say "Yes," and I would give them Quin-Coco.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

XQ. 13. About when did you have that conversation with Kelton?

A. It has been six or seven years ago. I am sure it was about

the time it was put on the market because he had been calling on me before and had never offered it to me for sale.

X Q. 14. Had you bought his preparations before then?

A. Yes.

X Q. 15. Rather frequently?

A. Kelton and I were great friends and I think I always gave him an order. Occasionally I might have missed him.

X Q. 16. Won't you please state exactly the words he used in offering to sell you Quin-Coco at the time you refer to? State just what he said and just what you said in direct form?

A. I can't repeat his exact words, but I remember that he said he had something new for me. I asked him what it was and he said "Quin-Coco, an identical preparation as Coco-Quinine,
278 and could be used and sold and dispensed as such." He further said a majority of his trade were using it in place of Coco-Quinine.

X Q. 17. I understood you to say that it was a new product. What then would you mean by a majority of his trade?

A. I suppose he was taking orders for it and they were going to use it in place of Coco-Quinine. I know at one time he showed me an order from several of the Dyersburg druggists for a quantity shipment.

X Q. 18. By asking you to state directly just what Kelton said to you and what you said to him, I mean to ask you to give his words and your words in the direct form. For instance you say that he said he had something new for me. Do you mean that his words were "I have something new for you?"

By Mr. Bradford: Objected to as immaterial.

A. I understood that he meant that he had something new for the trade.

X Q. 19. In what words did he express the thought, was it in the words "I have something new for you?" I don't care what impression he made on you. What I want to know and the court will want to know is what words did he use in attempting to convey some impression to your mind?

By Mr. Bradford: The question is objected to as immaterial and incompetent in assuming to state what the court will want to know, or implying that the court will have any interest whatever in the exact words used, so long as the witness testifies to the facts to the best of his recollection and belief.

A. "I have something new for you."

X Q. 20. Give in direct words, if you will, the words that you used in reply, just as you used them?

By Mr. Bradford: Objected to as immaterial.

279 A. As best I can remember I suppose I used the words "What is it," as every salesman, practically every salesman, that has a new article on the market usually addresses you by saying "I have something new for you."

X Q. 21. Now that you understand that what I want is what Kelton said and what you said, expressed in the direct form, will you not go ahead and give in direct form the rest of the conversation, as far as it related to the new product?

By Mr. Bradford: Objection repeated.

A. I have already stated that he told me it was the exact same formulae as Coco-Quinine. I do not rememeber whether I bought any of this article when it was first offered to me or not. And I can't remember what was the exact words said.

X Q. 22. After he said that, what else did he say?

By Mr. Bradford: Objected to not only as immaterial but unreasonable in view of the witness's previous answers.

A. I don't remember. I don't know that we even talked further on the subject.

X Q. 23. And then, or afterwards, you bought some of his Quin-Coco, did you?

A. Either then or afterwards, I did.

X Q. 24. Please state, in the exact words used, by each of you at any subsequent conversation, if there was any subsequent conversation on this subject?

A. When he would make his regular trips he would ask me how was my stock of Quin-Coco. He would always inquire as to how was my stock of Quin-Coco. And I presume that I told him if I had plenty, and if I was short, I bought it.

X Q. 25. Were you a friend of Kelton's and for how long?

A. From the time he first called on me until the time he
280 was discharged. However no more friendly relations existed between Kelton and I than does between their present representative, Mr. Du Vall and myself.

X Q. 26. I am sure that you consider yourself an honest druggist, and I need hardly ask the question?

A. I do.

X Q. 27. And you knew Kelton pretty well. Did you consider him an honest man?

A. I never knew a straighter man in business dealings than Mr. Kelton.

X Q. 28. Now I want to ask you whether Mr. Kelton in his talk in selling you Quin-Coco made any dishonest suggestions to you? Be kind enough to answer Yes or No, and then you can make any explanations afterwards.

A. He told me it could be substituted for Coco-Quinine. If it is the exact formulae of Coco-Quinine, as stated by Mr. Kelton, then I do not consider that he misrepresented it to me.

X Q. 29. What do you understand by "substitution" or "substituted?" Do they imply dishonesty on the part of the druggist?

A. Not necessarily. If an article is identically the same in every respect, no matter who it is made by, I would not consider that I was substituting, as far as what is contained in the article. But I am sorry to say that I have used some of Quin-Coco and given it to

my trade sometimes when I feel sure that they wanted Coco-Quinine. But relying on the statement of Mr. Kelton with what I consider an honorable house behind him, I felt justified in doing it. But believing that Eli Lilly & Co. are really entitled to the sales of this article I will sell no other but Coco-Quinine in the future.

X Q. 30. Then you regret having sold Quin-Coco for Coco-Quinine, do you?

281 A. Yes, I do.

X Q. 31. And you regard Kelton, you said, as an honest man?

A. I do.

X Q. 32. Do you regard your present position as more highly moral than the position you took when you sold Quin-Coco for Coco-Quinine, is that correct?

A. I do. The article may be just as good as Coco-Quinine, but if they want Coco-Quinine I intend to give it to them.

X Q. 33. That is all right. But what I now want to know if you feel sure that Kelton was suggesting to you to do something, which you have now concluded was not quite the square thing to do? How would such conduct on his part be consistent with the respect which you say you have for Kelton as a straight man.

A. I believe that Mr. Kelton believed Quin-Coco to be identical as Coco-Quinine.

X Q. 34. If Kelton was an honest man, in your opinion, do you say that he suggested to you that you should palm off or pass off on unsuspecting customers, Quin-Coco in place of Coco-Quinine when they called for Coco-Quinine?

A. I do not believe Mr. Kelton would have suggested using any article in his belief not just as good or a better article, and I am sure that I would not have sold Quin-Coco to the trade had I not believed it was an identical preparation as Coco-Quinine.

X Q. 35. You do not quite answer my question. I will repeat it. (X Q. 34 repeated.)

A. He did do it, but I believe with—He told me that it could be used as a substitute for Coco-Quinine.

X Q. 36. Please give his exact words in telling you that?

A. I have already stated several times that he stated that it was the identical formulae of Coco-Quinine ,and I believe he was honest in thinking so.

282 X Q. 37. Do you consider it as dishonest in a druggist or not dishonest to palm off or pass off an identical preparation in place of the other preparation when called for without informing the customer as to what he is getting?

A. If the preparation is identical it may not be dishonest, but it is not right.

X Q. 38. Then what I am trying to get at is whether the honest salesman, Kelton, made you a suggestion that you should buy his Quin-Coco and use it in a way that was not right in you as a druggist?

A. He made the suggestions that I have already stated. We all

do things at times that might seem to be all right, but after more serious thought find it is not exactly right and just.

X Q. 39. I assume that Kelton may have had the same regard for you as a straight man that you had for him. Is it not possible that in offering you Quin-Coco to take the place of Coco-Quinine he meant that you could in a perfectly straight way dispense it, letting the customer know that he was getting Quin-Coco?

A. I don't know what he thought about it, but I know that it hasn't been sold for Quin-Coco.

X Q. 40. You have not answered my last question. I will ask you to do so?

By Mr. Bradford: The question is objected to as the witness's answer was fully responsive to the question.

A. I hardly think Mr. Kelton expected me to tell every customer that called for Coco-Quinine that it wasn't Coco-Quinine, but was Quin-Coco.

X Q. 41. How long since you have sold Quin-Coco?

A. I am selling it now.

X Q. 42. How was your attention called to the thought that your method of selling Quin-Coco was not quite right, as you have expressed yourself?

A. Well, after thinking over the matter seriously it having
283 been offered to me as a substitute for Coco-Quinine, and realizing that Lilly was the first to get this on the market, and has gone to the expense of advertising this article to the physicians, I feel that they are justly entitled to the demand they have made for it.

X Q. 43. When did you think it over with this result?

A. In the last ten days. I thought of it more seriously in the last ten days. When Mr. Winchester, the representative of Eli Lilly & Co., telling me that this proceeding had been started and asked me to testify in Memphis, I tried every way to keep out of this and after thinking over the matter seriously I have come to this conclusion, that it is not the right thing to do, that is, to sell Quin-Coco for Coco-Quinine.

X Q. 44. When Winchester talked to you about this did he know what you had been doing in selling Quin-Coco?

A. I don't know that he did. He has seen both articles in my store, we keep both on hand. He might have. I don't know whether he did or not.

X Q. 45. I mean did Winchester know your methods in selling Quin-Coco, which methods you have testified were not quite right, or did you tell him about your methods?

A. I am not sure but I don't think I ever went over this matter with Winchester. I am sure that he knew that I was selling about five gallons of Quin-Coco to one gallon of Coco-Quinine.

X Q. 46. In your opinion as an honest druggist, is there any reason why a later product which is identical with an earlier product, should not be sold on its merits, provided that the customer is not

deceived and that he knows whether he gets the earlier product or the later product as the case may be? I refer now to pharmaceutical specialties.

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

284 A. There is no reason that they should not be if it is identical, but it should be sold for just what it is.

X Q. 47. Will you tell me if the only instance known to the drug business of identical drugs or preparations is the instance of Coco-Quinine and Quin-Coco?

By Mr. Bradford: Objected to as wholly immaterial, irrelevant and incompetent and not cross-examination.

A. No, there are other similar preparations, as far as the formulæ is concerned. I can say Quin-Coco is the only substitute that we carry in our store.

X Q. 48. Is it not extremely common in your business to handle or to be offered similar preparations?

By Mr. Bradford: Objection repeated and notice is given that plaintiff will not undertake to furnish defendant either witnesses or time to introduce into the record opinions on such irrelevant subjects.

A. Do you mean similar to Coco-Quinine and Quin-Coco, or do you mean to other pharmaceuticals?

X Q. 49. Are there not hundreds of cases or very many cases, where, if you wish to carry a certain drug, preparation, or specialty, you could find on the market more than one such drug, preparation or specialty which was similar to or perhaps identical? Is that not the case?

By Mr. Bradford: Objection and notice repeated.

A. Yes, I understand that some houses, as soon as a reputable house gets out some article, some houses will at once try to put on a similar article at a cheaper price.

X Q. 50. Mention any similar or identical preparation, drugs or specialties which you carry in stock?

By Mr. Bradford: Objection and notice repeated.

285 A. Well, take Syrup of White Pine Compound; most all houses make Syrup of White Pine Compound. Of course those things are made up, and many other things are made up according to the U. S. P. and would have to be identical.

You might say Elixir of Iron, Quinine and Strychnine, U. S. P. All of those would have to be identical to come up to U. S. P. When a pharmaceutical house, as I understand it, puts up a new preparation similar to the one put up by some other house, they show this to the physicians and submit to them their formulæ, but each house may have an entirely different name and when prescribed would be pre-

scribed by the special formulæ that the doctor wants and I will add that that is different from Coco-Quinine because other articles are practically all prescribed through the physician and Coco-Quinine is as commonly sold and called for in a drug store as salts or other similar articles.

X Q. 51. As the result of all this examination and consideration I come now to the final question, do you consider that your friend, Kelton, made you a dishonest suggestion to buy Quin-Coco and palm it off on your customers for Coco-Quinine when called for? I ask you to answer Yes or No.

By Mr. Bradford: The question is objected to as the witness has answered this question fully on several occasions.

A. I don't consider that he meant this dishonestly.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 52. I understood you to say that your feelings toward the Warner house were friendly and that you are a regular patron of said house. Is this correct?

A. This is correct.

286 R. D. Q. 53. I also understand that you are in doubt as to whether you made your first purchase of Quin-Coco at the time Kelton made his first introduction of the subject to you, or at another time. Was the representations he made at the first interview made at the time you made your first purchase, whether it was then or later?

A. Yes, he recommended it until I made the first purchase as being the same.

R. D. Q. 54. Was anything said about the price?

A. He recommended that I should handle it because it was the identical formulæ and cheaper in price.

Deposition closed.

C. H. PORTER.

Subscribed and sworn to before me this 5th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EDMUND F. BARNES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edmund F. Barnes; age 28; McComb City, Miss.; retail drug-

gist; I am one of the stockholders of the McComb City Drug Store. I am President of the corporation and Mr. E. C. Ellzey is Secretary and he and I together run the store.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine at your store?

A. We do.

287 Q. 3. Whose product do you recognize it to be?

A. Eli Lilly & Company.

Q. 4. How long have you handled this preparation?

A. Ever since I have been in the drug business, about ten years.

Q. 5. Do you have considerable demand for it?

A. Yes, we have a regular sale for it, a continuous sale.

Q. 6. How do you dispense it?

A. On prescriptions and when asked for by customers, at the counter.

Q. 7. In your own containers or bottles?

A. I pour it out in bottles and put my own labels on it.

Q. 8. Have you ever had a prescription for Quin-Coco at your store?

A. No, sir.

Q. 9. Have you ever had a customer ask for Quin-Coco at your store?

A. No, sir.

Q. 10. Have you ever been solicited to buy Quin-Coco, and if so, by whom and what were the reasons advanced why you should purchase it by the party offering it?

A. Quin-Coco has been offered us by Mr. Gonzales the salesman and representative of Warner & Co.

He offered it to be used as a substitute for Coco-Quinine and said that it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quinine without any one being the wiser.

Q. 11. Has Mr. Gonzales offered you Quin-Coco on more than one occasion, and if so, when was the first occasion if you remember?

A. I don't remember the exact dates, but he has been in our territory since January of last year, January, 1914, and he calls on us about every sixty or ninety days, and at each time he offers Quin-Coco.

288 Q. 12. Did you ever purchase any Quin-Coco of Mr. Gonzales or the house he represents?

A. No, sir.

Q. 13. Why did you not buy it?

By Mr. Rawle: Objected to as irrelevant.

A. I didn't think I could sell it to my customers because they don't know about it, and I couldn't dispense it because I didn't get prescriptions for it.

Q. 14. Did he say anything to you about the cost of it, the price?

A. He did, but I have forgotten what he said. He told me that

it was cheaper than Coco-Quinine, but just what the difference was I don't remember.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 15. Please give the exact words of Gonzales when he offered you Quin-Coco as you have testified?

A. He said "How is your stock of Coco-Quinine, why don't you buy our Quin-Coco. It is the same formulae and the only chocolate quinine on the market that can be disposed for Coco-Quinine without any one being the wiser. Besides it is cheaper."

X Q. 16. When he said this to you did he know that you were a druggist that was in the habit of substituting one drug for another or one preparation for another?

By Mr. Bradford: Objected to as improper and immaterial.

A. If he knows that he knows more than anybody else. I don't substitute.

X Q. 17. Then are you not in the habit of substituting one preparation for another without informing the parties?

259 A. I don't quite understand how to answer your question.

X Q. 18. When a customer calls for one preparation, are you in the habit of selling him another preparation without informing them?

A. No, sir.

X Q. 19. Would you consider it honest in a druggist to do so?

A. No, sir.

X Q. 20. And if I should accuse you of that sort of practice, you would resent it, wouldn't you?

A. I would.

X Q. 21. Did Gonzales suggest that sort of practice to you on Quin-Coco?

A. He offered Quin-Coco to be used as Coco-Quinine.

X Q. 22. Meaning that you should dishonestly use Quin-Coco for Coco-Quinine, and pass it off on your customers without telling them?

A. He suggested that I buy Quin-Coco and dispense it for Coco-Quinine, but there was nothing said of dishonesty.

X Q. 23. Then you didn't think that he was suggesting any dishonest course to you?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. He suggested that I use it as Coco-Quinine but there was nothing said of dishonesty.

X Q. 24. Did you understand him as suggesting to you that you should dishonestly dispense it as Coco-Quinine?

By Mr. Bradford: Objection repeated.

A. I did.

X Q. 25. Did you resent it and tell him so?

By Mr. Bradford: Same objection.

290 A. I told him that I never substituted.

X Q. 26. Do you swear that you told him you never substituted?

By Mr. Bradford: Same objection.

A. I do.

X Q. 27. Did you afterwards buy anything from him on that day? Or had you previously on that day bought anything from him?

A. I had not bought anything from him on that day, and haven't bought anything from him since.

X Q. 28. You testified that Gonzales suggested that you buy Quin-Coco and dispense it for Coco-Quinine. Please state precisely the exact words in which you can swear that he made such a suggestion to you?

By Mr. Bradford: Objected to as improper and immaterial.

A. I answered that once. I will repeat it though, if you wish me to. He asked me "how was my stock of Coco-Quinine," and asked me why I didn't buy Quin-Coco, and told me that it was the only chocolate quinine on the market that could be dispensed for Lilly's Coco-Quinine without any one being the wiser, and that it was cheaper.

X Q. 29. Do you swear that you distinctly and clearly remember that Gonzales spoke these exact words; namely:

"This is the only chocolate quinine on the market that can be dispensed for Lilly's Coco-Quinine, without anybody being the wiser."

A. I do, with the addition of the suggestion that it was cheaper, after he had asked how my stock of Coco-Quinine was.

X Q. 30. And in spite of this you didn't order him out of your store, did you?

A. No, sir.

X Q. 31. Are you in the habit of letting people in your store make dishonest suggestions to you, without ordering them out of
291 the store or taking some action like that?

By Mr. Bradford: Objected to as wholly immaterial, irrelevant and incompetent.

A. This is the only instance that I can recall and I only told him that I didn't substitute.

X Q. 32. Would it be dishonest in your opinion when a customer calls for Coco-Quinine to advise him to take Quin-Coco and thus make the sale?

By Mr. Bradford: Objected to as incompetent, not being cross-examination and as wholly irrelevant and immaterial.

A. No, sir. If I told the customer at the time that it was a good preparation.

X Q. 33. Then isn't it fair to give Gonzales the benefit of the doubt and to believe that that was the way he meant you to sell Quin-Coco for Coco-Quinine? I mean do it honestly.

By Mr. Bradford: Objected to as incompetent, this being a question for the court to decide and not the witness, and as irrelevant and immaterial.

A. Gonzales offered Quin-Coco to be dispensed on prescriptions, as well as to be sold over the counter as Coco-Quinine. In the case of a customer asking for Coco-Quinine we could honestly dispense Quin-Coco with the consent of the customer after having mentioned its merits, but in the case of a prescription it would be dishonest, without the physician changing the prescription to Quin-Coco.

X Q. 34. And that is what Gonzales suggested to you to do, wasn't it?

By Mr. Bradford: Objected to as an improper question. The witness having answered fully what Gonzales suggested.

292 A. No, sir.

X Q. 35. I repeat X Q. 33.

A. No, sir.

X Q. 36. Give the exact words in which he offered Quin-Coco to be dispensed on prescriptions.

By Mr. Bradford: Objected to as an unjustified repetition of questions; also as immaterial and irrelevant.

A. He asked "How is your stock of Coco-Quinine," and asked "Why don't you buy our Quin-Coco, it is the only chocolate quinine on the market that can be dispensed for Coco-Quinine without any one being the wiser."

X Q. 37. Is that all?

A. And besides that it is cheaper?

X Q. 38. Is that all?

A. He might have said something else but I don't just recall what it was. We didn't close our conversation right at that time.

X Q. 39. You have just testified two or three times that Gonzales said to you that Quin-Coco could be dispensed for Coco-Quinine, without any one being the wiser.

In answer to X Q. 33 you testified that "Gonzales offered Quin-Coco to be dispensed on prescriptions." How do you explain the difference between these two statements and which is correct?

By Mr. Bradford: Objected to on the ground that there is no difference between the two statements, as counsel well knows.

By Mr. Rawle: Mr. Rawle requests opposing counsel so far as he

can, to make objections in such form that they will not be suggestive to the witness.

By Mr. Bradford: Mr. Bradford requests opposing counsel to interrogate the witness in such form as to develop facts and not otherwise.

293 A. He meant on prescriptions written for Coco-Quinine originally.

X Q. 40. What did he say?

By Mr. Bradford: Objected to as having been answered several times.

A. He said it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quinine.

X Q. 41. And you now stick to it that that is what he said on that part of the subject?

A. Yes, sir.

Cross-examination closed.

Deposition closed.

E. F. BARNES.

Subscribed and sworn to before me this 5th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Tuesday, April 6, 1915, at same place, St. Charles Hotel, New Orleans, La., at 9 a. m.

New Orleans, La.,
St. Charles Hotel, April 6, 1915—9 a. m.

Met pursuant to adjournment, at St. Charles Hotel.

Parties present as before.

CHARLES C. BROUSSARD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

294 By Mr. Bradford:

Q. 1. Are you the same Charles C. Broussard who has already testified in this cause?

A. I am.

Q. 2. Do you recall any conversation at any time between yourself and Mr. B. F. Jones, traveling salesman for William R. Warner & Co., in the presence of Mr. Howard S. Smith? If you do will you please relate what was said at the conversation, where it took place, and any other circumstances in reference thereto, that may be of interest.

A. I remember a conversation that took place in Houma, La., be-

tween Mr. Jones and myself in the presence of Mr. Smith, in which Mr. Jones remarked that he had sold five gallons of Coco-Quinine the day previous. I told Mr. Jones that he hadn't sold any Coco-Quinine at all, as he didn't have it for sale. And he answered that he meant Quin-Coco which was the same thing.

Q. 3. When was this conversation as near as you can remember?

A. As near as I can remember it was sometime last fall.

Direct-examination closed.

Cross-examination.

By Mr. Rawle, without waiving the prior objections nor the notice to strike out, following Q. 12 of the witness's examination in chief:

X Q. 4. What was the name of the druggist as to which I questioned you in X Q. 13? Are you ready to give the name now?

By Mr. Bradford: I object to this question as improper, the witness having stated a good reason in answer to X Q. 21 of his previous examination for declining to give the name of the party re-
295 ferred to. Counsel for plaintiff will not ask any witness to disregard a promise even though the information sought may be of great value to plaintiff's case. He does not think that it is fair or would be an honorable thing to do. He here promises counsel for defendant however that he will make a diligent effort by other means to obtain the name of the party in question and also to produce said party as a witness in this cause. Up to this time he has been unable himself to obtain the name of said party, and is as ignorant thereof as counsel for defendant. There is no desire, as previously stated, to keep the name of said party from the knowledge of opposing counsel, and the question which gave rise to the present situation was asked without any previous knowledge that witness was not at liberty to answer.

The question is further objected to as clearly not cross-examination at this time.

A. No, sir, I am not ready to give the name, for the same reason given in my previous testimony.

By Mr. Rawle: Mr. Rawle repeats the notice to strike out and not waiving the same cross-examines as follows:

X Q. 5. What were you three doing at the time you have told us about?

A. If you have reference to the conversation between Mr. Jones and myself in the presence of Mr. Smith, we were in the lobby of the Commercial Hotel at Houma, Louisiana, discussing business.

X Q. 6. Just happened to meet there casually?

A. Yes, sir. We were all stopping at the same hotel.

X Q. 7. What had you been talking about when this conversation ensued which you have testified to?

A. Well, we were talking about business conditions in gen-

296 eral, and Mr. Jones always has the habit of telling just how much business he does, and I suppose he just wanted to let us know that he sold that much Quin-Coco that day, or the day previous.

X Q. 8. Were you having a very serious business talk, or was a light and pleasant and perhaps jesting talk, such as I observe is very common among salesmen I have been associating with in the last three weeks?

A. There wasn't any jesting about the matter. We were simply talking about the general condition of business throughout the territory when he mentioned this.

X Q. 9. It was a dead serious talk, was it?

A. Well, it was as serious as any business talk could be, I suppose.

X Q. 10. And Jones in speaking of his sales accidentally used the name Coco-Quinine for the name Quin-Coco, did he?

A. I can't say whether it was accidentally or not, but he mentioned just the facts as I have stated.

X Q. 11. Have you noticed, or do you know, that all through these depositions counsel in referring to either of these products have got the names mixed on the record, so that the Examiner has had to correct them?

A. No, sir, I did not notice.

X Q. 12. Is it not possible that Jones simply, as we say, misspoke, and accidentally used the wrong name for his product, which he said he had sold?

By Mr. Bradford: Objected to as incompetent.

A. Mr. Jones certainly ought to know the name of his own product.

X Q. 13. Please repeat the words of the conversation?

A. I have already—well, Mr. Smith of the Finlay-Dicks and Company and myself were in the lobby of the Commercial Hotel, at Houma, La., where we met Mr. Jones, who represents the William R. Warner & Company, and in speaking about general busi-
297 ness conditions throughout the territory, Mr. Jones mentioned the fact that he had sold five gallons of Coco-Quinine the day previous and I answered him that he hadn't sold any Coco-Quinine at all as he didn't have any for sale. He replied that he meant Quin-Coco which was the same thing.

X Q. 14. Are you aware that your version and the version given by Howard S. Smith differ?

A. No, sir, I do not know what Mr. Smith testified to.

X Q. 15. Please answer X Q. 13, of your first examination.

A. I cannot answer, for the same reasons stated in my previous testimony.

Mr. Rawle repeats the notice to strike out the entire deposition.

Cross-examination closed.

Deposition closed.

C. BROUSSARD.

Subscribed and sworn to before me this 6th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

MAX SAMSON, witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.
A. Max Samson; age, 54; New Orleans, La.; Proprietor
298 of Max Samson's Retail Drug Store, at No. 117 Camp St., New Orleans, La.
Q. 2. Do you do a large prescription business?
A. Yes.
Q. 3. Are you familiar with a pharmaceutical product known as Coco-Quinine?
A. I am.
Q. 4. Do you receive prescriptions for it?
A. Occasionally.
Q. 5. How long have you handled this product?
A. About ten years.
Q. 6. Whose product do you recognize it to be?
A. Eli Lily & Company's.
Q. 7. Do you also sell it to customers over the counter?
A. Yes, sir.
Q. 8. Has the demand for this product been a continuous one at your store since you began handling it?
A. It has, a slight demand but nothing very large.
Q. 9. Do you receive prescriptions from physicians all over the city?
A. Yes, my business is scattered all over the city.
Q. 10. Have you ever received a prescription written for Quin-Coco?
A. I can't recall it to mind.
Q. 11. Have you ever received a call from a customer for Quin-Coco?
A. I can't remember that either.
Q. 12. Would you be likely to know if there were calls, prescriptions for Quin-Coco at your store?
A. Yes.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 13. During how many hours of the average time your store is open, are you present dispensing drugs?
299 A. Probably eight. I am present that time, but I

simply supervise. The store is open from 7 a. m. until 10 p. m.

X Q. 14. Do customers ever call for a chocolate quinine preparation?

A. People have called for a chooclate quinine preparation and Eli Lilly's is the only one we have, which we have sold on these calls.

X Q. 15. When customers seem to want a chocolate quinine preparation, do they usually ask for it in that way or do they specify the exact trade name of a preparation of that sort? Which is most common?

A. At my store I have a more intelligent class of patrons I imagine than in the majority of stores located in a residential district and they seem to know what they want and the majority of them ask for the preparation under its proper name.

X Q. 16. Do a considerable minority ask for it as "chocolate quinine" or similar words, but not specifying the precise trade name?

A. The majority of them ask for it under the trade name although we have had calls for a chocolate quinine preparation.

X Q. 17. Your answers are never responsive to my questions. Please state whether or not a considerable minority of your customers, wishing to purchase a chocolate quinine preparation call for it by such words or words of like import but without giving the precise trade name of the product they desire?

A. A very considerable minority.

X Q. 18. Do such minority ever use other names than chocolate quinine, such as "sweet quinine," or "tasteless quinine," or "syrup of quinine?"

A. Yes.

X Q. 19. All of them or any of them?

A. A considerable majority of the minority.

X Q. 20. If that is so, how can you swear that not a single
300 one of them has in his mind and means to purchase Quin-Coco?

A. I never made any such oath, I never said that.

X Q. 21. May they not so have intended?

A. Or implied.

X Q. 22. You mean that they might have so intended, do you?

A. I can't read a man's mind, sir.

X Q. 23. In such case do you ask him what kind of chocolate preparation or tasteless quinine, or syrup of quinine, or sweet quinine they wish to purchase?

A. It depends upon the way the customer asks for it.

X Q. 24. Please explain.

A. Well, we have a syrup of quinine, known as the syrup of amorphus quinine, and the same comes in liquid and in powder, and we endeavor to give our patrons what they ask for. We may go into detail when there is any doubt as to what they really want.

X Q. 25. If the customer asks specifically for a "chocolate quinine" preparation, without saying anything more what do you give them?

A. On one or two occasions I endeavored to make a preparation of my own, but it did not reach my expectations, and having the Lilly preparation on our shelves we found it more convenient to dispense that.

X Q. 26. When a customer calls for a "chocolate quinine" preparation, I understand you to say that you feel it to be legitimate and proper to make a preparation of your own and dispense it. Is that correct?

A. Yes, where no specifications are made.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. Did you know of any chocolate quinine preparation on the market prior to the time Coco-Quinine was introduced
301 to the profession by Eli Lilly & Co., of Indianapolis?

A. If I did I have forgotten it.

R. D. Q. 28. Who do you consider has created the demand for a syrup of quinine preparation flavored and colored with chocolate?

By Mr. Rawle: I object to the question as irrelevant and immaterial, and because the witness is not qualified to give the information inquired about.

A. I don't know. If you want my experience, my opinion, I only know of the Eli Lilly preparation.

Recross-examination, without waiving objections.

By Mr. Rawle:

R. X Q. 29. In your thirty years of experience in the drug business have you never before Lilly's Coco-Quinine came out, known of the sweetening of a bitter dose of quinine by flavoring it with chocolate?

A. Yes. You ask me if masking the bitter taste of quinine. In my experience we used a salt of quinine with chocolate in the form of a lozenger. This salt was known as a tannate of quinine and was not very bitter, in fact very slightly bitter.

R. X Q. 30. When was this?

A. About twenty years ago.

R. X Q. 31. Was it common and what period did it cover, to your knowledge?

A. Two years positively.

R. X Q. 32. Can you remember any other preparation of cinchona or any derivative with chocolate, the latter being used to mask the taste?

A. Not as being sold, only experimentally.

R. X Q. 33. That seems to me to be rather strange. Has not

chocolate during all your experience been commonly used as a flavoring?

302 A. Flavoring for what?

R. X Q. 34. For pharmaceutical preparations mask an objectionable taste in any given drug?

A. Very, very little.

Re-cross-examination closed.

Deposition closed.

MAX SAMSON.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

LUCIEN E. LYONS, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Lucien E. Lyons; age, 57; New Orleans; Wholesale Druggist. I am of the firm of I. L. Lyons & Co., Ltd., Wholesale Druggists, and we have a Retail Department.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?

A. We do. It is the product of Eli Lilly & Co.

Q. 3. Do you handle it in both your jobbing and retail departments?

A. In both.

Q. 4. Does this product enjoy a considerable demand from the retail drug trade and also from the customers and patrons of your retail drug store?

A. To the best of my knowledge it has.

Q. 5. How long has your house been handling this product, if you can state?

303 A. Between ten and twelve years, we didn't handle the line in the beginning.

Q. 6. How long have you been in the drug business?

A. About thirty-two years.

Q. 7. Did you know of any quinine preparation in syrup form, colored and flavored with chocolate, prior to the time Coco-Quinine was introduced by Eli Lilly & Co.?

A. I think not.

Q. 8. Have you ever had a demand or a call for a preparation called Quin-Coco?

A. Of my personal knowledge, no, but I have been informed by one of our pricers that there have been possibly two or three calls for it.

By Mr. Rawle: The last clause is objected to as hearsay.

Q. 9. Has there ever been any demand for it in your retail store either by prescriptions or by customers?

A. To the best of my knowledge, no.

Q. 10. Did you make an inquiry or investigation to ascertain this fact, before coming here?

By Mr. Rawle: Objected to as calling for hearsay.

A. I did.

Q. 11. Whose product do you understand to be intended when Coco-Quinine is called for, without any other specification?

A. Eli Lilly's.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. I take it that you have not, for some years at least, had to do with the minor details of the business?

304 A. That is a difficult question to answer, because I am the detail man of the house, I am in every department.

X Q. 13. Do you ever have a demand for chocolate quinine liquid preparation?

A. To the best of my knowledge, no.

X Q. 14. Neither in the wholesale or retail branch of your concern?

A. To the best of my knowledge, no. Upon inquiry I found that we had two orders for the Warner preparation and ordered the goods and supplied them about a year ago.

By Mr. Rawle: Answer is objected to as hearsay.

X Q. 15. In the retail branch are you willing to state that customers have not called for a liquid chocolate quinine preparation, without specifying the exact trade name thereof?

A. No, sir, I couldn't say that.

X Q. 16. Then in what you have said above you have been speaking of the wholesale?

A. No, I have been speaking of the business in general.

X Q. 17. Do you intend it to be your testimony that neither in your wholesale nor in your retail business have you ever had, say, in the last two years, more than two or three calls for a liquid chocolate quinine preparation without specifying the maker?

A. To the best of my knowledge, I do.

X Q. 18. How much of every day for the last fifteen years have you spent in the retail department in such a way as to enable you to know of your own knowledge exactly what customers are calling for?

A. I am in and out of the department, in fact all departments of the house, all during the day, and generally supervising the work.

X Q. 19. Is the entire business in the same building?

305 A. Yes, sir, the retail department is on the same floor as the office.

X Q. 20. Is the retail department an ordinary dispensing drug store?

A. Yes, sir.

X Q. 21. During what hours of the day is it open?

A. From 7 a. m. until 10 at night.

X Q. 22. How many of those fifteen hours do you spend in the retail drug store in such a way that you could know exactly what all the customers are calling for?

A. I hardly know how to answer that question because I don't wait on customers, but very seldom, but reports are given to me of everything that is required to have in the retail store, and then I order the goods accordingly.

X Q. 23. I think my last question is capable of a more specific answer.

A. I answered to the best of my ability that I don't wait on the customers. I am in there possibly twenty times a day and possibly more supervising the business.

X Q. 24. Does this include the evenings after say, five o'clock?

A. Occasionally, and also Sundays.

X Q. 25. Would your going in and out of the retail drug store aggregate two hours a day on the average?

A. That I couldn't answer.

X Q. 26. Are there not many or at least some products of a pharmaceutical kind which enjoy a large sale to retail druggists, which you do not carry in stock, or do not have any call for?

A. Possibly.

X Q. 27. Can you mention any instance?

A. Not in this section, if it has any sale.

X Q. 28. Do you carry in stock Dr. Hobson's Toothache Drops?

306 By Mr. Bradford: Objected to as not cross-examination and as immaterial and irrelevant.

A. Well, I don't trust my memory for everything. We have got over four thousand maybe five thousand patent medicines in our store, and I certainly can not enumerate them all.

X Q. 29. What is your best recollection as to Dr. Hobson's toothache drops?

A. I believe we do carry it, the name is familiar.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 30. What territory does your jobbing department serve?

A. Louisiana, Mississippi, part of Alabama, Florida, lower part of Arkansas, Central America, the Islands.

Deposition closed. LUCIEN E. LYONS.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

FRANK AUSTIN FITCH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Frank Austin Fitch; age 42; New Orleans, La.; sales
307 manager for Parker-Blake Company, wholesale druggists.

Q. 2. Does your store handle a product known as Coco-Quinine, and if so whose product do you recognize it to be?

A. We handle Coco-Quinine. It is manufactured by Eli Lilly & Co., of Indianapolis.

Q. 3. What territory does your house serve?

A. Louisiana, Mississippi, part of Florida, part of Southern Alabama and the eastern part of Texas.

Q. 4. Do you have a considerable demand for this product throughout this entire territory?

A. We do.

Q. 5. How long have you been handling this product?

A. Ever since the Parker-Blake Company have been in business. We have been in business eleven years. I had better be more specific and testify since my connection with the Parker-Blake Company, six years last March past. I know we have handled it all that time.

Q. 6. How are the orders for Coco-Quinine received from your trade, I mean how is the product specified usually?

A. Usually as "Coco-Quinine." Occasionally Lilly's or frequently "Lilly's."

Q. 10. When the orders are for "Coco-Quinine," without "Lilly's" being specified, whose product do you understand is intended?

A. On all orders for "Coco-Quinine," we assume and know that the customer wants "Coco-Quinine, Lilly's."

Q. 11. Have you ever received an order at your store for a product called "Quin-Coco"?

A. Not that I can recall.

Q. 12. Would such an order if received since you have been in charge of your present department, likely come to your notice?

308 A. It would pass through my hands going and coming.

Cross-examination.

By Mr. Rawle:

XQ. 13. Do you have orders for chocolate quinine not specifying the name of the preparation, or the maker?

A. Not that I recall. They are usually "Coco-Quinine".

X Q. 14. Has your concern any retail stores?

A. We may own an interest in some retail store by a matter of credit, to such an extent that we virtually own it.

X Q. 15. How many?

A. One store.

X Q. 16. Where?

A. The Owl Drug Store, Jennings, La.

Cross-examination closed.

Deposition closed. FRANK AUSTIN FITCH.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

RALPH G. PERSELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Ralph G. Persell; age 33; New Orleans, La.; sales manager for Finlay-Dicks & Company, Ltd., wholesale druggists.

309 Q. 2. What territory does your house serve?

A. We cover the entire State of Louisiana, the lower three-quarters of the State of Mississippi, Eastern Alabama, and we have representatives in Tampa, Florida, and Beaumont, Texas.

Q. 3. Do you handle a pharmaceutical preparation known as Coco-Quinine and if you do, whose product is it?

A. We handle Coco-Quinine, made by Eli Lilly & Co., of Indianapolis.

Q. 4. How long has your house been handling this product, if you know?

A. We have been handling it ever since it has been on the market.

Q. 5. Are the demands for Coco-Quinine general throughout the territory covered by your house, and is the demand small or considerable?

A. The demand is considerable. In fact I might say that Coco-Quinine is on two out of every three orders that come into our house.

Q. 6. Have you ever received an order calling for Quin-Coco, since you have been sales manager for your house?

A. Not a single order.

Q. 7. Would you know if such an order had been received?

A. I would.

Q. 8. Do you know anything in reference to the product referred to, called Quin-Coco, and if so, what can you tell us?

A. Previous to my becoming sales manager of Finlay-Dicks & Co., I was ten years a traveling drug salesman and Quin-Coco is generally known in the territory that I covered as a repeater or substitute for Lilly's Coco-Quinine.

Q. 9. Have you ever seen this product in the retail stores while you were traveling salesman?

A. Yes, in some instances.

510 Q. 10. Have you any further information on which you base your statement that it is known as a substitute for Lilly's Coco-Quinine?

By Mr. Rawle: The question and the last answer is objected to as hearsay or calling for hearsay and as irrelevant.

A. No other than Warner's representative, Mr. Jones, with whom I traveled, has told me that it was the same thing as Lilly's Coco-Quinine.

Director-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 11. How long have you been connected with this house in your present position?

A. Two years last October.

X Q. 12. Where were you before and what were you?

A. I was traveling salesman for the Parker-Blake Company of this city.

X Q. 13. What are your duties as sales manager for the present house?

A. To look after the entire sales organization and price all the orders from the country territory and Central American.

X Q. 14. Do you mean that you are at the head of the selling department?

A. Yes, exactly.

X Q. 15. Do you travel very much?

A. Very seldom, I make a tour of inspection about once a year around the territory.

X Q. 16. Whom do you visit or see on such yearly trips?

A. I meet our representatives in various territory and call on the large trade in a few of the best towns covered by each man.

X Q. 17. How many separate items of drugs or pharma-
511 ceutical preparations do you carry in stock, approximately?

A. No human could approximate the different items that we carry. So far as I am concerned I could not approximate them because the drug business is one of a multitudinous small items.

X Q. 18. Give your best approximate, whether it be one or ten thousand or any figure between?

A. I could not say with any degree of accuracy.

X Q. 19. Do you handle during the year as many as five thousand items?

A. Yes, we handle that many and probably a great many more.

X Q. 20. Ten thousand?

A. As I stated, I could not say with any degree of accuracy just how many.

X Q. 21. More than seventy-five hundred or less?

By Mr. Bradford: The question is objected to as useless repetition and unnecessary padding of the record.

A. As stated, I could not say with any degree of accuracy.

X Q. 22. Are you not familiar with your company's stock?

A. Yes, in every detail.

X Q. 23. Do you publish any catalogues showing all your items or substantially all carried in stock?

By Mr. Bradford: Objected to as absolutely immaterial and irrelevant.

A. We publish a catalogue, listing items generally known in this market as "staples," for which we have steady demand. We carry in stock thousands of items which are necessary to have a complete stock, calls for which we have only occasionally, and it would entail an expense and be altogether useless to list these items in our catalogue.

312 X Q. 24. Do you consider that you carry a complete stock?

By Mr. Bradford: Objection repeated.

A. We carry a complete stock of items that are regularly in demand in this section.

X Q. 25. Approximately to how many drug stores or doctors who dispense medicines do you sell in the course of a year?

A. I can not state positively, but it is my impression and I think it is about correct, that our ledgers carry about ten thousand names.

X Q. 26. And you say that two out of every three orders you receive include an item for Coco-Quinine. Is that correct?

A. This statement might not be exactly correct, but the item in question appears on the majority of our orders, as the demand in the territory which we cover is pretty general.

X Q. 27. Then you would like to modify your former statement that two out of every three orders include an item of Coco-Quinine, would you?

A. To the effect of my last statement.

X Q. 28. Why did you so greatly exaggerate the subject in your first answer?

A. I do not admit that I exaggerated, but handling all the orders that I do, and knowing that we supplied it on so many orders, I would judge that our output would conform to the last statement made.

X Q. 29. You say you have ten thousand customers on your ledgers? Do they average approximately ten orders each and every year?

A. Well, I couldn't say that. Some of them we only get one order a year from. Not every account is active. Some are inactive.

X Q. 30. Perhaps some of the ten thousand names on your ledgers are those of drug stores to whom you have ceased to sell on account of credit or the like. Is that probable?

313 A. Altogether. These accounts though are sometimes brought into line and become active accounts.

X Q. 31. About how often is each salesman expected to call on each customer or possible customer?

By Mr. Bradford: Objected to as not cross-examination and as irrelevant and immaterial.

A. Some weekly, some two-weekly, some monthly, some every ninety days.

X Q. 32. State approximately how many orders you receive during the year?

A. Without reference to our books I couldn't tell.

X Q. 33. Do you receive as many as fifty thousand a year?

A. I don't know.

X Q. 34. Do you receive as many as twenty-five thousand a year?

A. If I knew I would have answered you in the first place.

X Q. 35. Do you receive as many as twelve thousand a year?

A. Same answer.

X Q. 36. Do you receive as many as six thousand a year?

A. Same answer.

X Q. 37. You are under oath and are legally bound to answer all proper questions put to you unless an answer to a question would incriminate you. I now ask you to state your opinion or your belief, rather, as to whether your house receives during the year more than twenty-four thousand separate orders for pharmaceutical preparations?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant. And further because the witness has already stated that he don't know the number of orders received.

314 A. I am answering your questions to the best of my knowledge and belief and so stating I could not say accurately how many orders we receive.

X Q. 38. Please state your "belief" as to whether your house during a year receives more than twenty-four thousand separate orders for pharmaceutical preparations?

By Mr. Bradford: Objection repeated.

A. I don't know positively.

X Q. 39. Have you any belief on this subject?

A. I can not go on record as I don't know.

X Q. 40. (Question repeated.)

A. I don't know. I can't tell.

X Q. 41. By the word "substitute" which you have used, do you mean a pharmaceutical preparation which is identical with or similar to another and perhaps earlier preparation on the market, in respect of its medicinal effect?

A. As to many preparations on the market under patent names put out by various concerns there are similar preparations which are supposed to be and in many cases accepted as the same formulæ. This in the parlance of the trade is known as "replacers."

X Q. 42. Are they also known as "substitutes"?

A. "Substitutes" and "replacers" are synonomous.

X Q. 43. And you have now fully answered X Q. 41?

A. This is the best answer that I can give to that question, as I understand it.

X Q. 44. Do you handle "Pill Cascara Cathartic" (Hinkle). I am asking this question in order to make clear your definition just given.

A. Yes, we handle this preparation. I really don't know the originator of it.

X Q. 45. Do you buy it from William R. Warner & Co., of Philadelphia?

A. No, we don't handle Warner's pills generally. But if we had an order for that particular brand we would get it for our customers.

315 X Q. 46. You know the pill, don't you?

A. In a general way only. I know what it is.

X Q. 47. I mean do you know it as an article of commerce?

A. Yes, we handle it.

X Q. 48. Do you know a Lilly & Co., product called "Pill Cascara Compound, Hinkle"?

A. Yes, we handle it.

X Q. 49. Do you understand that these two products are of the same formulæ?

A. I know that it is an "open" formulæ, but I have never compared the Lilly formulæ with the Warner formulæ.

X Q. 50. Have you any doubt that they have the same formulæ?

A. I do not know, having never compared them.

X Q. 51. In order to clear up your definition of "substitute" or "replacer," please assume that the two pills which I have just mentioned, Warner and Lilly, have the same formulæ, and that the Warner pill was originally put out by Warner & Co. Would the Lilly pill come within your definition of a substitute upon those assumptions?

A. They are put out under the same name and if I mistake not are listed by other pharmaceutical concerns. When a preparation has an "open" formulæ and is listed by various manufacturers it is generally accepted as a regular pharmaceutical and not a specialty, as it can be purchased under the same name from various manufacturers.

By Mr. Bradford: No objection has been made to this line of clearly improper examination, for the reason that complainant does not desire to be put in the attitude of objecting to any of its acts being disclosed in the record. Counsel for defendant, however, is now requested to confine his cross-examination to what is legitimately cross-examination and has some relevancy to the issues involved in this suit.

316 By Mr. Rawle: Defendant's counsel refers to Q. 8 where the witness used the words "repeater" or "substitute," and states that he is cross-examining in order to develop what the witness means by those words.

Mr. Bradford: Mr. Bradford replies that the alleged cross-examination speaks for itself.

X Q. 52. Please answer X Q. 51.

A. I answered that question.

X Q. 53. Don't you know that the two pills I have named are not put out under the same name by Warner and Lilly respectively?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. I know that Lilly puts out a pill "Hinkle," and while I am not as familiar with Warner's pharmaceuticals as I am with Lilly's, I am almost certain that Warner puts out a pill "Hinkle" also.

X Q. 54. Question repeated.

By Mr. Bradford: Objection repeated.

A. Same answer; that's all I can say.

X Q. 55. I now ask you to answer X Q. 51.

A. I have answered that question to the best of my ability already.

X Q. 56. Do you use the word "substitute" in respect to a given preparation, without regard to whether druggists handling it dispense it honestly or dispense it by way of palming it off in place of a preceding and earlier preparation on the market to which it is similar or with which it is more or less identical?

A. When a preparation with a given name is in demand and supplied, no substitution takes place. But if this preparation is asked for and a similar preparation under a different name is supplied then this is what we understand as a "substitution."

317 X Q. 57. You have now switched over to the word "substitution." What I am asking you about is whether you place a certain limitation or not upon the word "substitute"? I put it this way. If a given preparation had been on the market for ten years prior to this year, and a similar preparation were offered by another house, would you call it a "substitute" in the language of your business?

A. If the name was identical and supplied as ordered it would not be a substitute.

X Q. 58. I repeat the last question and ask you to answer yes or no as the question is perfectly capable of such an answer.

By Mr. Bradford: Mr. Bradford advises the witness that he is privileged to answer counsel's questions as may seem to him proper and is not necessarily confined to a yes or a no, although where such an answer suits the witness it is advisable to use it.

A. I have answered that question, I think, to the best of my ability.

X Q. 59. Why can't you answer it yes or no?

A. I have answered the question by explanation.

X Q. 60. If I pointed out an animal on the street and asked you if that was a horse or not, could you answer yes or no?

A. Certainly.

X Q. 61. If a given preparation had been on the market for ten years prior to this year, and this year a similar preparation were offered by another house, would you apply the word "substitute" to the latter, in the language of your business? Please reply without regard to whether the trade names of the two preparations were identical or otherwise, but assume only that they were similar and that one had been on the market some time prior to the other.

A. In our business if preparations have the same name and we receive an order we are at liberty to supply either one and
318 it would not be regarded as a substitute. For instance we receive an order for "Simmons Liver Regulator." We are at liberty to supply "M. A. Simmons Liver Regulator," or "Zehlin's Simmons Regulator."

X Q. 62. Can you tell me why you cannot answer or will not answer X Q. 61 yes or no? You can explain your answer afterwards, if you choose. I am only asking you whether your definition of "substitute" covers the given case or instance set forth in my question?

A. Substitution is supplying one thing for another. When a preparation has identically the same name it is optional with us to supply either preparation.

X Q. 63. How is it when they have different names?

A. When they have different names we supply what is ordered.

X Q. 64. I ask you to define a "substitute" or rather to say whether your definition of it extends to a given case set forth in X Q. 61. You have answered by defining "substitutions." Is it possible for you to say whether the word "substitute" is used in the trade to cover the later of two pharmaceutical preparations which are identical or similar but put on the market under a different trade name.

A. It makes no difference when they were put on the market. If their names are the same you are, as I have stated, at liberty to supply either one.

X Q. 65. But if their names are different, what then?

A. If their names are different you can't supply something that you haven't got.

X Q. 66. But suppose you have got both in stock?

A. Then we would supply what was ordered. If we should supply a different preparation from the one ordered we would be substituting.

X Q. 67. If a given pharmaceutical preparation had been on the market for five years and a similar or identical preparation under a different name, were put out by another house, would it
319 be proper to speak of the latter as a "substitute" for the former, and might you not use the word "substitute" in that way, entirely without regard to dishonest substitution by a druggist or drug concern?

A. Any preparation that purports to be the same as another preparation we recognize as a substitute.

X Q. 68. And speak of it as such?

A. Yes.

X Q. 69. Have you ever had any calls in the two and a half years for a "chocolate" quinine syrup or a "chocolate" quinine liquid preparation?

A. Our calls are for "Coco-Quinine."

X Q. 70. Invariably?

A. I am certain that all of our orders are for "Coco-Quinine."

X Q. 71. Of course they all come from the trade?

A. Yes, sir.

Cross-examination closed.

Deposition closed. RALPH G. PERSELL.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Recess until 2.30.

After Recess.

CHARLES HENO, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

320 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Charles Heno; age 37; Napoleonville, La.; retail druggist.

Q. 2. How long have you been in the retail drug business?

A. Some nineteen years.

Q. 3. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if you do whose product is it?

A. I do. It is the product of Eli Lilly & Co.

Q. 4. When did you first begin handling Coco-Quinine?

A. Ever since the product was made, perhaps. Ten years or more.

Q. 5. Had you known of any cocoa or chocolate quinine preparation prior to the introduction of Coco-Quinine by Eli Lilly & Co.?

A. No, sir.

Q. 6. How is Coco-Quinine dispensed at your store?

A. Principally prescriptions, and sometimes on call over the counter, in my own prescription bottles.

Q. 7. How do your physicians write their prescriptions for "Coco-Quinine"?

A. They generally write "Coco-Quinine" and sometimes they specify "Coco-Quinine, Lilly."

Q. 8. When you receive a prescription written for "Coco-Quinine" without the manufacturer's name, whose product do you understand the physician intends?

A. Lilly's.

Q. 9. Is this product Coco-Quinine, prescribed by the physicians in your neighborhood generally and continuously or only occasionally?

A. It is pretty generally and continually. It is a good way of giving quinine to children.

Q. 10. Have you ever received a prescription written for "Quin-Coco"?

321 A. No, sir.

Q. 11. Have you ever had a customer ask for Quin-Coco over the counter?

A. No, sir.

Q. 12. Do you know anything about the preparation called Quin-Coco and if so tell us what you know in reference thereto?

A. All I know is that three or four years ago a representative, I think it was a Mr. Jones, sold me one gallon of Quin-Coco, telling me at the time that it was a cheaper preparation from a financial standpoint then Coco-Quinine, and that physicians were using it all over for Coco-Quinine. I bought a gallon and used perhaps three pints and was stopped by one of my physicians because it did not receive the required results or anticipated results. He told me he did not understand what was the matter with my Coco-Quinine. Then I told him I was using Quin-Coco and he ordered me to stop Quin-Coco and ordered me to buy Eli Lilly's.

By Mr. Rawle: The last part of the answer is objected to as hearsay and as res alios acta.

Q. 13. By Mr. Jones do you refer to Mr. B. F. Jones, the traveling salesman for William R. Warner & Co.?

A. Yes, sir; he is the only Jones that travels in our territory. I don't know his initials.

Q. 14. What did the physician say, if anything, about the preparation?

By Mr. Rawle: Objected to as calling for hearsay and for a transaction which can not affect the rights of the defendant.

A. He told me he didn't want me to use it any more, he didn't get the results that he anticipated. He said it was substitution, that I was substituting his prescriptions.

Q. 15. How was his prescription written on which you supplied the Quin-Coco?

A. "Coco-Quinine."

322 Q. 16. What was the name of the physician?

A. W. E. Kitredge, of Napoleonville, and Dr. T. B. Pugh, was another.

Q. 17. Are both of these physicians still in practice in Napoleonville?

A. Yes, sir.

Q. 18. Have you at any other time ever purchased Quin-Coco from Mr. Jones or any one else?

A. Not since that time.

Q. 19. Have you ever been solicited by Mr. Jones or any one else to buy Quin-Coco since that time?

A. Yes, sir.

Q. 20. Please explain when and what was said on such occasion?

A. Well, I don't remember exactly, but it was two or three months ago when Mr. Jones and a special representative of the laboratories, or one who represented himself as such, came on his regular trip and offered the same products, and said that they had been selling it all along for Coco-Quinine, to be used as Coco-Quinine.

Q. 21. Do you remember who the special representative was?

A. I don't remember his name.

Q. 22. Did he represent himself as a special representative of the manufacturers of Quin-Coco?

A. Yes, of Quin-Coco and all the line of Warner. He said he was from their laboratories and knew exactly how the products were made. He said he could vouch for same, because when I told him that I had kicks about it he said he could vouch for it.

Q. 23. Do you know whether your physicians were satisfied after you quit supplying Quin-Coco and returned to the Lilly preparation in filling their prescriptions?

Mr. Rawle: Objected to as calling for hearsay and as irrelevant and immaterial.

A. I had no complaints afterwards.

Direct-examination closed.

323 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 24. How large a place is Napoleonville?

A. The census says 1,200, but we are about 1,600, and there are three drug stores there.

X Q. 25. Much malaria there?

A. At times, not more than any other place, in Southwest Louisiana.

X Q. 26. Less than there used to be four or five years ago since they began to make war on the mosquitoes?

A. Well we never had no mosquito fight in our section. But it is about the same thing, sir.

X Q. 27. Did Jones tell you three or four years ago that Quin-Coco was taking the place of Coco-Quinine with the physicians?

A. Yes, sir; he told me they used it for Coco-Quinine.

X Q. 28. In prescriptions?

A. Yes, sir.

X Q. 29. Please give his exact words just as he said it, and what you said?

A. I can't remember four or five years back, but I tell you what he told me. He said he was selling a lot of it to physicians. He said, "I am selling a lot of it to physicians for use in their practice and thereby they make more money than by buying Coco-Quinine, and are getting the same results." And that is where he and I differ. I told him that my physicians wouldn't stand for it.

X Q. 30. Then Jones called on you two or three months ago with another man?

A. Yes, sir.

X Q. 31. At that interview did they say they had been selling it to physicians?

A. Physicians and all their trade, they didn't just specifically say physicians, all their trade or their customers.

324 X Q. 32. To take the place of Coco-Quinine?

A. Yes, sir.

Cross-examination closed.

Deposition closed.

CHARLES HENO.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

HARRY W. LYLE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Harry W. Lyle; age 43; New Orleans, La.; salesman for Eli Lilly & Co.

Q. 2. What territory do you cover and what are your duties?

A. City of New Orleans, selling goods to the retail drug trade, and detailing physicians, in behalf of the Eli Lilly & Co., entire line of pharmaceuticals. Orders that I take are filled through the jobbing trade of New Orleans.

Q. 3. Please explain as to the demand for Coco-Quinine in your territory?

A. Yes, there is a general demand from all the retail drug trade of the city, being purchased by them in pint packages up to one gallon packages.

Q. 4. Do many physicians prescribe it?

A. Quite a number practically all of those that I call on who do a general practice.

Q. 5. Who are the jobbing houses of New Orleans?

325 A. I. L. Lyons & Co., Parker-Blake Company and Finlay-Dicks & Co.

Q. 6. Are these all of the jobbers in this territory?

A. They are the only ones that I solicit business through and they are the only ones in the city, with the exception of one small concern who does not handle the line.

Q. 7. Are the concerns named large concerns and do they do a large business?

A. Yes; all three are of about equal importance. All three of them do a very large business in New Orleans and in the surrounding territory.

Q. 8. What are the leading drug stores known as prescription drug stores in New Orleans?

A. Max Samson; Katz & Besthaff and J. A. Legendre. Of these three Max Samson is considered the leading prescription pharmacy of the city. I speak now of the prescription pharmacies down town. Of the suburban stores Mr. Edward H. Walsdorf, Magazine & Peters Avenue, does one of the largest prescription business-. Mr. Walsdorf occupies a very prominent position in local and State pharmaceutical matters, being the ex-president of the Louisiana State Pharmaceutical Association and at present chairman of the executive committee of that association.

X Q. 9. Have you ever seen Quin-Coco in the retail drug stores of this city on your visits?

By Mr. Rawle: Objected to as irrelevant.

A. Yes, sir, repeatedly, very generally, mostly in packages of one gallon.

Q. 10. Do you know anything about its being sold or dispensed as a substitute for Lilly's Coco-Quinine?

By Mr. Rawle: Objected to as calling for hearsay and for transactions which are res inter alios acta and which do not bind the defendant.

A. Naturally the only information that I have is that obtained from the retail druggists themselves, not having had occasion
326 to dispense it myself. Practically all of the retail druggists who have bought this preparation have stated to me frankly that they bought it because it was cheaper than the article I was selling known as "Coco-Quinine," and that they were selling it over the counter upon receiving a call for chocolate quinine. That is about the extent of my knowledge regarding the sale of the preparation known as "Quin-Coco." I have had one physician to complain that he had quit prescribing Coco-Quinine as he did not get the results from it which he formerly did, and that for that reason he no longer used the Lilly preparation or prescribed Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay and as stating no fact which can affect the defendant's rights.

Direct examination closed.

No cross-examination.

HARRY W. LYLE.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EDWARD H. WALSDORF, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edward H. Walsdorf; age 42; New Orleans, La., retail druggist and pharmacist.

Q. 2. How long have you been in the drug business and what has been your experience?

327 A. Twenty-eight years. I have had a great deal of experience, I do a great, large business, a big prescription business, and at one time had eighteen people employed, and ran three stores for seven or eight years. I have been president of the State Pharmaceutical Association, am ex-secretary of the Louisiana State Board of Pharmacy, Examiner in Chemistry and Materia Medica, and now chairman of the executive committee of the Louisiana State Pharmaceutical Association.

Q. 3. Do you handle a product known as Coco-Quinine and if so whose product do you recognize it to be?

A. I do. It is the product of Eli Lilly & Co.

Q. 4. How did you dispense this product?

A. On prescriptions and whenever called for over the counter, in my own bottles.

Q. 5. Did you ever know of a cocoa or chocolate quinine preparation prior to the time Coco-Quinine was introduced by Eli Lilly & Co.?

A. None to my knowledge.

Q. 6. Have you ever seen a physician's prescription written for a product called "Quin-Coco"?

A. I have not.

Q. 7. Have you ever had a customer ask for "Quin-Coco" over the counter?

A. I have not.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. In your large business, of course, many customers might have called for a preparation without your knowing it?

A. I don't think they would call for Coco-Quin, I mean Quin-Coco.

X Q. 9. I ask if it may not be possible that many calls for preparations have been made in your large business without your knowing it?

328 A. It is possible, but hardly likely or not likely.

X Q. 10. Didn't you say you once had seven stores?

A. Three.

X Q. 11. Will you consider for a moment, and say whether before you knew of Lilly's Coco-Quinine you ever knew of some other preparation made of a combination of chocolate and some derivative of cinchona, whether in tablet or liquid form?

By Mr. Bradford: Objected to so far as relating to tablet form as irrelevant and immaterial.

A. I have in tablets, but not in liquid form, never in liquid form. I. Lyons & Co., many years ago, had a chocolate quinine lozenger I think it was, many years ago. It was Lyons' Chocolate Quinine Lozenger.

X Q. 12. What were the ingredients?

A. I suppose quinine and chocolate.

X Q. 13. Was this over sixteen years ago?

A. Yes, sir. It wasn't a good preparation. It would not keep; would become mildewed and we would have to destroy them, throw them in the garbage.

X Q. 14. What color were they?

A. Chocolate color, a grayish chocolate.

X Q. 15. Who made them?

A. I believe I. Lyons & Co.

X Q. 16. Whereabouts?

A. In New Orleans, La.

X Q. 17. Did you dispense them?

A. I did.

X Q. 18. For how many years?

A. I don't remember how many years.

X Q. 19. Give an estimate?

A. About three or four years.

X Q. 20. When fresh made were they satisfactory?

By Mr. Bradford: The question is objected to and all of the questions relating to this tablet as absolutely having no place in the record, wholly irrelevant and immaterial.

329 A. They were.

X Q. 21. How many grains per tablet?

By Mr. Bradford: Same objection.

A. I don't quite remember.

X Q. 22. Have you known calls for a "chocolate quinine" preparation in any of your stores? I mean where a customer used those words or similar words without giving any trade name? Can you answer yes or no?

A. Yes.

X Q. 23. Of course you have had calls for Coco-Quinine, have you?

A. I have, many calls.

X Q. 24. And your customers are men, women and children from all ranks and conditions of life, are they not?

A. Yes, sir.

X Q. 25. About what proportion of the calls are cases where the customer gives the trade name of a preparation of this sort and what proportion are the cases where the customer uses "chocolate quinine" preparation or similar words, but without giving any trade name?

A. About fifty per cent, about half.

X Q. 26. Have you ever before Coco-Quinine, Lilly, came out, made any liquid or other chocolate quinine preparation or combination in your business?

A. No, sir, never.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. Referring to the Lyon lozenger which you have mentioned, do you know whether this lozenger was a success and attained any considerable sale or was generally known?

330 A. It sold very well, but it was generally known to be no good. The sales were local. It was known to be absolutely no good, had no virtue in it unless used when first made. It would mould and deteriorate in two or three days.

Re-direct closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 28. You don't wish to vary your answer to X Q. 20, do you?

A. When fresh made they were satisfactory. What I mean by that is if you used them right away, that is what I meant in my last answer.

R. X Q. 29. When first made they were good therapeutically?

A. When fresh made.

R. X Q. 30. But they didn't keep?

A. No, sir.

Deposition closed.

EDW. H. WALSDORF.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Brook Haven, Miss., tomorrow at 1 o'clock p. m.

Brook Haven, Miss.,

The Inez Hotel, April 7, 1915—1 p. m.

Met pursuant to adjournment, at the Inez Hotel.

Parties present as before.

331 Dr. O. N. ARRINGTON, a witness called by and — behalf of the plaintiff, having been first duly sworn, deposes and says

as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. O. N. Arrington; age 38; Brook Haven, Miss.; physician.
Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and, if so, whose product do you recognize it to be?
A. Yes, sir; Eli Lilly's.
Q. 3. How long have you been familiar with this preparation?
A. As well as I remember since I have been practicing medicine, for about eight years.
Q. 4. Do you use it in your practice?
A. Yes, sir.
Q. 5. How do you write your prescriptions for Coco-Quinine?

By Mr. Rawle: Objected to as irrelevant.

A. Just "Coco-Quinine" with the directions following.
Q. 6. Do you intend when specifying the preparation by this name to specify Lilly's preparation only?
A. Yes.
Q. 7. Did you know of any other coco-qui-ne preparation of liquid form on the market before Eli Lilly's Coco-Quinine was introduced?
A. No, sir.
Q. 8. Has this preparation been used by you in your practice, continuous over the period of eight years you have mentioned?
A. Yes, sir.

Direct-examination closed.

332 Cross-examination.

By Mr. Rawle:

X Q. 9. Do you dispense your own drugs or do you furnish medicines to your patients only by means of prescriptions?
A. This preparation only by prescription, as I do not carry it with me.
X Q. 10. X Q. 9 repeated.
A. I dispense this preparation only by prescription but I do carry some other drugs with me and dispense them, but not this preparation.
X Q. 11. What proportion of the drugs prescribed by you for your patients are furnished on your prescriptions and what proportion thereof do you personally dispense to your patients?

By Mr. Bradford: Objected to as wholly irrelevant and immaterial.

A. I might answer that this way. All that I administer prac-

tically is emergency drugs, ordinarily called. Drugs that can be had from the drug stores and where time will admit are dispensed by prescriptions.

Cross-examination closed.

Deposition closed. O. N. ARRINGTON, M. D.

Subscribed and sworn to before me this 7th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

SOL C. RAY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

333 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Sol C. Ray; age 34; Brook Haven, Miss.; retail druggist; that is, prescription clerk for the Price Drug Company of this city.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. Yes, sir; Eli Lilly's.

Q. 3. How long have you been familiar with this preparation?

A. For the last thirteen years.

Q. 4. Did you know of any other liquid chocolate quinine or cocoa quinine preparation on the market before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No, sir.

Q. 5. How long have you been in the drug business?

A. Sixteen years.

Q. 6. Do you dispense this product on prescriptions or calls or both?

A. Both, in our own bottles. We label it "Coco-Quinine" just as we label "paregoric," "listerine" or anything else.

Q. 7. Have you ever been solicited to buy a product called "Quin-Coco," and if so, will you relate the circumstances as nearly as you can?

A. Yes, we have been solicited to buy "Quin-Coco," to sell when chocolate quinine was asked for and to use in place of Coco-Quinine, if we desired to use it, on prescriptions. We have had a number of prescriptions for Quin-Coco and for that reason we have to keep some of it on hand. We used to but we haven't had any in about a year. I don't remember just when the last was bought. I didn't do the buying for about three or four months after I came back from Bude, the 6th of last May. I was away from here about fifteen months.

334 By Mr. Rawle: The answer is objected to as not connected with the defendants and as not stating facts but only generalities.

Q. 8. Who offered Quin-Coco to you, and on behalf of what manufacturing house?

A. Mr. Howard Smith was the first and then Mr. Gonzales.

Q. 9. What house did they represent?

A. Do you want all the houses they represent? William R. Warner, the Pfeiffer Chemical Company and Searle & Hereth.

Q. 10. Can you remember what was said to you by either of these gentlemen relative to Quin-Coco and Coco-Quinine? If so, will you please state, specifying which salesman made the statements you refer to?

A. We were offered the Quin-Coco as an article that we could dispense or sell at a bigger profit than we could the Coco-Quinine by both Mr. Smith and Mr. Gonzales.

Q. 11. Was it your understanding of their representations that you could use Quin-Coco to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to because the witness has already been asked to state what was said and has answered the question; also as leading; and because the witness' understanding is not evidence.

A. Yes, sir; that was the understanding.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 12. When did Howard Smith call on you and solicit a sale of Quin-Coco?

A. In 1911 and '12, I think, I couldn't give you the exact date.

335 X Q. 13. Were you buying stock at that time for your store?

A. I was buying for the Price Drug Company.

X Q. 14. Can you fix the date?

A. I could not, no, sir.

X Q. 15. Can you fix it within a month or six months?

A. Mr. Smith lived at Weston and came to Brook Haven about every five or six weeks while in the employ of Warner.

X Q. 16. And solicited your trade every five or six weeks?

A. He solicited trade, yes, sir.

X Q. 17. Your trade?

A. He solicited orders from the Price Drug Company.

X Q. 18. Were you present every time?

A. No, sir; not every time.

X Q. 19. Most of the times?

A. Yes, sir; most of the times.

X Q. 20. Did you ever buy anything from him?

A. Yes, sir; we bought something from him nearly every time he came, some pharmaceuticals of some description.

X Q. 21. Do you suppose he made as many as twenty-five calls on your Price Drug Store to solicit business at which you were present?

A. If you mean while in the employ of Warner he did.

X Q. 22. As many as fifty?

A. I couldn't answer that positively.

X Q. 23. About how many do you think?

A. I should say about thirty-five or forty times.

X Q. 24. To which one of these calls did you refer to above in answer to Q. 8?

A. Mr. Howard Smith.

X Q. 25. I mean to which one of the thirty-five or forty calls that you say Mr. Howard Smith made on you do you refer in your answer to Q. 8?

336 A. We take the catalogue and go through it and order what we need as the articles are called off by the traveling men, by Mr. Smith, or whoever the traveling man should be.

X Q. 26. You say Smith called on you thirty-five or forty times, is that right?

A. Yes, sir.

X Q. 27. And you said something above about his having talked to you about Quin-Coco; is that right?

A. Yes, sir.

X Q. 28. On which one of the thirty-five or forty calls was it that he talked to you about Quin-Coco in the way you have stated above?

A. On almost every call.

X Q. 29. How often did you buy Quin-Coco from him?

A. I would have to look at the invoices to tell exactly.

X Q. 30. As many as five times?

A. In the two years; yes, sir.

X Q. 31. Ten times?

A. I don't think so.

X Q. 32. Please state just what Smith said to you, giving his exact words?

A. That would be impossible, to give the words.

X Q. 33. Can't you give any of them?

A. He said that we could dispense Quin-Coco when chocolate quinine was called for or when Coco-Quinine was called for at a saving of about a dollar a gallon.

X Q. 34. You say he said that you could dispense Quin-Coco when chocolate quinine was caled for. That would be all right, wouldn't it?

A. When chocolate quinine was called for; yes, sir.

X Q. 35. Are you clear that he said you could dispense Quin-Coco when Coco-Quinine was called for?

A. Yes, sir.

337 X Q. 36. How do your customers call for these preparations, by the trade name, or do they call it chocolate quinine a good deal of the time.

A. I would say about half the people call for chocolate quinine and about half for Coco-Quinine.

X Q. 37. Do you consider it a square thing as a druggist, when Coco-Quinine is called for to sell Quin-Coco, without saying anything about it to the customer?

A. No, sir.

X Q. 38. You don't do it, do you?

A. No, sir.

X Q. 39. It isn't considered honest among druggists, is it?
A. No; that would be substituting.
X Q. 40. Is Smith, in your opinion, a square man? Have you known him long?
A. About eight years.
X Q. 41. Have you always thought him a square man?
A. Yes, I always thought he was a good man.
X Q. 42. If he was a good man did you consider that he was making a proposal to you to do a thing which was not honest or square as a druggist—substitution? I mean at all those thirty-five or forty calls.
A. I don't believe that it was right and we didn't buy Quin-Coco to substitute for Coco-Quinine when Coco-Quinine was called for, but to dispense when chocolate quinine was called for and to dispense on prescriptions for Quin-Coco.
X Q. 43. When he called on you all these times did you understand from him that he was making you a dishonest proposal to buy Quin-Coco and dishonestly, as a druggist, substitute it on your doctor's prescriptions? I am asking you whether that is a kind of a proposition he was making you as you understood it?
A. As I understood it, that was a part of his proposition.
X Q. 44. Every time he called.
338 A. I can't say that he did it every time that he called, and I couldn't fix any specific date that he did make the proposition.
X Q. 45. As you are an honest druggist and you say he was making you a dishonest proposal to substitute, how did you answer him?
A. I told him that we didn't want it to use as a substitute at all for calls for Coco-Quinine. We didn't feel that we were substituting when we sold it for chocolate quinine.
X Q. 46. I want to know if you thought he was making you a dishonest proposition?

By Mr. Bradford: Objected to as immaterial and irrelevant.
By Mr. Rawle: Question withdrawn.

X Q. 47. I want to know if you understood at the time that the proposition that he was making you was dishonest?

By Mr. Bradford: Same objection.

A. I knew that the proposition wasn't right, but Smith was a good friend of ours and we never had any arguments in regards to it.
X Q. 48. Is the conversation clear in your mind?
A. As to Mr. Smith's meaning?
X Q. 49. No, as to what he said?
A. In substance it is.
X Q. 50. Can't you give his words?
A. No, I couldn't give his exact words.
X Q. 51. Did he tell you that you could substitute Quin-Coco on doctors' prescriptions, and did he say so distinctly?

A. He did.

X Q. 52. Did he say that you could substitute Quin-Coco on doctors' prescriptions by getting the consent of the doctor to do so?

A. Nothing was ever said about the doctor.

339 X Q. 53. Do you mean that he said that you could sell Quin-Coco over the counter on calls for Coco-Quinine, without informing the customer of what you were doing?

A. Yes, sir.

X Q. 54. This is a pretty serious accusation to make against a salesman. Do you feel sure you are right in making it?

A. I know I am right.

X Q. 55. Who did you first mention these interviews to?

A. I really couldn't tell you.

X Q. 56. When did you first mention them to anybody connected with the Lilly Company?

A. I have talked to Mr. Fly about it on several occasions in the last year or so, when he would mention the stock of Coco-Quinine we had on hand and refer to it.

X Q. 57. Did you tell Fly that you were substituting Quin-Coco for Coco-Quinine?

A. No, sir.

X Q. 58. Were you?

A. No, sir.

X Q. 59. Neither on prescriptions nor over the counter?

A. No, sir.

X Q. 60. Then you have never substituted Quin-Coco for Coco-Quinine on prescriptions or over the counter?

A. I have never substituted it on prescriptions and don't think that I have otherwise over the counter. We usually label those things as they call for it. If they call for chocolate quinine I label it like they call for it, to save explanation. I am speaking personally not for the manager of the business, or any of the other clerks. I don't know what they did.

X Q. 61. If as you say you consider Smith a good man and he was trying to sell you Quin-Coco and introduce it into your

340 store, isn't it possible that he didn't mean to be dishonest but merely meant that you should dispense Quin-Coco when you could and if Coco-Quinine was called for tell the people if you were giving them Quin-Coco?

A. It is possible, but we were never advised to offer explanations to customers or to doctors, for that matter.

X Q. 62. Then you think that you might perhaps have misunderstood Smith and that he wasn't proposing anything dishonest to you?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. I didn't misunderstand the meaning of the proposition.

X Q. 63. That is what you understood, is it? I mean the way you have given it.

A. The way the question was answered, yes, sir. Smith was

good friend of ours and we tried to give him an order for something every time he came to town.

X Q. 64. I understand you have stated what was your understanding of Smith's proposal. Is that correct?

A. Yes, sir; that is the way I understood him.

X Q. 65. Do you swear positively that that was also Smith's understanding of his proposal, or might you have misunderstood him?

A. I have always been under the impression that Quin-Coco was put out for that purpose.

By Mr. Rawle: Answer is objected to as not responsive and as immaterial.

X Q. 66. Please answer the question.

Question reread.

By Mr. Bradford: The question is objected to, the first part because it is incompetent, and the second part because it has already been answered many times.

341 A. I can answer only for myself. I don't know what Mr. Smith's understanding was. I have answered the question just as I understood the proposition to buy the goods from time to time.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 67. You said you always thought Quin-Coco was put out for a purpose. Will you please explain for what purpose?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. To take the place of Coco-Quinine at a saving of about a dollar a gallon to the druggist.

R. D. Q. 68. What preparation had you supplied to your trade when chocolate quinine was asked for before you bought Quin-Coco?

A. Coco-Quinine and occasionally we made up some chocolate quinine on a prescription calling for quinine and chocolate syrup, called for so many grains of quinine and so much chocolate syrup.

R. D. Q. 69. What kind of chocolate syrup?

By Mr. Rawle: Objected to as irrelevant.

A. It was a prescription from a physician and he told me to use fountain chocolate syrup.

Recross-examination, without waiving objections.

By Mr. Rawle:

R. X Q. 70. You have said that you always though that Quin-

Coco was put out to take the place of Coco-Quinine. Isn't that what Smith wanted to sell you Quin-Coco for, to take the place of Coco-Quinine as a chocolate quinine preparation?

342 A. That is the way I understood it.

R. X Q. 71. And that is about the substance of what he said to you at these various interviews, isn't it?

A. Yes, sir.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 72. Do you mean by your last answer that you desire to modify anything that you have said in answer to previous direct or cross-questions on this general subject?

By Mr. Rawle: Objected to as improper for re-re-direct-examination and as an attempt to lead the witness.

A. No, sir, I think that is as near as possible what I said before.

R. R. D. Q. 73. You mean that your statements relative to these matters are as correct as you can make them?

(Same objection.)

A. I think it is as correct as it is possible for me to make them.

Deposition closed. SOL. C. RAY.

Subscribed and sworn to before me this 7th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Hattiesburg, Miss., at Hotel Hattiesburg, at 8 p. m., today, April 7th, 1915.

343 Hattiesburg, Miss.,
Hattiesburg Hotel, April 7th, 1915—8 p. m.

Met pursuant to adjournment at Hotel Hattiesburg.

Parties present as before.

FLOYD I. AMES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Floyd I. Ames; age, 29; Hattiesburg, Miss.; Retail Druggist. I am a Partner and Manager in the Century Drug Store of this City.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if you do, whose product do you recognize it to be, and about how long have you handled it?

A. We do. The product of Eli Lilly & Co. We have handled it ever since it has been on the market I guess, for at least ten years or more.

Q. 3. How do you dispense it?

A. On prescriptions and as called for, in our own bottles under our own labels.

Q. 4. Have you had a considerable and continuous sale for it during all these years?

A. Yes, we have had quite a sale for it during all these years.

Q. 5. Have you ever received any prescriptions calling for Quin-Coco?

A. Not that I remember of.

344 Q. 6. Have you ever had any calls for Quin-Coco over the counter from customers?

A. I can't recall ever having had any.

Direct-examination closed.

No Cross-examination.

Deposition closed.

FLOYD I. AMES.

Subscribed and sworn to before me this 7th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Laurel, Miss., tomorrow, April 8th, 1915, at Hotel Pinehurst, at 9 a. m.

Laurel, Miss.,
Hotel Pinehurst, April 8th, 1915—9 a. m.

Met pursuant to adjournment, at the Hotel Pinehurst.
Parties present as before.

WESLEY S. AMES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Wesley S. Ames; age, 24; Laurel, Miss.; Retail Druggist, Manager of the Century Drug Store, at Laurel.

345 Q. 2. Do you handle a preparation at your store known as Coco-Quinine, and if so, whose product is it?

A. I do, and it is known as the product of Eli Lilly & Co.

Q. 3. How do you dispense Coco-Quinine?

A. As "Coco-Quinine" when it is written on the prescription or called for by the laity, when the laity call for chocolate quinine and the like, in our own bottles labeled "Coco-Quinine."

Q. 4. How long have you been handling Coco-Quinine?

A. I don't know just exactly, but about ten years I think.

Q. 5. Did you know of any other liquid quinine preparation flavored and colored with chocolate before Coco-Quinine was brought to your attention?

A. No, sir, I did not.

Q. 6. Do you have a considerable demand for this preparation at your store?

A. Yes, sir, we have a pretty good demand for it.

Q. 7. Have you ever had any prescriptions at your store for the product called "Quin-Coco?"

A. I don't know positively about that, I know of no specific one right now.

Q. 8. Do you remember of ever receiving a call from a customer for Quin-Coco at your store?

A. They designate Coco-Quinine, the laity, when they come in and ask for chocolate quinine and it is possible that I have had them to call it Quin-Coco.

Q. 9. I asked you if you ever remember of any customer calling for Quin-Coco?

A. I do not remember that they have asked for Quin-Coco.

Q. 10. When a customer asks for chocolate quinine, what preparation do you understand they intend?

By Mr. Rawle: Objected to as immaterial.

A. I understand them to want Coco-Quinine.

346 Q. 11. Have you ever been solicited to buy Quin-Coco, and if so, on what representations?

By Mr. Rawle: Objected to as an improper question, the only proper question being, what was said.

A. Quin-Coco has been offered to me for sale as a similar preparation to Coco-Quinine, and I have been told that I could dispense it on calls for Coco-Quinine, without detection, and that it was the same goods exactly. That's about the only representations I have had.

By Mr. Rawle: The answer is objected to as not stating the facts of the transaction.

Q. 12. Was anything said about price?

By Mr. Rawle: Objected to as improper, the only proper question being as to what was said, and as leading.

A. It was quoted at a cheaper price to me than Coco-Quinine.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle·

X Q. 13. I suppose that your customers in your store are men, women and children of all classes in life?

A. Yes, sir.

X Q. 14. Is "cocoa" as a name for a certain article as commonly used by the laity as "chocolate?" I am speaking now of the raw material which is very commonly called chocolate, for instance, in connection with candy, and what I am asking you is whether the laity are not more familiar with the word "chocolate" than they are with the word "cocoa." I am not referring to any drug or pharmaceutical preparation.

A. The laity regard cocoa as chocolate. They don't re-
347 gard it as a medicine, and it is used just as commonly, as far as I know.

X Q. 15. You say that the laity usually ask at your store for chocolate quinine? Is that right?

A. They ask for chocolate quinine occasionally, because they get chocolate and cocoa confused in their minds, I suppose.

X Q. 16. You testified that "the laity when they come in and ask for chocolate quinine." Do they commonly come in and call for chocolate quinine?

A. They do quite frequently. I will illustrate that to you. A man will come in and say "My wife wants me to get some quinine syrup for the baby, I believe she said chocolate or cocoa or something like that." I have calls frequently like that. And my interpretation of an order like that is that they want Coco-Quinine.

X Q. 17. Is that the only kind of quinine syrup for the baby that you keep?

A. The only kind in a chocolate base.

X Q. 18. And you don't keep Quin-Coco?

A. No, sir.

X Q. 19. Do you know anything about it?

A. Not from actual experience by handling it, no, sir.

X Q. 20. You have given me one illustration of how a customer comes in and what he asks for. Can you give me another one? Do the customers sometimes ask for a chocolate quinine preparation?

A. They do, yes, sir.

X Q. 21. Is that quite common?

A. It is.

X Q. 22. Can you mention any other words in which they ask for such a preparation as that?

A. No, only in my other answer.

X Q. 23. What proportion of the laity, old and young, rich and poor, ask for such a preparation, and call for it by its exact name of "Coco-Quinine?" You can answer approximately.

348 A. Well, it is hard to say just exactly, but at least two-thirds of them anyway, to the best of my knowledge.

X Q. 24. At least two-thirds of them ask for which?

A. "Coco-Quinine."

X Q. 25. How long have you done the buying for the Century Drug Store, of this City?

A. Fourteen months.

X Q. 26. Are you the only one that does the buying for it?

A. I am, and have been.

X Q. 27. Give the name of the salesman who offered you Quin-Coco?

A. I can't remember the name, I can't remember just who he was. He was representing the Pfeiffer Chemical Company I believe, or whoever manufactures it.

X Q. 28. When was this?

A. I don't remember the date.

X Q. 29. Had he ever solicited the trade of the Century Drug Store before that?

A. He never had because we have only been in business fourteen months.

X Q. 30. Was this his first call on you at that drug store?

A. As I remember it was, at this store, yes.

X Q. 31. Has he ever solicited your business since that first call?

A. A representative of the same people call on me now, a Mr. Jones. However, I don't remember if he is the man that had offered me Quin-Coco or that he has offered it to me.

X Q. 32. How often has Mr. Jones called on you and solicited your trade?

A. Three or four times as nearly as I remember, since I have been here.

X Q. 33. You can't state positively, can you, that it was Jones who offered you Quin-Coco for sale? I refer to your answer to Q. 11.

349 A. I cannot state positively that it was Mr. Jones, because in buying a person does not pay any attention, having so many salesmen call on them, and don't know the names of a third of them who do call.

X Q. 34. Do you state positively that you had a call from another Warner salesman before Jones first called on you?

A. No, I didn't say another Warner salesman. I said I didn't remember whether it was Mr. Jones or not because I am under oath here and giving my testimony to the best of my knowledge and I am not stating any specific facts unless I know it to be a fact.

X Q. 35. State your best recollection as to whether it was Jones or another Warner salesman?

A. My best recollection is that it was Mr. Jones. However, I may be mistaken in that.

X Q. 36. When this salesman called, did he offer you a full line of Warner preparations?

A. He offered me Warner's goods, and Searle & Hereth and other lines manufactured by the people that he worked for, or controlled by them.

X Q. 37. How many different items or articles in the lines he offered you at that interview, did you talk about?

A. I can't remember. I rather think we reviewed the whole line just like other salesmen do.

X Q. 38. How long was the conversation?

A. I can't say exactly. It may have been thirty minutes, or it may have been an hour.

X Q. 39. Did you buy anything from him?

A. I don't remember that I bought anything at that time, I have bought stuff from that concern since I have been here.

X Q. 40. Why can't you remember whether you bought anything from him at that time?

A. Because I have on an average of three or four traveling men call on me every day in the week, every week in the year, and with the other duties connected with running the business I can't remember.

350 X Q. 41. Where was the interview held?

A. At the Century Drug Store, Laurel, Miss.

X Q. 42. Do you remember in what part of the drug store?

A. Out in the store, in the lobby part. By "lobby" I mean not behind the counter, but in front of the counter.

X Q. 43. Please state the exact words which Mr. Jones used in offering you Quin-Coco, as far as you can remember them?

A. To begin with, I won't state that Mr. Jones was the salesman that offered me Quin-Coco positively. But Quin-Coco has been represented to me as being identical with Coco-Quinine and offered to me at a cheaper price.

X Q. 44. Did that salesman offer it to you at that time as being identical with Coco-Quinine and cheaper?

A. Yes, sir.

X Q. 45. What else did he say?

A. Not anything of any importance other than that it was just chocolate quinine, chocolate syrup of quinine in it and that it was identical with Coco-Quinine. He probably said something else but I don't exactly remember verbatim.

X Q. 46. Please try to remember what else he said, if anything, and give the exact words in which he said it?

A. It is hard to answer that question, because he didn't say anything more than any other salesman would say when he is offering a similar preparation to one that is already on the market.

X Q. 47. Is yours a large drug store, doing a large business?

A. Not a very large one, it is an average drug store.

X Q. 48. How many are there in this city?

A. Five, including ours, and a suburban drug store.

351 X Q. 49. About where do you stand on the volume of the business, compared with the others?

A. We think we do about next to the biggest in town.

X Q. 50. Can you give me any instances in which you carry in stock two lines of similar preparations made by different pharmaceutical manufacturers, so that I can understand more clearly your answer to X Q. 46?

By Mr. Bradford: Objcted to as not cross-examination, as immaterial and irrelevant.

A. I can think of some similar preparations as there are pills similar to lapactic pills in formulæ. They have different names.

Lapactic pills are made by Sharpe & Doehme. I have got a pill in stock called "Evacuant." It is made by Parke, Davis & Co., as well as I remember, the formulæ being the same as lapactic, I think.

I have got preparations that are similar to listerine in formulæ. Listerine is made by Lambert of St. Louis. There is a similar preparation made by Parke, Davis, called "Euthymol."

X Q. 51. You have a Parke, Davis preparation similar to listerine. Have you a Lilly preparation similar to listerine? I think it is euchalyptus and thymol compound.

By Mr. Bradford: Objection repeated.

A. I can't say how my stock is just now. I think Eli Lilly & Co. make a euchalyptus and thymol antiseptic solution.

X Q. 52. Have you ever carried it in stock?

(Same objection.)

A. And I have dispensed it, but not in tablet form.

X Q. 53. Please give me another instance, of two similar preparations or articles which you know of or carry in stock?

(Same objection.)

352 A. Dioxygen and peroxide of hydrogen. Dioxygen made by Oakland Chemical Company and peroxide by most anybody. I can make it if I had the apparatus.

X Q. 54. Do you know of "Tabloid, Rhubarb, Calomel and Colocynth Compound, made in London by Burrows, Welcome & Co.?

(Same objection.)

A. Yes, sir.

X Q. 55. Ever carried it in stock?

(Same objection.)

A. Yes, sir.

X Q. 56. Has Lilly got a similar preparation?

(Same objection.)

A. I think they have, but I wouldn't say positively, as I am not running Mr. Lilly's business.

X Q. 57. Isn't Lilly's product called "Tablets, Calomel, Rhubarb and Colocynth Compound?"

(Same objection.)

A. I can't say. I don't know about it, sir. I haven't got them in stock now.

X Q. 58. Mention some other cases which you know of or carry in stock of similar preparations?

(Same objection.)

A. I don't know any other, I don't recall any.

X Q. 59. Do you know of a preparation called "Haydens Viburnum Compound?" Do you carry it and do you know of a similar preparation by another house?

By Mr. Bradford: Same objection. Counsel for plaintiff calls the court's attention to the flagrant breach of the privilege of cross-examination being indulged in by counsel for defendant and to the further fact that he has requested counsel for defendant to
353 desist and to take his own testimony in his own time and at his own expense, further stating that he has no objection to having all of the information which these questions seek to bring out brought to the attention of the court, but believes that this is neither the time, the place, or the method proper to use for the purpose.

By Mr. Rawle: Mr. Rawle states that he believes that he is cross-examining within the strict limit of proper practice and not beyond it, and refers to X Q. 46.

A. I carry "Haydens Viburnum Compound" in stock made by Hayden Chemical Company, I think and I have got other preparation with viburnum in them. I don't know whether they are similar to Hayden's viburnum or not and never would attempt to use one of these to take the place of Hayden's.

X Q. 60. Do you know or do you carry "Glyco-Thymoline" and also any similar preparation? Give the names and the names of the makers?

(Same objection.)

A. I know of Glyco-Thymoline and carry it in stock. It is made by Kress and Owen, and I know of Borol made by Parke, Davis, which is similar and Eli Lilly makes an alkaline antiseptic solution I think, which is similar. There may be others, I don't know.

X Q. 61. I should like to ask you again, because there seems to be a discrepancy in what you have said, whether there isn't a majority of the customers of all ages and conditions who ask for a chocolate preparation or a syrup of quinine or a sweet or tasteless quinine, without giving the exact trade name of the preparation?

A. No, sir, there isn't a majority. My experience hasn't been a majority.

Cross-examination closed.

354 Redirect examination.

R. D. Q. 62. Where were you in business before becoming manager of the Century Drug Company here?

A. I was a druggist with the Century Drug Store at Hattiesburg. This is a branch of the Hattiesburg store.

R. D. Q. 63. Have your answers been based upon your experience at both the Hattiesburg and the Laurel stores?

A. Yes, sir.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 64. Did you do the buying for the Hattiesburg concern?
A. I did the buying of the pharmaceuticals, yes, sir.

Deposition closed. WESLEY S. AMES.

Subscribed and sworn to before me this 8th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

ANTHONY FLY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Anthony Fly; age, 45; New Orleans, La.; Traveling Salesman for Eli Lilly & Co.

355 Q. 2. What territory do you cover?

A. I cover the territory generally known as South Mississippi, and points in Louisiana east of the Mississippi River.

Q. 3. Do you sell a product known as Coco-Quinine, and if so, what can you tell the court relative to the demand for such product in your territory, and how the demand has been created?

A. Yes, I sell Coco-Quinine and in connection with the commercial end of it it becomes my mission as a repreesntative of Eli Lilly & Co. to detail this item to the medical profession, it being one of our leading specialties.

The demand for Coco-Quinine has been created by Eli Lilly & Co. for years past, by a continued effort on the part of salesmen and special detail representatives of Eli Lilly & Co. in introducing this item to the practicing physicians and the drug stores throughout the country.

Following this line of procedure in the way of detail work there is a very large demand for the product known as Coco-Quinine.

Q. 4. How long have you been in the drug business, and in what capacity, from the beginning to the present time?

A. Practically my entire life has been spent in the retail drug business. The past four years and three months I have been associated with Eli Lilly & Co. in the capacity of a salesman. Being more accurate I can say that I have been associated with the retail drug business for the past twenty-seven years.

At the age of 18 I opened up a business for myself in the town of Centerville, Miss., at which point I remained in business for three or four years and then moved to McComb City, Miss., where I operated a retail drug store almost continuously for about twenty-one or twenty-two years. In 1910 I organized a drug company

356 and opened a very extensive retail drug store in Canal Street, in the City of New Orleans. After severing my connection

with this concern I then became associated with Eli Lilly & Co., and have been constantly in their employ since January 1st, 1911. For the first eight months I covered the territory known as South Georgia and for the remainder of the time the territory above stated.

Q. 5. As a retail druggist before your connection with Eli Lilly & Co. were you familiar with a product known as Coco-Quinine, and if so, how long have you known of it approximately?

A. Yes, I have known Coco-Quinine practically ever since it was placed upon the market. Roughly speaking without consulting any data I would say it covered a period of about fifteen years.

Q. 6. What can you say relative to whether or not this product was an original product of Eli Lilly & Co.?

A. Previous to the introduction of this item known as "Coco-Quinine," there was nothing of a similar character which represented quinine sulphate in a liquid form that had been offered the trade or profession as a proprietary product.

Q. 7. In your work as traveling salesman, do you visit retail drug stores and inspect their stocks of pharmaceuticals, and other products behind the prescription counter?

A. Yes. I make it a point to visit at regular intervals as nearly as possible all retail drug stores, dispensaries, hospitals, sanitariums and such institutions that distribute medicine.

Q. 8. What do you know about the sale of a product called "Quin-Coco" in the territory you cover?

A. I do know that the sale for the item known as "Quin-Coco offered under the label of Searle & Hereth, and distributed under the supervision of the salesmen of William R. Warner & Company.

This product is offered and sold generally as a substitute for
357 Coco-Quinine, based upon the sale and the popularity of the item known as "Coco-Quinine," which has been so strenuously exploited by Eli Lilly & Company for a number of years.

By Mr. Rawle: Mr. Rawle objects to the answer, the last part, as incompetent and inadmissible and as stating an inference and not facts, and even so as based only on the witness's experience of about one per cent of the whole country.

Q. 9. What are your reasons for the statement in your last answer that Quin-Coco is sold as a substitute for Coco-Quinine?

By Mr. Rawle: Objected to because calling for inferences and not for facts, and calling for evidence which does not affect any right of the defendant, being necessarily transactions between third parties.

A. Because it is generally known and accepted by the drug people throughout the entire country as being a piece of goods that is sold upon the strength and the popularity of Coco-Quinine.

By Mr. Rawle: The answer is objected to as giving inferences and not facts and as referring to the entire country in which the witness has had knowledge of only a small section, and as incompetent and inadmissible.

Q. 10. What do you know of your own knowledge on this subject?

A. Many times in soliciting business from the retail buyers in my territory when the item of "Coco-Quinine" is offered I am told "I have plenty on hand. I just received a gallon of Quin-Coco that hasn't been opened." I am also told quite frequently by buyers "Why should I buy Coco-Quinine from Eli Lilly & Co., and pay them $4.80 for a gallon when I can buy Quin-Coco for $3.50."

358 By Mr. Rawle: Objected to because stating transactions between third parties not binding the defendant, and as incompetent and inadmissible.

Q. 11. In your business as a retail druggist did you fill prescriptions yourself?

A. Yes, I did. I was actively engaged in prescription work the entire length of time that I operated a business for myself. I am a registered pharmacist under the laws of the State of Mississippi and for four years occupied the position as President of the Mississippi Board of Examiners, as well as serving a term as President of the Mississippi Pharmaceutical Association.

As a man actively engaged in the filling of prescriptions I felt that the prescription work was a sacred trust, based upon confidence and any departure from the accuracy of dispensing was considered entirely out of my prerogative and as history will bear me out the slogan that I used in connection with my business was "Substitution Considered a Crime."

Q. 12. Did this slogan express your personal sentiments?

A. It undoubtedly did.

By Mr. Rawle: The last two questions are objected to as incompetent and immaterial.

Q. 13. Why did you consider substitution a crime?

(Same objection.)

A. For the reason that in dispensing medicine under the direction of an attending physician I thought that in presuming to substitute one item for another I was taking upon myself a great responsibility and one that did not come within my province, feeling that in presuming to substitute one item for another I might possibly be undoing all that had gone before in the way of diagnosis by the physician who is the legitimate source for the prescribing for his patients.

Direct examination closed.

359 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. I understand that your duties are among other things to call on retail druggists and take orders for Lilly's line of goods and

turn these orders over to a jobber, who fills them. I understand that they are not filled directly from the Lilly factory to such druggists. Am I correct?

A. Not entirely so, for at times, we make what is known as a "drop shipment," the order being filled either by the home office of Eli Lilly & Co. or by one of its branches, the same being billed through the jobber as specified by the customer. As a rule these orders are taken, sent to the jobber to come out with the next regular shipment, as specified by the customer.

X Q. 15. As a business matter, apart from how the goods are shipped, is not the actual sale of a given order made by your house to the jobber and the jobber alone charged for the price?

A. Our policy is to ship exclusively through the jobber and not to bill to the customer direct.

X Q. 16. Do you invariably bill to the jobber?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. I have nothing at all to do with the billing, and as I explained the policy of the house is to ship through the jobber and to no retail customer direct. In other words we have no individual transaction with any retail customer, as I understand the policy of Eli Lilly & Co.

X Q. 17. Is it your business to call on retail druggists, show them your line of Lilly goods and solicit orders?

A. It is.

X Q. 18. In this part of your work, wherein are your methods different from those of salesmen of other pharmaceutical houses?

A. Our methods are distinctive. We have one policy for
360 doing business with the retail trade, treating all customers alike, regardless of quantity. We have no bargains, quantity prices, or special deals, to offer any retailer.

X Q. 19. Apart from these virtuous sentiments I ask you whether it is not a part of your business, and a large part of it, to offer Lilly goods to retail druggists?

A. It is.

X Q. 20. Do you know any salesmen of other drug houses?

A. Quite a number of them.

X Q. 21. Don't they call on retail druggists and offer them the goods of their respective houses?

A. I imagine that they do. That is what they are employed for.

X Q. 22. Have you any doubt on the subject?

A. I have never given the subject any thought.

X Q. 23. You have just testified, X Q. 18: "Our methods are distinctive." If you have never given the methods of other salesmen any thought how can you say that your methods are distinctive?

A. My experience as a retail buyer for twenty odd years being approached by divers and sundry manufacturers' and jobbers' salesmen has made me thoroughly competent to express the opinion that the policy of Eli Lilly & Co. is thoroughly distinctive and in a class by itself.

X Q. 24. Do Lilly's salesmen solicit the sale of Lilly goods to retail druggists, yes, or no?

A. Yes.

X Q. 25. Do other drug houses and jobbers have traveling salesmen who visit retail druggists and solicit the sale of their respective lines, yes, or no?

A. They do.

X Q. 26. Then when you visit a retail druggist you talk to him precisely as if you were desiring to sell him the Lilly line of goods, although you are only taking his order for the purpose of
361 turning it over to a jobber. Is that correct?

A. That is, but we stand behind a price that is made and guarantee the customer that he shall be taken care of as applying to any irregularities that might appear on his invoice from his jobber.

X Q. 27. How many items approximately have you in the Lilly line?

A. I have never enumerated them, but it is generally understood that our price list covers approximately five thousand items.

X Q. 28. I understand you to say that the demand for Lilly's products has among other things been created by soliciting sales from druggists and by recommending your goods to physicians. Don't the other drug houses do the same thing?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. In some instances they do. In other words, some houses do and some do not.

X Q. 29. Don't most of the drug houses do the same thing?

(Same objection.)

A. Answering that question directly, Mr. Rawle, covers a wide field. Most of the houses do not do what is called "detail" work.

X Q. 30. Don't most of the houses solicit sales from druggists?

A. Most of the houses, what houses?

X Q. 31. I mean drug manufacturers and drug jobbers?

A. They do.

X Q. 32. But you say that not all the drug houses do "detail" work among the doctors, is that correct?

A. Yes, I would say that they don't all do it so far as my knowledge and belief is concerned.

X Q. 33. Do a majority of them do it?

362 A. I am incompetent to answer that, whether a majority of them do it or not.

X Q. 34. What is your belief based upon experience?

A. My belief is that they do not.

X Q. 35. You said something about special salesmen to introduce Quin-Coco to doctors and druggists throughout the country. Do you mean that the Lilly house sends out special salesmen on that preparation alone?

A. I beg to say that I have made no statement whatever in re

gard to Eli Lilly & Co. sending out a special salesman to introduce Quin-Coco.

X Q. 36. Then they don't send out special salesmen to introduce Quin-Coco?

A. No, sir, they do not send out special salesmen to introduce Quin-Coco. We have nothing at all to do with Quin-Coco.

X Q. 37. I see that in the last question I misspoke and said "Quin-Coco" when I meant "Coco-Quinine." I now ask you whether you mean to say that the Lilly house sends out special salesmen to introduce Coco-Quinine to the trade?

A. In answer to this question I will say that every representative of Eli Lilly & Co. is a special salesman to introduce their specialties, prominent among them being Coco-Quinine.

X Q 38. How many other specialties have you in your line approximately?

A. Approximately, about thirty.

By Mr. Bradford: All this line of examination is objected to as wholly irrelevant and immaterial and unnecessary padding of the record.

X Q. 39. About how many drug stores are there in your territory, approximately?

A. Roughly speaking I should say about three hundred.

X Q. 40. Did you ever hear of the word "replacer" in the drug business?

363 A. Only as a gentle covering for the word "substitution."

X Q. 41. Have you ever heard of the term "Copy-formula?"

A. That is not a common term used in connection with the retail drug business.

X Q. 42. Have you in the Lilly line a product called substantially "Tablet, Rhubard, Calomel and Colocynch?"

By Mr. Bradford: Objected to as an improper question, not being cross-examination, and being wholly immaterial and irrelevant.

By Mr. Rawle: Mr. Rawle calls attention to some evidence of the witness on the question of substitution.

A. If I understand your question correctly, we have not, because you have got the formula wrong.

X Q. 43. Give the correct name of the Lilly product?

(Objection repeated.)

A. We quote a price on a sugar coated tablet containing two grains each of calomel, rhubard and colocynch compound, which tablet, according to my best knowledge and belief will be found amongst the formulæ of the N. F. or U. S. P. and which is made and sold by divers and sundry pharmaceutical manufacturers.

X Q. 44. Who made and marketed the original compound of these ingredients?

(Objection repeated.)

A. I am unable to say.

X Q. 45. Was Lilly the first house to put this preparation on the market?

(Objection repeated.)

A. I don't know.

X Q. 46. Have you never heard of "Tabloid, Calomel, Rhubard and Colocynch Compound," made by Burrows, Welcome & Co., of England, or seen it?

364

(Objection repeated.)

A. Yes, I have heard of them, just as I have heard of pill compound cathartic made by Sharpe & Doehme.

X Q. 47. Are you familiar with the size and shape of the tabloids in the Burrow's preparation?

By Mr. Bradford: Objection repeated, and attention of the court is again called to the flagrant violation of counsel's right to cross-examine outside of the court on a line which has no bearing whatever on anything developed in direct-examination, and clearly for the purposes of attempting to justify some theory of the defendant's case.

(Mr. Rawle refers to the witness's testimony as to "substitute.")

A. Not any more so than I am with the sugar coated tablets made by other manufacturers.

X Q. 48. Don't you know that they are the same size and shape as the Lilly similar tablets?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant; counsel inquiring about a pharmaceutical preparation common to all since memory of man runneth not to the contrary.

A. I don't know that they are the identical size and shape at all.

X Q. 49. Aren't they substantially the same size and shape?

(Objection repeated.)

A. They are about the same size and shape just as the half grain calomel tablets made by other manufacturers.

X Q. 51. You have said something about "replacer" and "substitute." If the Burrowes calomel tabloid was the first on the market and the Lilly tablet followed it would you say that the Lilly tablet was a replacer or substitute for Burrowes'?

365

Objection repeated.

A. No more than I would say that any standard pharmaceutical product made by a competing house would be a substitute one for the other.

X Q. 52. Do you know of Hayden's Viburdum Compound or a preparation of substantially that name?

Same objection.

A. Yes, I know of a semi-patent or proprietary article which is sold under the name of Hayden's Viburdum Compound.

X Q. 53. Hasn't Lilly in its list a preparation called substantially Elixir Viburdum Compound?

Same objection.

A. They have.

X Q. 54. Do you consider Lilly's as a replacer of Hayden's?

Same objection.

A. I do not.

X Q. 55. Why not?

Same objection.

A. Because it is not alike in color, odor, or taste, the same as H. V. C. The formula of Hayden's Viburdum Compound is a hidden formula which no competing manufacturer knows nor are they in position to make a piece of goods so nearly like in its physiological action, as to take the place of H. V. C. I would say further that there is a piece of goods manufactured by William R. Warner that in odor, color, and taste is so nearly like Hayden's Viburdum Compound in its general appearance that it is used in a number of places as a substitute remedy for Hayden's Viburdum Compound.

366 By Mr. Rawle: The last part of the answer is objected to as volunteered.

X Q. 56. Isn't Lilly's Elixir Viburdum Compound intended to take the place of H. V. C.?

Same objection.

A. Elixir of Viburdum Compound, Lilly, is an open formula, printed upon its label, bearing the quantitative ingredients contained therein and is sold to be dispensed upon its merits.

X Q. 57. And you would recommend it to a druggist as a suitable remedy in cases where H. V. C. would be suitable?

Same objection.

A. I have stated in my previous answer that this item was distinctive in its odor, color and taste, so completely so that it could not be used as a substitute for H. V. C.

X Q. 58. X Q. 57 repeated.

Same objection.

A. I would not.

X Q. 59. Why not?

Same objection.

A. For the reasons stated.

X Q. 60. Do you understand that odor, color and taste in a medical preparation have anything to do with medicinal value necessarily?

A. Not necessarily with its medicinal value, but frequently odor and taste has a great deal to do with the patients being able to retain the medication when given internally.

X Q. 61. About how often do you call on each druggist in your district, approximately?

A. As nearly as possible every sixty days.

X Q. 62. By detailing physicians do you refer to having a drug salesman visit a physician and explain to him the virtues of his line of goods or some of them?

367 A. Detailing to a physician from a pharmaceutical point of view means the exploiting of specialties and talking the individual merits of the particular preparation when it is introduced to the physician?

X Q. 63. You have testified, X Q. 18, that the Lilly house has no quantity prices. Is that correct?

A. That is absolutely correct.

X Q. 64. Do you know Lilly's prices?

A. I guess I do.

X Q. 65. Do you know the price of Fluid Extract of Cascara?

A. Yes, I do. The Fluid Extract of Cascara in single pounds is $1.20 a pound net. In one gallon quantities, bulk, $4.95. In five gallon packages, bulk, $3.60 per gallon net. To all alike, large or small who engage in the retail drug business.

X Q. 66. Is the price for one gallon eight times the price for one pound?

A. I have given you the prices there.

X Q. 67. Question repeated.

A. The prices on bulk goods does not mean quantity prices. The price on one pound of any item net, would be the same as one hundred one pounds in individual packages. The same way with gallons and five gallons.

X Q. 68. Have you a price on a dozen packages of soda mint tablets?

By Mr. Bradford: Objected to as absolutely immaterial and irrelevant.

A. We have.

X Q. 69. Have you a gross price?

Same objection.

A. We have.

X Q. 70. Is it twelve times a dozen price?

Same objection.

A. It is not. But this gross price applies to all retail drug-
368 gists alike, large or small, regardless of their buying ability.

Cross-examination closed.

Deposition closed.

ANTHONY FLY.

Subscribed and sworn to before me this 8th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at 5.30 p. m. today at Collins, Miss.

Collins, Miss., April 8th, 1915—5.30 p. m.

Met pursuant to adjournment.

Parties present as before.

ELLIS B. STOVALL, a witness called by and on behalf of the plaintiff, being first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Ellis B. Stovall; age 30; Collins, Miss.; retail druggist; proprietor of Stovall's Pharmacy, in Collins, Miss.
Q. 2. Do you know anything about a pharmaceutical preparation known as Coco-Quinine, and if so, when did you first know of it and whose product is it?
A. Yes, I have known of it six or seven years, ever since I
369 have been in the drug business. It is Eli Lilly & Co. product.
Q. 3. Did you ever handle it in your store?
A. Yes, sir.
Q. 4. Do you handle Eli Lilly & Company's Coco-Quinine now?
A. I have handled it, but I have not bought any for the last two or three years.
Q. 5. Do you receive calls for Coco-Quinine?
A. Occasionally.
Q. 6. What do you fill these calls with?
A. If I have Coco-Quinine I give them Coco-Quinine and if I don't, I give them Quin-Coco, because I regard it as practically the same.
Q. 7. Do you always explain to the physicians when they ask for "Coco-Quinine" and you give them Quin-Coco, what preparation they are getting?
A. No, I don't do that.
Q. 8. Do you always explain to the physicians when you receive physicians' prescriptions for Coco-Quinine?
A. I do if he specifies Lilly's. If he don't specify Lilly's, I fill it with Quin-Coco without any explanation.
Q. 9. Why do you consider Quin-Coco the same as Coco-Quinine? On whose representations and statements?
A. All I have to go by is the formula on the bottle.
Q. 10. Did any one ever tell you that Quin-Coco was the same as Coco-Quinine?
A. I don't know that I have ever had them tell me it was the same, but said it was practically the same.

Q. 11. Did they ever tell you it could be used to supply the demand of Coco-Quinine?

A. They said I could use it as Coco-Quinine.

X Q. 12. Who told you this?

A. Warner & Company's representative, Mr. B. F. Jones.

370 Q. 13. Did you buy the Quin-Coco on such representations and dispense it accordingly?

A. Yes, I guess I did. I bought it because they both contained the same amount of quinine, as quinine was what they were after and both were tasteless preparations, and I considered that I was giving them what they were asking for.

Direct-examination closed.

ELLIS B. STOVALL.

(This deposition was taken during the temporary absence of Mr. Rawle, counsel for defendant, due to automobile trouble of the machine in which he was riding from Laurel to Collins, and after waiting for his arrival until nearly time for the train to leave for Gulfport, according to our schedule the deposition is closed subject to producing the witness for cross-examination at a later date and subject to any objections which Mr. Rawle may desire to place of record, to have the same force and effect as if made at the time the direct-examination was made.)

Subscribed and sworn to before me this 8th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

O. S. MAYFIELD, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. O. S. Mayfield; age 33; Collins, Miss.; retail druggist; proprietor of the Collins Drug Company.

Q. 2. Are you familiar with a pharmaceutical prepara-

371 tion known as Coco-Quinine, and if so, whose product is it and how long have you been familiar with it?

A. I am familiar with it and it is the product of Eli Lilly & Co., and we have been handling it for three or four years or more.

Q. 3. Have you ever been offered a product known as Quin-Coco, and if so, by whom and on what representations?

A. Yes, I was offered it by Mr. B. F. Jones, of Warner & Co. and the Pfeiffer Chemical Company. I cannot say the exact language used, but it was offered me as a cheaper preparation than Coco-Quinine and one that could be used for the same purpose, as similar preparation to Coco-Quinine.

Q. 4. Did you buy it?

A. No, I don't think we have ever bought any.

O. S. MAYFIELD.

Subscribed and sworn to before me this 8th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

(This deposition was taken during the temporary absence of Mr. Rawle, counsel for defendant, due to automobile trouble of the machine in which he was riding from Laurel to Collins, and after waiting for his arrival until nearly time for the train to leave for Gulfport, according to our schedule the deposition is closed subject to producing the witness for cross-examination at a later date and subject to any objections which Mr. Rawle may desire to place of record, to have the same force and effect as if made at the time the direct-examination was made.)

(Mr. Rawle arrived later.)

By Mr. Rawle: Mr. Rawle, having read the depositions has no cross-examination.

372 He objects to Q. 6, Q. 7 and Q. 8 of Stovall as irrelevant and as stating matter which is res inter alias acta.

Q. 10 is objected to as leading; also Q. 11.

Q. 13 is objected to as irrelevant.

As to Mayfield deposition no objections.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Mobile, Ala., tomorrow, Friday, April 9th, 1915, at 10.30 a. m., at the Battle House.

Mobile, Ala.,
Battle House, April 9th, 1915.

Met pursuant to adjournment.

Parties present as before.

SAMUEL H. COLVIN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Samuel H. Colvin; age 37; Mobile, Ala.; wholesale drug business. Manager of Van Antwerp Wholesale Drug Company, Incorporated, of Mobile, Ala.

Q. 2. What territory does your jobbing business cover?

373 A. Our territory is limited to a territory tributary to Mobile, I should say from a hundred to a hundred and fifty miles on the various roads and rivers leading out of Mobile.

Q. 3. Do you handle a product known as Coco-Quinine, and if so, whose product is it?

A. Yes, sir, we do; Coco-Quinine made by Eli Lilly & Co. We handle quite a bit of it.

Q. 4. Do you handle a product called Quin-Coco?

A. We do not.

Q. 5. Have you ever had a call from the retail trade for Quin-Coco?

A. I don't remember of having had a single call since I have been manager of the wholesale department for about six years, last past.

Direct-examination closed.

No cross-examination.

Deposition closed.

S. H. COLVIN.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EDWIN R. ALBRIGHT, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edwin R. Albright; age 31; Mobile, Ala.; retail druggist; partner in the firm of Albright & Wood, located at Dauphin and Jackson Sts., at Government and Royal and St. Francis Streets, Mobile, Ala.

374 Q. 2. Does your firm handle a pharmaceutical product known as Coco-Quinine at these several stores, and, if so, whose product do you recognize it to be?

A. Yes, we handle it. It is the product of Eli Lilly & Co.

Q. 3. How long have you been familiar with this product?

A. About twelve years.

Q. 4. Did you know of any other syrup of quinine colored and flavored with chocolate before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No.

Q. 5. How is this product dispensed at your stores?

A. On prescriptions and also on calls for it. We put it up in our own bottles and label it.

Q. 6. Do your stores do a considerable prescription business?

A. Yes, sir.

Q. 7. How are prescriptions for Coco-Quinine written by physicians usually?

A. They simply write "Coco-Quinine."

Q. 8. Whose product do you understand is intended when prescriptions are received so written?

A. Eli Lilly's.

Q. 9. Have you ever received a prescription at either of your stores so far as you know written for "Quin-Coco"?

A. No.

Q. 10. Have you ever had a call so far as you know from a customer for "Quin-Coco"?

A. No.

Q. 11. Do you know anything about the product called "Quin-Coco," and if so, what can you tell us concerning it?

A. I have seen it. It looks very much like Coco-Quinine.

Q. 12. Has it ever been offered to you for sale, and if so on what representations?

375 By Mr. Rawle: Objected to as improper and as not calling for the conversation.

A. It has been offered to me as being the same as Coco-Quinine. That's about all.

Q. 13. By whom was it offered to you?

A. By a representative of the Pfeiffer people, a Mr. Jones. I have known him for many years, but do not know his initials. He also represents the Warner line.

Q. 14. Do you buy other goods from Mr. Jones?

A. Yes, sir.

Q. 15. What is the name of the firm on the invoices you receive?

A. It used to be Pfeiffer, but it is now William R. Warner & Co.

Q. 16. How was it expected that you would sell Quin-Coco when you receive no calls or prescriptions for it?

By Mr. Rawle: Objected to as improper and as not calling for a statement of what was said but for expectations, and because the witness has already testified on the subject in answer to Q. 12.

A. I don't know how he expected me to sell it other than to use it for Coco-Quinine.

Q. 17. Was that your understanding of the proposition?

By Mr. Rawle: Objected to as not calling for the conversation and because the witness has fully testified in answer to Q. 12 and as leading.

A. I naturally understood it that way, when he told me it was the same thing as Coco-Quinine.

Q. 18. Was anything said about the price?

A. Yes, sir, the price was considerably lower than Coco-Quinine.

Q. 19. Have you ever sold Quin-Coco either at your present stores or elsewhere?

A. I have never sold it at my present stores, but sold it when I was previously employed.

376 Q. 20. In response to what demand did you sell it where you were previously employed?

By Mr. Rawle: Objected to as irrelevant and as res inter alios acta.

A. To demand for Coco-Quinine, and on prescriptions for Coco-Quinine.

Q. 21. Were the customers and physicians advised that they were getting Quin-Coco instead of Coco-Quinine, when these transactions were made?

(Same objection.)

A. No, sir.

Q. 22. Do you ever receive calls from customers for "chocolate quinine," and if you do, what product do you understand is intended?

By Mr. Rawle: Objected to as irrelevant.

A. We very rarely receive such calls, but when we do we understand that they want Coco-Quinine.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

XQ. 23. You mean, I take it, that when a customer calls for "chocolate quinine," that your stores, carrying no other chocolate quinine than Coco-Quinine, sell the customer, Coco-Quinine? Is that correct?

A. Yes, sir.

X Q. 24. Do men, women and children of all ages and conditions sometimes purchase a chocolate quinine preparation?

A. Yes, sir.

X Q. 25. Briefly what is the difference between cocoa and chocolate?

A. None that I know of. I consider them the same.

X Q. 26. Having in your mind drug stores and candy
377 stores, what is the popular and usual name employed for chocolate or cocoa? Isn't it chocolate?

A. I don't think so any more than cocoa.

X Q. 27. Do you think a girl goes into a candy store and asks for some cocoa candy?

A. No. I run a drug store; I don't know anything about what they do in candy stores. I do sell candy in boxes and packages only.

X Q. 28. Are your chocolate candies labeled "chocolate" or "coc-a", for instance Hershey or Peters, &c.?

A. Candies are labeled chocolate but we carry Hershey's cocoa.

X Q. 29. And Hershey's chocolate, also.

A. Yes, sir.

X Q. 30. Don't you think that on the whole chocolate is decidedly the popular name for that article?

A. Yes, sir.

X Q. 31. If that is the popular name for the article, don't you think that a good many customers in calling for a chocolate quinine

preparation call for it by that name, or substantially so. That is, by the name of "sweet quinine," or "tasteless quinine" or "syrup of quinine," but without giving the article called for a trade mark name?

A. I don't exactly understand what you are trying to get at there. You will have to make it a little clearer.

X Q. 32. Haven't you said that "chocolate" is on the whole the popular name for an article sometimes called "chocolate" and sometimes known as "cocoa"?

A. Yes.

X Q. 33. That being the case I ask you whether you do not often have calls for "chocolate quinine," or "tasteless quinine," or "sweet quinine," or "syrup of quinine," or some other similar name, the customer not calling for the article by its exact trade mark name?

A. Yes, sir.

X Q. 34. Don't you believe that it is called for in some such way about half the time?

378 A. No, sir, I should think about probably one-tenth maybe.

X Q. 35. All the other calls give the exact trade name of the article, is that correct?

A. Yes, sir.

X Q. 36. What trade name?

A. "Coco-Quinine."

X Q. 37. How many prescription clerks are usually on duty, including the partners at your various stores?

A. Six.

X Q. 38. Haven't you on your shelves any medicinal preparations which you consider similar in medicinal effect and which so far as your pharmaceutical judgment is concerned could perfectly well be used one for the other and with the same medicinal effect?

By Mr. Bradford: Objected to as improper not being cross-examination and as wholly irrelevant and immaterial to any issue herein.

By Mr. Rawle: I call attention to Q. 16.

A. We have numbers of them that could be used with the same medicinal effect. I would consider a two grain quinine capsule to have the same medicinal effect. There is no similarity in the looks or taste.

X Q. 39. How about listerine and similar products of other drug concerns?

(Same objection.)

A. How about it?

X Q. 40. Do you carry listerine in stock?

(Same objection.)

A. Yes, sir.

X Q. 41. Do you carry any other similar preparation, and if so, give the name and the maker's name or names?

(Same objection.)

379 A. We carry Wampole's Formolid, manufactured by H. K. Wampole & Co., Philadelphia, which is a similar preparation. However the formula is different.

X Q. 42. Do you carry or do you know of any other preparation similar to listerine? If, so, give the name and the maker's name?

(Same objection.)

A. I don't know of any more.

X Q. 43. Do you know of Lilly's Eucalyptus and Thymol Compound?

(Same objection.)

A. No, sir.

X Q. 44. Wasn't listerine on the market long before the Wampole product?

By Mr. Bradford: Same objection. The attention of the court is further asked to the flagrant abuse of the privilege of cross-examination by counsel for defendant and the total waste of complainant's time with such improper and irrelevant interrogatories at this stage of the proceedings.

A. I do not know, they were both on the market when I started in the drug business.

X Q. 45. Assume that listerine had been on the market and well known before the Wampole product was put on the market, and assume that they are similar preparations. Would you consider that when a drug salesman, such being the case, in offering you the Wampole similar product meant to have you dishonestly pass it off on your customers when they called for listerine?

(Same objection.)

A. I don't care to answer that question. I can't assume such things.

X Q. 46. Don't you understand my question?

(Same objection.)

380 A. Not thoroughly. You seem to want my opinion.

X Q. 47. Can't you answer the question. It will be re-read to you.

(Same objection.)

A. My opinion is that if he stated that it was the same as listerine and could be used instead of listerine that that was his motive.

X Q. 48. I understand you to say that Jones told you that the price of Quin-Coco was considerably lower than Coco-Quinine and that it was the same thing as Coco-Quinine? Is that correct?

A. Yes, sir.
X Q. 49. And that is what he did say?
A. Yes, sir.
X Q. 50. Did he say anything else on that subject?
A. He said that he sold a lot of it all over his territory, to some of the best druggists.
X Q. 51. Is that all on that subject?
A. Yes, sir.
X Q. 52. Where were you previously employed?
A. At Ortmann's Pharmacy, in Mobile, Ala., from about 1901 to 1910, something like that, about nine years. Prior to 1901 I was employed by Floyd's Pharmacy, Phœnix, Ala., but I didn't sell Quin-Coco there.
X Q. 53. You have testified, as I understand it, that at Ortmann's drug store you did dispense Quin-Coco for Coco-Quinine to customers and on prescriptions in cases where the customers and physicians did not know that they were getting Quin-Coco instead of Coco-Quinine. Is that what you say?
A. Yes, sir.
X Q. 54. Is that the work of an honest druggist, do you now think?
A. No, sir. I didn't think so then.
X Q. 55. How long ago was that?
A. It lasted for nine years, it continued for nine years, I worked there nine years.
381 X Q. 56. Beginning when?
A. I don't know the exact date, I would have to figure it out. For the last five years I was at Ortmann's I did prescription work and that was the time I referred to, but before that I sold it over the counter.
X Q. 57. Sometimes on a call for a chocolate quinine preparation?
A. Yes, sir.
X Q. 58. When did you have the interview with Jones referred to in Q. 13?
A. Several months after going in business on my own account. And several times since then.
X Q. 59. And at each of these interviews he told you that Quin-Coco was a cheaper product than Coco-Quinine, and was about the same thing or a similar product. Is that right?
A. I don't remember whether he stated that the price was cheaper every time he offered it, but he always stated that it was the same preparation, and that a customer couldn't tell the difference.
X Q. 60. I understand that you have been connected with your present firm for three and a half years and previously to that did prescription work at Ortmann's for five years and that for several years prior to the pescription work at Ortmann's you dispensed Quin-Coco. Am I correct?
A. I don't just remember whether I dispensed it several years prior to that but I do remember that I dispensed it while at Ortmann's. I can't recall those dates. I can't go back there. I can't

figure it out. I can get them if you will give me a little time to do so.

X Q. 61. You have already said substantially as I have quoted. Are you now meaning to change your testimony?

A. Not at all.

X Q. 62. Then your first statement was correct as to your dispensing Quin-Coco for five years as prescription clerk at Ortmann's and selling it over the counter for certain years prior
382 to your doing prescription work there. Is that correct?

By Mr. Bradford: Objected to as not a fair statement of the witness's previous testimony and as an attempt to pin witness down to exact dates when he has already explained that he is unable to give them if counsel will give him a few minutes time to look up the data.

By Mr. Rawle: The objection is objected to.

A. I cannot be certain as to the dates but did dispense it before I was a registered prescription clerk. If you will allow me to look up my date of registration I can give you the exact date.

X Q. 63. For how many years did you dispense it over the counter before you put up prescriptions or before you were registered?

A. I don't know exactly.

X Q. 64. Three years?

A. I couldn't say exactly how long. I don't remember that has been so long ago.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 65. Suppose the fact to be that Quin-Coco was first introduced in the fall of 1907, would you say that you dispensed it prior to that time?

A. No, sir.

By Mr. Rawle: The question is objected to as leading.

R. D. Q. 66. What retail drug store of Mobile has the reputation of doing the largest prescription business of the city?

383 A. Van Antwerp Drug Corporation. There are about forty or fifty drug stores in Mobile. That includes the city and suburbs.

Deposition closed.

EDWIN R. ALBRIGHT.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

QUINTUS S. ADAMS, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age residence and occupation?

A. Quintus S. Adams; age, 25; Mobile, Ala.; Pharmacist in Van Antwerp Drug Company's Retail Department. I am the prescription clerk who handles all the prescriptions that come into the store, except the hours that I am off duty.

Q. 2. About how many prescriptions on the average are handled by your store per day?

A. Average the year around about 125 a day.

Q. 3. Won't you explain your duties at the store?

A. My duties are I have charge of all prescriptions that come in. I take them in and turn them out at the window, price them if necessary.

Q. 4. Do you receive prescriptions at your store for a product known as Coco-Quinine?

A. Yes, quite often.

Q. Do they come from various physicians and various localities throughout the city?

A. Yes.

Q. 6. How are these prescriptions written usually?

384 A. "Coco-Quinine" and the amount and directions.

Q. 7. Have you ever seen a prescription received at your store for a product called "Quin-Coco?"

A. No.

Q. 8. How long have you been looking after this work at this store?

A. About eight months, about six or eight months.

Q. 9. Have you inquired of other prescription clerks at the store, whether they have ever seen prescriptions for Quin-Coco, and if so, what did they say?

By Mr. Rawle: Objected to as hearsay.

A. I have and they say that they have never seen a prescription for it.

Direct examination closed.
No Cross-examination.
Deposition closed.

QUINTUS S. ADAMS.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

OSCAR J. MCMILLAN, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Oscar J. McMillan; age, 22; Prichard, Ala.; Proprietor of a Retail Drug Store, at Prichard, Ala. Prichard is a suburb of Mobile, Ala. I have been established there about three months. I have been in the drug business about five or six years and prior to es-
385 tablishing my present store was employed by Dr. N. S. Gay, at Whistler, Ala., another suburb of Mobile.

Q. 2. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so whose product is it?

A. Yes, sir, I do. It is Eli Lilly's product.

Q. 3. How do you dispense it?

A. On prescriptions and over the counter.

Q. 4. Did you ever hear of a product called "Quin-Coco," and if so, when and under what circumstances?

A. I heard of it through the William R. Warner & Company salesman, Mr. McCarty.

Q. 5. What did Mr. McCarty say to you on this subject?

A. He asked me if I didn't want some of their preparation Quin-Coco. I told him "No, we couldn't substitute." He told me it was all right, that it was the same thing as Coco-Quinine, that you couldn't tell the difference. And that it was the original preparation, brought out by a doctor who didn't have the money to back it up with advertising. And that in the meantime Lilly had put Coco-Quinine on the market and that then Warner brought out this Quin-Coco and put it on the market. He told me it wouldn't be substituting at all, that you couldn't tell the difference between it and Coco-Quinine. That is about all.

Q. 6. In what way did he tell you that it could be used or dispensed, that is, in response to what character of calls or demands?

By Mr. Rawle: Objected to as leading and because the witness has already answered as to the conversation.

A. As "Coco-Quinine."

Q. 7. What kind of calls for Coco-Quinine?

(Same objection.)

A. Either prescriptions or calls over the counter.

386 Q. 8. How are prescriptions written received at your store for "Coco-Quinine?"

A. "Coco-Quinine," just the name and the amount.

Q. 9. Whose product do you understand is intended by the physicians when they write prescriptions just "Coco-Quinine?"

A. Lilly & Company's.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 10. When was this talk with McCarty?
A. About the latter part of February, 1915. It was after I went into business for myself.
X Q. 11. While you were with Dr. Gay had you sold Quin-Coco?
A. No.
X Q. 12. Did you buy any Quin-Coco from McCarty?
A. No, sir.
X Q. 13. Did you buy any of the rest of his line?
A. Yes.
X Q. 14. Been dealing with him since?
A. Yes, sir.
X Q. 15. Think him an honest man?
A. I guess so, about as honest as the majority of the manufacturers.
X Q. 16. As honest as you are?
A. In the dealing that I had with him he was all right. We only bought patent medicines from him.
X Q. 17. Do you consider it honest for a druggist to dispense one preparation when another is called for without informing the physician or the customer?
A. No, as to that dealing with that Quinine-Coco I don't think they are.
X Q. 18. I repeat the question. I think you could answer it a little better. Please try. It is meant to be a general question on a moral subject in your business. You can answer it yes or no perfectly well.
387 A. No, sir.
X Q. 19. You say "McCarty was all right" in his dealings with you. Do you think he meant to make you a dishonest suggestion as to how you could use Quin-Coco?
A. Yes.
X Q. 20. Did he tell you it was a similar preparation to Coco-Quinine?
A. Yes, sir.
X Q. 21. And cheaper in price?
A. Yes, sir.
X Q. 22. And could compete in the market with Coco-Quinine?
A. Yes, sir.
X Q. 23. And that is about the substance of what he said to you?
A. Yes, sir.
X Q. 24. Do you say that he meant to make you a dishonest suggestion as to how you could sell Quin-Coco?
A. I would consider it dishonest if I sold it like he told me.
X Q. 25. I always understood that an imputation on the honesty of a southern gentlemen or a suggestion to him of a dishonest course would be severely resented. Am I correct?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. There are so many cases of that kind nowadays that you don't hardly look upon that as a thing of that kind.

X Q. 26. Then you mean that McCarty talked up his product in about the same way as the general run of drug salesman do?

A. He said more for his product, especially as compared with Coco-Quinine.

388 X Q. 27. Don't the drug salesmen all talk up their products, their specialty products?

A. They do, but they don't make a comparison between a substitute and a staple article as plain as Mr. McCarty did.

X Q. 28. In your experience have you known of customers calling for chocolate quinine preparation?

A. Very seldom.

X Q. 29. Men, women and children customers always pretty much come right out with the name "Coco-Quinine," do they?

A. The majority of them.

X Q. 30. How often does McCarty visit you?

A. He hasn't called since February.

X Q. 31. How many different items of his line did he talk to you about in February?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. About six.

X Q. 32. Don't you think you might possibly have misunderstood him as to any part of his talk which you consider contained a dishonest suggestion to you?

A. No, sir, we had quite an argument as to its merits when compared with Coco-Quinine.

X Q. 33. What did he says on its merits?

A. That it was the same as Coco-Quinine and could be dispensed without the doctor or patient detecting it, and that it cost us less money.

X Q. 34. And yet you didn't resent that suggestion?

A. No, sir.

X Q. 35. To whom did you first mention this interview with McCarty. I mean to what Lilly man?

A. Tisdale.

X Q. 36. When?

A. I told Tisdale about it about two weeks after McCarty's talk.

X Q. 37. How did you happen to tell him?

389 A. I just told him that McCarty had been out trying to sell me some more of that quinine preparation. This was just in the course of a general conversation.

X Q. 38. Is that all you told Tisdale?

A. I think so.

Cross-examination closed.

Deposition closed.

OSCAR J. McMILLAN.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EMMET S. SHEPHERD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Emmet S. Shepherd; age, 26; Mobile, Ala.; Pharmacist in the employ of Albright & Wood, Retail Druggists in Mobile, Ala. I am at their store No. 3, at St. Francis & Royal Sts. I am Prescription Clerk.

Q. 2. Do you handle a product known as Coco-Quinine and if so, whose product is it?

A. We do, the Coco-Quinine of Eli Lilly & Co.

Q. 3. How is this product dispensed at your store?

A. It is dispensed in pints, also in smaller fractions of a pint, also on prescriptions and on calls—over the counter.

Q. 4. Do you know anything of a product called Quin-Coco, and if so, tell us what you know of it?

A. I know of the product "Quin-Coco," manufactured by
390 William R. Warner R. Warner & Co. It has been used and dispensed for Coco-Quinine in places where I have formerly been employed, both over the counter and on prescriptions.

Q. 5. Is it used in the store where you are at present employed?

A. No product other than Coco-Quinine, Lilly's, is employed in the store of Albright & Wood.

Q. 6. Do you ever receive prescriptions for Quin-Coco?

A. I have no knowledge of ever receiving a prescription for Quin-Coco.

Q. 7. Have you ever had a customer ask for Quin-Coco over the counter?

A. I have never had a customer call for Quin-Coco over the counter.

Direct-examination closed.

Q. 4. Is objected to as hearsay and as res inter alias acta.

No Cross-examination.
Deposition closed.

EMMET S. SHEPHERD.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, April 10th, 1915, at 9.30 a. m., at Marion Junction, Ala.

Marion Junction, Ala.,
April 10, 1915—9.30 a. m.

Met pursuant to adjournment.
Parties present as before.

391 O. C. TISDALE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded by him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. O. C. Tisdale; age 31, Mobile, Ala., traveling salesman for Eli Lilly & Co. I cover Southwest Alabama and a portion of Southeast Mississippi. My duties are to visit druggists and dispensing doctors, soliciting business, and to detail physicians and dentists, introducing the Lilly pharmaceuticals to the medical profession.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, and can you tell us whether or not such preparation is in demand in your territory and the extent of the demand?

A. Yes, I handle the preparation called Coco-Quinine, and there is considerable demand for it.

Q. 3. Is this one of the preparations that has been detailed to the medical profession in your territory?

A. Yes, sir, very extensively.

Q. 4. Do you know anything about a product called Quin-Coco, and if so what can you tell us about it?

A. I see quite a good bit of it used in my territory, more so in some places than in others. The only thing I know about the preparation is that it is being used, as a good many of them say, as a substitute, and others will tell you that it is being used for "chocolate" quinine.

By Mr. Rawle: The answer is objected to as incompetent, and as hearsay, and as irrelevant.

Q. 5. You say that you see a good bit of it used in your territory. Please explain more fully as to what you mean by this?

Same objections.

392 A. I see it in drug stores, more frequently so than in the doctors' offices, dispensing doctors you might add, because prescription writers don't carry drugs.

Q. 6. You say "a good many of them say" and "others will tell you," whom are you referring to?

By Mr. Rawle: Objected to as calling for hearsay and as incompetent.

A. I am referring to the retail druggists and the proprietors of drug stores.

Q. 7. Please state what retail druggists have said to you on this subject?

By Mr. Rawle: Same objection and as res inter alias acta.

A. Offhanded I couldn't call off all the druggists that have told me that. It would take pretty good while to go over and state just

ow many had said it. I can recall several instances where we could o and get th se names and get the parties who have told me this.

Q. —. You seem to misunderstand my question. I didn't ask ou for the names of the druggists, I asked you for the statements f the druggists?

Same objection.

A. I suppose that fully ninety per cent. of them that handle Quin-Coco will tell me that they are handling it as a substitute for Coco-Quinine and that my preparation is too expensive. They also state that it is not necessary to pay us our price for Coco-Quinine when they can use Quin-Coco and the doctor nor the patient will never detect the difference. And I suppose in my territory that seventy-five per cent. of the druggists handle Quin-Coco, and I have never yet had one of them to tell me that he had received a prescription for it, or a call for Quin-Coco by the laity.

By Mr. Rawle: The objections to the question are repeated as to the answer and to the witness' statements of his suppositions
393 and his generalization.

Q. 9. Does the above statement fairly and correctly detail the character of statements with which your efforts to obtain orders for Coco-Quine are met in the proportion of the retail trade which you have referred to?

By Mr. Rawle: All of the above objections are made here and the objection that the question is inadmissible.

A. I don't quite get that question.

Q. 10. My question is: Is the statement you have just made concerning what many of the retail druggists have said to you on this subject, a fair summary of the statements with which your efforts to sell these druggists Coco-Quinine, are met?

By Mr. Rawle: Same objections as above.

A. I wouldn't like to make a statement unless I figured it out from a standpoint of going over my entire territory and taking every druggist that handles Quin-Coco and bring him out on this particular subject. It is so commonly used, it is so generally used amongst the retail trade, until some of them in ordering the preparation have oftentimes asked me for Quin-Coco. There are quite a number of them will ask me if my house prints labels for Coco-Quinine, that is, labels for dispensing as called for by the laity.

Q. 11. What purpose, if you know, have they in asking you this question?

By Mr. Rawle: Objected to as immaterial and for the above reasons.

A. To get new labels.

Q. 12. What do they want with new labels?

Same objection.

A. To keep a stock bottle.

394 Q. 13. Stock bottle of what?

Same objection.

A. Labeled "Coco-Quinine."

Q. 14. Won't you explain more fully and in detail just what you have in mind on this subject?

Same objection.

A. They do this to pour Quin-Coco into a Coco-Quinine bottle so the doctors will see the Coco-Quinine label and be led to believe that they are getting the genuine article "Coco-Quinine."

Q. 15. Won't you explain still more in detail just what the druggist does in this connection?

Same objections.

A. Well he pours the Quin-Coco into different sized packages and labels them "Coco-Quinine" to deceive the public.

Q. 16. Have any druggists told you why they label this "Coco-Quinine" instead of using its true name "Quin-Coco?" and if so what did they say on this subject?

Same objections.

A. I have had numbers of them tell me that if they would label it "Quin-Coco" they couldn't get the patient to take it, whereas if they label it "Coco-Quinine" a person would have no objection, they being very near the same color, consistency and taste.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. To make clear your use of the word "substitute" in this connection, and in your business, will you please define it?

A. The word "substitute" is to get a call for one thing, for in-

395 stance "Coco-Quinine," and give them, for example, "Quin-Coco," as it is the same taste, color and consistency without getting the doctor's consent or explaining to the laity when called for by the name "Coco-Quinine."

X Q. 18. You have apparently defined "substitution." Please define the noun "substitute" and state under what circumstances do you consider one preparation a substitute for another?

A. "Substitute" means something given in the place of or to take the place of and giving "Quin-Coco" when "Coco-Quinine" is prescribed or called for by the laity without an explanation would be called a "substitutor."

X Q. 19. Is that the only instance to which you would apply the word "substitute?"

A. That is about as clearly as I can make it in this instance.

X Q. 20. In the use of the word "substitute" do you differentiate between honest and dishonest acts?

A. Yes, sir.

X Q. 21. How?

A. Well, you wouldn't see the better class of druggists, the reputable druggists, substitute, because substitution is deception.

X Q. 22. I understand you now to mean that in a disreputable drug store Quin-Coco would be a "substitute" for Coco-Quinine, but in a reputable drug store it would not be. Is that correct?

A. That doesn't apply to all cases. You will find some disreputable druggists who will not substitute Quin-Coco for Coco-Quinine because the doctor has free access to his prescription department and this substitution is always kept from the doctor. In a number of instances I have known of a pint of Coco-Quinine to sit beside a gallon of Quin-Coco and you would see from eight to ten new bottles of Quin-Coco per year without seeing a new bottle of Coco-Quinine. This is done to deceive the practitioner when
396 looking for Coco-Quinine, and to present to the laity when they wished to see the label. I have two cases in mind where this has occurred quite recently and have been instructed to that effect. Then they also state that "you can't blame me for this, I am in business for dollars and cents."

By Mr. Rawle: The answer is objected to as volunteered and irresponsive, except as to the first sentence, as hearsay and as incompetent.

X Q. 23. Your answer to X Q. 21 is not responsive. I will ask you whether you mean that in a disreputable drug store which is in the habit of selling Quin-Coco for Coco-Quinine, if there be any such, Quin-Coco would be a "substitute" for Coco-Quinine, but in a reputable drug store it would not be. You will observe that I eliminate from X Q. 21 the case of the disreputable druggist who does not deal dishonestly in dispensing Quin-Coco?

A. You will not find Quin-Coco in what I consider a reputable drug store, because it is bought with the full intention of substitution, and a reputable druggist will not substitute.

X Q. 24. You still fail to give me any clear idea of what you mean by "substitute" and the limitations of what you mean thereby. I will try to get your idea through an illustration. Take for instance Listerine. Do you carry a similar preparation called in substance Eucalyptus and Thymol Compound and would you consider it a "substitute" for Listerine?

A. I couldn't answer this question as I do not know the formulæs of either preparation. And furthermore, I am instructed by the officials of the main office to never use the word "substitute" or never offer anything or any preparation as a substitution. In fact I think I have that in writing.

By Mr. Rawle: Objected to as volunteered.

X Q. 25. Don't you know the formulæ of your Lilly preparations, Eucalyptus and Thymol Compound?

397 A. Offhand I do not.

X Q. 26. In your use of the word "substitute" would you apply it to Lilly's Syrup Hypophosphites, as compared with Syrup Hypophosphites (Fellows).

Q. We have about a dozen formulæ of hypophosphites. Offhanded I could not recall the formula of either.

X Q. 27. If a doctor or a druggist asked you if you had in Lilly's line a preparation similar to Syrup Hypophosphites (Fellows) what would you tell him?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant, as improper on cross-examination, as a plain attempt to lug into the record on plaintiff's time and at plaintiff's expense alleged evidence for defendant's case, and as wholly unjustified by the excuse that it is an effort to get witness' opinion of what is the correct meaning of "substitute" or "substitution," his opinion having been clearly and explicitly stated, beyond the possibility of any misunderstanding on the part of anyone.

A. I would tell him, "Doctor, we are not offering our preparation as a substitute, but we have quite a number of the syrups of hypophosphites from which you can get the therapeutic effect of the hypophosphites, sold under our own label, but that will be different in color and probably in consistency and taste. They are the originators of this preparation Fellows Syrup of Hyp*h*ophosphites and I am instructed by our company that I am not to offer any of our products or label as a substitute, as we consider ourselves the originators of our formulas." Furthermore, the medical profession will maintain a higher respect for a representative who answers the question in this way.

X Q. 28. But which of your hypophosphites would you offer him?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

398 A. In a question under this condition I would hand him my book of formulas and let him make his own selection.

XQ. 29. Now I want to ask you whether if he selected a Lilly hypophosphite and had in stock a Fellows hypophosphite, you would consider those two preparations as a substitute one for the other, and if that is what you mean among other things by "substitute"? I have in my mind a druggist rather than a doctor.

Same objection.

A. I have never had a druggist to ask me for a formula of that kind.

X Q. 30. You have said that you told the doctors that Lilly was the originator of all the formulæ in the Lilly line. Would this apply to the Lilly Hinkle Pill?

By Mr. Bradford: Objected to for the reasons before stated and as not justified by anything that the witness has before said.

A. I couldn't say because there are one or two formulas that we purchased, for instance, Success Alterans, McDade Formula.

X Q. 31. How many retail drug stores are there in your territory, approximately?

A. Approximately about two hundred and fifty.

X Q. 32. How many doctors?

A. I would hate to say unless I took time to figure out. I would say approximately five hundred.

X Q. 33. I understand you to say that about seventy-five per cent of the druggists in your territory handle Quin-Coco and that about ninety per cent of that seventy-five per cent practice "substitution," which you say is dishonest in a druggist. Is that correct? I mean "substitution" of Quin-Coco for Coco-Quinine.

A. That is correct.

X Q. 34. Are you willing to give the names of the ninety per cent of the seventy-five per cent?

A. That would be impossible offhanded.

399 X Q. 35. You couldn't give any of them, or a third of them, or a tenth of them?

A. I can go over the territory and give you ninety per cent. that are handling it, for the simple reason that I have free access to every prescription department in my territory, but wouldn't like to give it offhanded without stopping to figure or even to observe it closer.

X. Q. 36. How many druggists in ordering the Lilly preparation of chocolate quinine from you have oftentimes asked you for Quin-Coco?

A. I have two in my mind at present.

X Q. 37. Any more?

A. Not that I know of at present.

X Q. 38. Do you think there were more?

A. I don't know of any more.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 39. Is it or is it not true that many pharmaceutical preparations are manufactured from the same formula, taken from the U. S. P., or the N. F., in common by various manufacturers?

A. That is true.

Deposition closed.

O. C. TISDALE.

Subscribed and sworn to before me this 10th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet this afternoon at 3.30 at Cuba, Ala.

400 Cuba, Ala., April 10th, 1915—3.30 p. m.

Met pursuant to adjournment.
Parties present as before.

AMOS L. VAUGHAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Amos L. Vaughan, age 51, Cuba, Ala., physician and druggist, member of the firm of Vaughan & Vaughan, retail druggists, of which firm I am the sole owner at present.
Q. 2. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so, how long have you handled it approximately, and whose product do you recognize it to be?
A. I do. I have handled it about twelve years. I recognize it to be the product of Eli Lilly & Co.
Q. 3. Did you know of any similar liquid quinine chocolated preparation before Eli Lilly & Co. introduced Coco-Quinine?
A. I did not.
Q. 4. How do you dispense Coco-Quinine?
A. I dispense it over the counter as called for by prescriptions, or as prescribed by myself, or as called for by customers.
Q. 5. Do you know anything about a product called "Quin-Coco" and if so, what can you tell us about it?
A. I don't know anything about it. I never handled it. I never used any of it at all.
401 Q. 6. Has it ever been offered to you for sale, or an order for it been solicited at your store?
A. Yes, sir; it has.
Q. 7. By whom?
A. I don't know the man's name. I am a very poor hand to remember names. He was the traveling man for Warner & Co. I don't remember his name. I don't know his name.
Q. 8. Did you buy any other items of the Warner line from him?
A. I did. I bought a few articles, not that, but something else.
Q. 9. What did he say to you about Quin-Coco?
A. Well, the conversation came up about this way: He asked me how my stock was of Coco-Quinine, and I told him I had plenty on hand. He then told me he would like to demonstrate to me and show me a preparation of Quin Coco. I told him it would be useless because I had plenty on hand of Coco-Quinine, and was not in the market for substitutes and I had plenty of Coco-Quinine on hand. He told me that he would like for me to look at it as he wanted to demonstrate it to be as the same color, consistency was the same, and was guaranteed to have the sulfate of quinine the same amount, as the Coco-Quinine made by Lilly & Co.

Q. 10. How did he propose to make the demonstration as to its color and consistency?

A. He just told me that if I would get him a piece of white paper he would pour some out and see if I could tell the difference between the two, and I told him that that was useless because I was not in the market for quinine of any kind.

Q. 11. You mean he proposed to pour some of each product on a white paper for comparison?

A. I couldn't answer what he meant. I don't know about that.

Q. 12. What was it that he proposed to you to pour out on the white paper?

402 A. That was a little vial that he had that was labeled "Quin-Coco." I cut him off right there and that was the end of it.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 13. What is the population of this town?

A. Six hundred and fifty is my recollection at the last census, about six hundred and fifty. That is inside of the corporate limits.

X Q. 14. How many drug stores?

A. Two.

X Q. 15. When did this traveling man call on you?

A. I can't answer that question direct; I think it has been about ninety days ago, possibly a hundred and twenty. I might get the exact date by looking at my bill, because I bought some other stuff at the time.

Cross-examination closed.

Deposition closed.

AMOS L. VAUGHAN, M. D.

Subscribed and sworn to before me this 10th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Birmingham, Ala., Monday, April 12th, 1915, at 10 A. M.

Birmingham, Alabama,

Tutwiler Hotel, April 12th, 1915—10 a. m.

Met pursuant to adjournment.
Parties present as before.

403 FRED R. DALY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Fred R. Daly; age 36; Boyles, Ala.; a suburb of Birmingham Ala., retail druggist, proprietor of Boyles' Pharmacy.

Q. 2. Are you familiar with a pharmaceutical product known as Coco-Quinine and if so how long have you been familiar with it and whose product do you recognize it to be?

A. I am familiar with it and have been acquainted with it for about twelve years. I recognize it to be the product of Eli Lilly & Company.

Q. 3. Do you handle the same at your store?

A. I do.

Q. 4. How is it dispensed?

A. It is dispensed on prescriptions as Coco-Quinine. It is dispensed just on demand chiefly as "chocolate quinine." We never dispense it in original bottles, but in our own bottles under our own labels.

Q. 5. Have you ever received a prescription written for "Quin-Coco"?

A. Not that I remember of.

Q. 6. Have you ever had a call over the counter for Quin-Coco?

A. Not under that name.

Q. 7. How do the physicians write their prescriptions for this product?

A. "Coco-Quinine."

Q. 8. Do you handle the product called Quin-Coco and if so, from whom do you buy it?

A. I do handle it and I buy it from W. R. Warner.

Q. 9. What is the name of the Warner salesman from whom you have purchased Quin-Coco?

404 A. I don't remember the name of the salesman I bought the last from.

Q. 10. Have you bought any from Mr. Plaisance?

A. I don't recall buying any Quin-Coco from Mr. Plaisance.

Q. 11. Do you buy other Warner preparations from Mr. Plaisance?

A. I have.

Q. 12. The Mr. Plaisance who is present in the room now?

A. Yes, sir.

Q. 13. How do you sell the Quin-Coco?
A. On demand for "chocolate quinine."
Q. 14. What is your true belief of what a customer intends to ask for when asking for "chocolate quinine"?

By Mr. Rawle: Objected to as improper, as res inter alias acta, immaterial and incompetent.

A. Nearly always I think they mean "Coco-Quinine."
Q. 15. How do you label your bottles of Quin-Coco you sell over the counter?
A. Sometimes "Coco-Quinine" and sometimes "chocolate quinine."
Q. 16. Did your customers ever call for "chocolate quinine" before you had Quin-Coco in your store?

By Mr. Rawle: Same objection.

A. I am sure they did. I don't recall any particular case though.
Q. 17. They had then become accustomed, at least some of them sometimes, to ask for Coco-Quinine by the name "chocolate quinine"?

Same objections and as leading.

A. Yes, sir.

Direct examination closed.

405 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 18. What proportion of the calls over the counter are for "chocolate quinine"
A. At least a half.
X Q. 19. Perhaps sixty per cent?
A. Well, I might say that, yes, sir.
X Q. 20. Might be seventy per cent?
A. I won't increase that percentage any more.
X Q. 21. How many drug stores are there in Boyles?
A. In Boyles proper, at present, only one. In Boyles and Inglenook, in the territory which I reach, there are three.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 22. How do your purchases of Quin-Coco compare, as to quantity, with your purchases of Coco-Quinine?

By Mr. Rawle: Objected to as immaterial and as res inter alias acta.

A. I buy about forty to fifty per cent of Coco-Quinine as I do of Quin-Coco. Up to two years ago I had not bought any Quin-Coco.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 23. How long has Mr. Plaisance been selling for Warner. Isn't it a year and a half?

A. I don't recall the exact length of time, a year or possibly a little over.

406 R. X Q. 24. What is approximately the population of the territory that you supply?

A. Approximately twenty-five hundred.

Deposition closed.

FRED R. DALY.

Subscribed and sworn to before me this 10th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Dr. EZRA H. WALKER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Ezra H. Walker, age 31, Birmingham, Ala., physician.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, will you state what you can in reference to it as a medical preparation?

A. Yes, sir; I am familiar with it. I consider it one of the best preparations of quinine in the market. I have used it for three years in my practice and find it an excellent form of preparation of quinine for use in the treatment of children. I could rely on it as containing two grains of quinine to the dram and think it is reliable in every respect.

Q. 3. Whose product is it if you know?

A. I know it is Lilly's product and when prescribing I mean Lilly's whether specifying Lilly or not.

Q. 4. How do you usually designate this preparation when you write prescriptions?

407 A. I usually just write "Coco-Quinine (Lilly)," but not always, sometimes I simply write "Coco-Quinine."

Q. 5. Do you know anything about any other syrup of quinine of chocolate character called "Quin-Coco"? If so, what do you know about it?

A. I just know there is such a thing. I have seen the preparation. I have seen it in the drug stores. That is about all I know about it.

Q. 6. Did you ever prescribe it?

A. No, sir.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 7. Is Coco-Quinine chiefly given to children?

A. Yes, sir.

X Q. 8. Approximately what proportion is given in the treatment of children and what proportion to adults?

By Mr. Bradford: Objected to as immaterial.

A. I don't know. I never give it to an adult.

X Q. 9. What do you give adults?

Same objection.

A. I prescribe quinine capsules for adult patients.

X Q. 10. Does the chocolate in the preparation make it attractive to children?

A. Yes, sir.

X Q. 11. Particularly so?

A. Yes, sir.

X Q. 12. Chocolate is rather a favorite flavor with children, is it not?

A. It is.

By Mr. Bradford: This line of examination is objected to as not cross-examination.

408 X Q. 13. How long have you been practicing medicine?

A. Three years.

X Q. 14. Do you ever dispense drugs to your patients?

By Mr. Bradford: Objected to as immaterial.

A. Yes, sir.

X Q. 15. What proportion of your patients?

A. I guess half of them. I am associated with a drug store.

X Q. 16. Do you dispense Coco-Quinine yourself?

A. Yes, sir.

X Q. 17. Apart from the drug store with which you are associated?

A. Yes, sir. My office is in the drug store, the Morgan-Winter Drug Store.

Cross-examination closed.

Deposition closed.

E. H. WALKER, M. D.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

DON J. BARBER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Don J. Barber, age 35, Birmingham, Ala., retail druggist, president of the Barber-Ramsuer Drug Company, of Birmingham, Ala.

409 Q. 2. Are you in the active management of the business?

A. I am.

Q. 3. Are you familiar with a pharmaceutical preparation known as "Coco-Quinine," and if you are, do you handle it at the store?

A. I am familiar with it and handle it at the store.

Q. 4. When did you first become familiar with it approximately, and whose preparation do you recognize it to be?

A. I have been familiar with Coco-Quinine for possibly ten years and it is known as Lilly's Coco-Quinine and I recognize it as their product.

Q. 5. How is this product dispensed at your store?

A. It is dispensed on physicians' prescriptions and also to customers on calls over the counter, put up in quantities prescribed or called for, properly labeled.

Q. 6. Are your prescriptions received from physicians generally or from only a few?

A. From physicians generally.

Q. 7. Please state how generally this preparation is prescribed by the physicians of Birmingham judging from the prescriptions received at your store?

A. I would say that the physicians generally prescribe it, as we receive a good many prescriptions for it from many different physicians.

Q. 8. How do the physicians usually designate the product on their prescriptions?

A. They generally prescribe "Coco-Quinine." They sometimes add the word "Lilly," but generally just the name "Coco-Quinine."

Q. 9. How do people ask for it over the counter?

A. They ask for "Coco-Quinine" generally, and occasionally "chocolate quinine."

Q. 10. So far as you know has your store ever received a prescription for a product called "Quin-Coco"?

A. No, sir.

410 Q. 11. Would a prescription written for "Quin-Coco" be likely to be called to your personal attention?

A. Yes, sir; it would.

Q. 12. Have you ever had a customer, so far as you know, ask for "Quin-Coco" over the counter?

A. No, sir.

Q. 13. Whose product do you understand is intended when a customer asks for "Chocolate Quinine"?

A. Eli Lilly's Coco-Quinine.

Q. 14. Why?

A. Well, Eli Lilly's Coco-Quinine is known as the original "coco-quinine" or "chocolate quinine," and the only one that I have ever dispensed or have ever seen, and is the preparation the customers have always been using. I would really be afraid to give anything except Lilly's Coco-Quinine, believing that I would be substituting and not supplying the customer with the article they desired, and in the case of a physician's prescription I would not dispense anything except Lilly's Coco-Quinine as I don't care to take the responsibility on my own shoulders of giving anything except what the physician specifies.

Direct examination closed.

Cross-examination, without waiving objections:

By Mr. Rawle: Q. 14 and answer objected to as res inter alias acta and as incompetent.

X Q. 15. Is "chocolate" or "cocoa" the popular and common name among the laity, old and young, for that article?

A. Coco-Quinine.

X Q. 16. What I mean is, does a child come in and ask for cocoa ice cream or does the child ask for chocolate ice cream?

A. Chocolate ice cream.

X Q. 17. When an ordinary customer old or young and
411 of different conditions in life, desires to buy at a drug store or at a candy store, whether it be ice cream or candy or soda water, something composed or partially composed of that which is indifferently called chocolate or cocoa, I ask you whether chocolate is not the popular and common name used by such laity?

A. Chocolate is the popular name, but hot chocolate is very often called cocoa.

X Q. 18. What do you mean by "hot chocolate." Where is it sold?

A. Over the counter of the soda fountain.

X Q. 19. Now in view of that fact what percentage of the laity, approximately, old, and young, and of all conditions, call for a "chocolate" quinine preparation, and what proportion use the precise trade name of the Lilly preparation?

A. To the best of my knowledge and belief about one per cent call for "chocolate quinine."

X Q. 20. How many calls do you have in each week, on the average?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I could not give the number. Approximately twenty.

X Q. 21. And hardly one out of the twenty uses the popular name "chocolate." Is that correct?

A. The percentage would not run as high as one out of twenty.

X Q. 22. How large a business do you do approximately as compared with the general run of drug stores in this city?

A. It is of average size. It is not the largest and it is not the smallest.

X Q. 23. How many drug stores are there here?

A. About one hundred.

X Q. 24. Do you carry Quin-Coco in stock or have you ever carried it?

412 A. No, sir.

X Q. 25. Then I presume that your doctors are trained in the use of Coco-Quinine, are they not?

A. They prescribe Coco-Quinine.

Cross-examination closed.

Deposition closed.

DON J. BARBER.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

HILL W. HOWELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Hill W. Howell, age 29, Hamilton, Ala., physician, practicing medicine.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine and if so whose product do you recognize it to be?

A. I am. It is Eli Lilly's product.

Q. 3. Have you used it in your practice?

A. Yes, sir.

Q. 4. When did you begin using it?

A. Some three or four years ago. I wouldn't say positively about that.

Q. 5. How do you regard it as a pharmaceutical preparation?

A. I consider it first class. I think it is all right.

Q. 6. Are you familiar with a preparation called Quin-Coco and if so tell us what you know about it?

413 A. Yes, sir, I bought some one time. It seemed to be all right. I bought it from William A. Webster's man, his name was Mr. Martin. I asked for some Coco-Quinine and he told me he didn't sell Coco-Quinine, but that that was the same preparation.

By Mr. Rawle: The answer is objected to as hearsay and as res inter alias acta and as immaterial.

Q. 7. What else was said by Mr. Martin on this subject?

Same objection.

A. I don't remember. He told me that it was about ten cents a pint cheaper. I bought a five-pint bottle.

Q. 8. How was the bottle marked or labeled, if you remember?

A. Quinin-Coco. I am not absolutely sure that that is correct. It was not "quinine-coco," but I think it was "Quinin-Coco."

Q. 9. Anything else on the label?

Same objection.

A. I don't remember what was on the label. Searle & Hereth I believe was the name. I have the exact name in my pocket. It was Searle & Hereth or something like that. I am not exactly certain as to that name.

Q. 10. Have you also got the name of the product in your pocket as it was printed on the label?

A. No, sir, I haven't.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 11. What was the color of the label?

A. It was a yellow label.

X Q. 12. You say "Coco-Quinine" is all right as a pharmaceutical preparation. Is it the chocolate flavor that makes it attractive to customers and particularly children?

414

A. I suppose it is.

X Q. 13. Do you prescribe it mostly for children?

A. Yes, sir.

X Q. 14. And straight quinine for adults?

A. Usually, yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 15. Wouldn't some other flavor also be attractive to children, possibly?

A. Possibly, yes.

Deposition closed.

HILL W. HOWELL.

Subscribed and sworn to before me this 12th day of April, 19
CHARLES E. RIORDON,
Special Examiner.

Recess.

After Recess.

MERRILL P. NORTHINGTON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Merrill P. Northington, age 39, Birmingham, Al
415 treasurer Doster-Northington Drug Company, wholesal druggists.

Q. 2. What territory does your house serve?

A. All of the northern half of Alabama and small parts of Georgi and Mississippi.

Q. Do you handle a general line of pharmaceuticals of most of th leading manufacturers?

A. Yes, sir.

Q. 4. Do you handle a product known as Coco-Quinine, and if yo do, whose product do you recognize it to be?

A. We handle Coco-Quinine. It is manufactured by Eli Lilly & Co. of Indianapolis.

Q. 5. How long have you known of this product?

A. Since we have been in business, which is about thirteen years.

Q. 6. Did you know of any other syrup quinine preparation col- ored and flavored with chocolate before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No, sir.

Q. 7. What is the character of the demand for this preparation from the retail trade in your territory?

A. We have always had a good heavy demand for Coco-Quinine and have sold a good deal of it since we have been in business. We have had a continuous demand for it.

Q. 8. Have you ever received an order at your store for a product called "Quin-Coco," so far as you know?

A. Not within my knowledge, no sir.

Q. 9. If such an order were received would it be likely to be called to your attention?

A. I would be apt to see it as all orders pass through my hands when they come into the store.

Q. 10. Do you know anything about Quin-Coco.

A. No, sir. So far as I personally know I wouldn't have known that there was such a product on the market.

Direct examination closed.

416 Cross-examination.

By Mr. Rawle:

X Q. 11. Approximately how many drug stores are there in your territory?

A. I don't believe that I could answer that hardly. Approximately I would say there are four hundred drug stores in the territory that we cover. It is just a guess.

X Q. 12. Do you handle any of William R. Warner & Co. line?

A. We handle only their specialties.

Cross-examination closed.
Deposition closed.

MERRILL P. NORTHINGTON.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

By Mr. Rawle: Mr. Rawle places on the record at this point an objection to the accumulation of proofs along the same line at various points distant from each other and the taking of testimony at these points which entails long lines of travel by rail, the consumption of much time, and imposes much expense upon the defendant.

By Mr. Bradford: Mr. Bradford replied that much as he regrets the necessity he knows of no other way to present to the Court a comprehensive understanding of the facts governing the questions at issue in this cause.

417 AVINGTON C. FANCHER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Avington C. Fancher, age 34, Birmingham, Ala., traveling salesman for Eli Lilly & Co.

Q. 2. What territory do you cover?

A. North Alabama.

Q. 3. Approximately how many drug stores in your territory?

A. Approximately I should say about three hundred and fifty or four hundred. I hadn't thought of it before. This is my guess.

Q. 4. About how many physicians would you estimate in your territory?

A. Seven or eight hundred.

Q. 5. As I understand it your duties require you to call both on the druggists and the physicians. Is this correct?

A. Yes, sir.

Q. 6. What can you say about the sale of Coco-Quinine in your territory?

A. I sell quite a good deal of it. It is a very popular preparation and I sell quite a good deal of it. Practically every druggist in my territory has a demand for it and stock it.

Q. 7. What can you say about the sale of Quin-Coco to supply the demand for Coco-Quinine in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial, and as leading.

A. Well, I can say that there is quite a good deal of Quin-Coco sold in my territory?

Q. 8. How do you know?

418 A. Because I see it on the druggists' shelves.

Q. 9. Approximately what proportion of the druggists in your territory sell Quin-Coco?

A. I believe seventy-five per cent. of the druggists in my territory handle it.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 10. How often do you call on your druggists on the average?

A. Every thirty to sixty days.

Deposition closed.

A. C. FANCHER.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Auesday, April 13th, 1915, at 10 a. m., at Montgomery, Ala.

Montgomery, Ala.,
Exchange Hotel, April 13th, 1915.

Met pursuant to adjournment.
Parties present as before.

TERRY T. GREIL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

419 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Terry T. Greil, age 39, Montgomery, Ala., wholesale druggist, member of Greil Brothers Company, of Montgomery, Alabama, wholesale druggists.

Q. 2. What territory does your house serve?

A. All of the southern part of Alabama, except Mobile territory

proper; southwest Georgia, as far south as Tallahassee, Florida, and north of Montgomery as far as Birmingham, and West Point, Georgia. And as far west as Columbus, Miss.

Q. 3. Does your house handle a general line of pharmaceuticals and solicit orders from the retail drug stores of this territory?

A. Yes, sir, we do.

Q. 4. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so, whose product is it?

A. Yes, and the same is manufactured by Eli Lilly & Co., of Indianapolis.

Q. 5. What character of demand do you have for this product in your trade?

A. We receive orders from the retail druggists. The demand for Coco-Quinine is very satisfactory and I should say quite large for a specialty, throughout the whole territory.

Q. 6. How long have you been handling this product?

A. As near as I can remember between eight and eleven years, practically ever since we have been in the drug business. We have been in business since June, 1903. I refer to our wholesale drug department.

Q. 7. Has your house since it has been in the jobbing drug business ever received an order for a product called "Quin-Coco"?

By Mr. Rawle: Objected to as immaterial.

420 A. Not as I remember or have been able to ascertain.

Q. 8. How do you regard the house of Eli Lilly & Co. and its preparations?

Same objections. Character evidence is not material to the issue.

A. I consider the house of Eli Lilly & Co. one of the most reputable that we have ever done business with and one of the most satisfactory and their reputation is beyond reproach, and I consider goods of their manufacture as good as any pharmaceutical house in the United States.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 9. Do you handle an entire line of Lilly's goods?

A. Yes, sir.

X Q. 10. Do you handle any other entire pharmaceutical line than Lilly?

A. Yes, but we do not handle it to the extent that we handle Lilly's, but we carry a very complete line of Sharpe & Doehme. We carry a fairly representative stock of Parke, Davis regular line and their specialties.

X Q. 11. To whose line do you give preference?

A. Eli Lilly's.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 12. Do you or do you not stock goods of any house for which there is any demand in your territory?

A. We always stock everything that we have sufficient calls for.

421 R. D. Q. 13. Regardless of the manufacturer?

A. Yes, regardless of the manufacturer.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 14. Aren't there any products for which there is a demand in your territory but which you do not carry in stock? For example, Dr. Hobson's Toothache Drops?

A. We always try to carry in stock and supply the trade with everything that is called for when we have sufficient demand. In other words, whenever we feel like we are justified in putting in a proposition we always stock it.

R. X Q. 15. But there may be a demand for a preparation in your territory which demand is supplied through other drug houses, is that correct? I mean supplied by either manufacturers or other jobbers.

A. I suppose there is. I don't quite understand what you mean. There are some manufacturers who sell direct to the retail trade.

R. X Q. 16. I understand you to say that there are products in your territory for which the manufacturers have created a demand and supplied it themselves without your having an opportunity to supply that demand?

By Mr. Bradford: Objected to as not justified by the witness' testimony.

A. In cases where manufacturers sell direct to the retailer naturally they don't cater to the jobber.

R. X Q. 17. Who doesn't cater to the jobber?

A. Those manufacturers who sell direct to the trade.

R. X Q. 18. Can you now tell me whether there are products in your territory for which the manufacturers have created a demand and have supplied it themselves, without your having an opportunity to supply that demand? Can you answer this yes or no?

422 A. Yes.

R. X Q. 19. About how many drug stores are there in your territory?

A. From four to five hundred. That is just guessing.

R. X Q. 20. Are you confident there are over three hundred?

A. Yes.

R. X Q. 21. Would you be equally confident there are over four hundred?

A. I should say there is.

R. X Q. 22. Would you be surprised to know that there are over five hundred?

A. No, I wouldn't be surprised, because I have never given the actual count any serious consideration.

R. X Q. 23. How many are there in Montgomery and its suburbs?

By Mr. Bradford: Objected to as not cross-examination, as immaterial and irrelevant. Also the previous questions on this subject.

A. Between fifteen and twenty. I could count them exactly if you give me time.

Recross-examination closed.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 24. Have you ever stocked any of the products of William R. Warner & Co.?

A. Yes.

R. R. D. Q. 25. And supplied the products of this house for which there is any demand in your territory?

A. Yes.

Re-recross examination.

By Mr. Rawle:

R. R. X Q. 26. You surely don't mean to say that your house supplies to the retail drug trade all the line of William R. Warner goods for which there is any sale in your territory, or any demand? And that your house meets the entire demand for such Warner goods and supplies it?

423

By Mr. Bradford: Objected to as not re-recross examination, no question having been asked in re-redirect to any such purport.

By Mr. Rawle: Mr. Rawle calls attention to R. R. D. Q. 25.

A. We do not stock a line of William R. Warner's pharmaceuticals, but we do carry and sell all of their specialties and patent medicines that they are interested in that we have sufficient demand for.

R. R. X Q. 27. Isn't it true that most of the retail drug stores in your territory buy direct from Warner many items of the Warner line which they sell, for which a demand has been created?

A. Yes.

Re-re-redirect examination.

By Mr. Bradford:

R. R. R. D. Q. 28. Do you also carry the same Warner items and supply them to the trade when they are called for?

A. In many instances where the retailers ordering direct in order to make a shipment they include items that the jobber carries in stock.

R. R. R. D. Q. 29. Mr. Rawle asked you if it was not true that most of the retail drug stores in your territory buy many items of the Warner line direct from Warner. You answered "Yes." I now ask you if your house does not also supply these items to the retail trade when you have any demand for them?

By Mr. Rawle: Objected to as leading.

A. I answer this as I answered the former question that we always stock all items of everybody's manufacturer when we
424 have sufficient demand for them, including William R. Warner's.

Re-re-recross-examination.

By Mr. Rawle:

R. R. R. X Q. 30. I understand you to say that you do carry in stock some items of the Warner line. Is that correct?

A. Yes.

R. R. R. X Q. 31. But not all the entire Warner line?

A. No.

R. R. R. X Q. 32. Then there are items in the Warner line for which the Warner Company has created a demand in your territory, which items the retail druggists buy direct from Warner?

A. If we have received sufficient demand for any of these items we have or will stock them.

R. R. R. X Q. 33. Question repeated.

A. That is a fact.

R. R. R. X Q. 34. And it is equally true that there is a demand for some items of the Warner line in your territory which does not come to you as jobbers?

A. Yes.

Re-re-re-redirect examination.

By Mr. Bradford:

R. R. R. R. D. Q. 35. Do William R. Warner & Co. solicit orders from your house for their goods?

A. We buy lots of goods from them, but as far as their representative coming around, I don't know, as I don't do the buying.

R. R. R. R. D. Q. 36. What items of the Warner line do you carry as far as you can recall?

A. We carry B. B. B., Sloan's Liniment, Warner's Specialties, Hobson's Eczema Ointment, King's New Discovery, Harter's Tonis, Meade & Baker's Mouth Wash, the Searle & Hereth specialties.

425 Re-re-re-recross-examination.

By Mr. Rawle:

R. R. R. R. X Q. 37. Do you carry all of Searle & Hereth specialties?

A. I don't know how many they make, so I couldn't tell you. We only carry two or three.

Deposition closed.

TERRY T. GREIL.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

COLEMAN F. PEARSON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Coleman F. Pearson, age 37, Montgomery, Ala., physician.

Q. 2. In your profession do you use a pharmaceutical preparation known as Coco-Quinine, and if so how long have you used it and whose preparation do you recognize it to be?

A. I do use Coco-Quinine, I have used it approximately fifteen years, and I recognize it to be the product of Eli Lilly & Co.

Q. 3. How do you designate this product on your prescriptions?

A. "Coco-Quinine."

Q. 4. When so designated whose product do you intend the druggist to furnish?

426 A. Eli Lilly & Company's.

Q. 5. Do you regard this as a sufficient designation of the product to inform the druggist that you intend Eli Lilly & Company's product to be used?

A. I do.

Q. 6. Why do you consider this name alone as sufficient to designate the Lilly preparation?

By Mr. Rawle: Objected to with the other questions as immaterial and incompetent.

A. That is the only preparation on the market that I know to be manufactured by that name.

Direct-examination closed.

No cross-examination.

COLEMAN F. PEARSON.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN B. REID, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John B. Reid, age 28, Union Springs, Alabama, retail druggist, one of the proprietors of the City Drug Store.

Q. 2. In your business do you handle a product known as Coco-Quinine?

A. I do.

Q. 3. Whose product do you recognize it to be?

A. Eli Lilly & Company.

427 Q. 4. How long have you handled Coco-Quinine at your store?

A. In my store about four years, in all about nine years, ever since I have been in the drug business. I was with the Ravenscroft Drug Company about three years and with J. L. Paulk for about two and a half years, both stores in Union Springs, and I handled this product at both stores during the entire time as well as at my store.

Q. 5. How have you been accustomed to dispense Coco-Quinine?

A. I have been accustomed to dispensing it on calls and on prescriptions also, in quantities as called for or prescribed, properly labeled.

Q. 6. How do physicians so far as your experience goes, write their prescriptions for this product?

A. Coco-Quinine.

Q. 7. Whose product do you understand is intended by a prescription so written?

A. Lilly's.

Q. 8. Have you ever seen a prescription written for Quin-Coco?

By Mr. Rawle: Objected to as immaterial.

A. No, sir.

Q. 9. Have you ever had a customer ask for "Quin-Coco"?

Same objection.

A. No, sir.

Q. 10. Is Coco-Quinine prescribed generally by physicians whose prescriptions are filled at your store and at the stores where you have worked?

By Mr. Rawle: Objected to as immaterial and as res inter alias acta.

A. It is.

Q. 11. Do many people use this product where you have been serving them in the drug stores so far as you know?

428 A. They do.

Q. 12. Do you know anything about the product called Quin-Coco and if you do what can you tell us about it?

A. I do. It is a preparation manufactured by the Searle & Hereth Company. My first knowledge of it, it was represented to me to be the same as Coco-Quinine by Mr. McCarty, a Warner salesman. That was about three years ago.

Q. 13. As near as you can recall what did Mr. McCarty say to you on this subject?

A. To the best of my memory, it was about something like this: He asked me if I used very much Coco-Quinine. I told him that I used a good deal. He then said that he could save me some money on the product. He showed me the sample of Quin-Coco and made me a price of $3.50 a gallon, and I bought one gallon.

Q. 14. Did he tell you how you could sell it or dispense it, and if so, what did he say?

By Mr. Rawle: Objected to as leading.

A. He simply sold it to me as a product to take the place of Coco-Quinine, said that it contained the same amount of quinine and would take the place of Coco-Quinine.

Q. 15. In what way would it take the place of Coco-Quinine?

By Mr. Rawle: Objected to as incompetent.

A. It would have the same effect, that is Quin-Coco would have the same effect as Coco-Quinine.

Q. 16. You have already testified that you never had any demand for Quin-Coco; how did you expect or he expect for you to dispose of Quin-Coco if you had no demand for it?

By Mr. Rawle: Objected to as leading and as calling for an opinion, and as incompetent.

429 A. I gathered from his conversation at the time that I bought it, that I bought Quin-Coco, that I would have to sell is as a substitute for Coco-Quinine.

By Mr. Rawle: Answer is objected to as incompetent, and also because what the witness gathered from a conversation is not evidence.

Q. 17. Do you mean to supply the demand for Coco-Quinine?

Same objection and as leading.

A. I do.

Q. 18. Did you sell Quin-Coco in accordance with this understanding?

By Mr. Rawle: Objected to as incompetent and as leading.

A. Not entirely.

Q. 19. Please explain how you sold the gallon of Quin-Coco which you have stated you bought?

Same objection.

A. I sold Quin-Coco usually when I had calls for "chocolate quinine," and on a few occasions when I had calls for Coco-Quinine.

The answer is objected to as to the last clause as being res inter alias acta and as not affecting the rights of the defendant.

Q. 20. How had customers been accustomed to ask for Coco-Quinine prior to the time you bought this gallon of Quin-Coco?

A. Some called for "Coco-Quinine," some called for "chocolate quinine syrup," some called for "brown quinine syrup," and others called for "quinine syrup."

Q. 21. Whose product did you understand was intended by the customer when asked for by any of these names?

By Mr. Rawle: Same objection.

430 A. By questioning the customer I found that they wanted Coco-Quinine, Lilly.

Same objection to the answer.

Q. 22. Your customers then, or at least some of them, had been accustomed to call Coco-Quinine by these other names, prior to the time you stocked Quin-Coco? Is this so?

By Mr. Rawle: Objected to as leading and immaterial, and as res inter alias acta.

A. They had.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 23. When did you begin in the drug business?

A. I began in the drug business with Ravenscroft Drug Company about 1905.

X Q. 24. Approximately what proportion of your customers over the counter, men, women and children, who desire a sweet quinine, or a syrup of quinine preparation, call for "chocolate quinine"?

A. I judge about one per cent.

X Q. 25. Isn't chocolate a more common name in the mouths of the ordinary laity than cocoa?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant.

A. I don't know.

X Q. 26. How often is such a preparation called for by such expressions as "tasteless quinine" or "sweet quinine"?

A. Very seldom.

X Q. 27. You believe then that nearly all the calls are by people who use the extract Lilly trade name of "Coco-Quinine"?

A. A large per cent of them are.

X Q. 28. What is the population of Union Springs?

431 A. Four thousand and fifty. It is about forty miles from Montgomery on the Central of Georgia Road. There are four white drug stores and two owned by Negroes.

X Q. 29. How long have you been doing business with Mr. McCarty, the Warner salesman?

A. I began doing business with Mr. McCarty shortly after I went into the drug business for myself in 1911, that is, in the City Drug Store.

X Q. 30. Have you been the buyer for your firm?

A. Yes, sir.

X Q. 31. How often did he call on you?

A. About twice a year.

X Q. 32. That is about eight times. At which of the calls did he take up the subject of Quin-Coco to which you have referred?

A. To the best of my recollection it was about the third call.

X Q. 33. And he hadn't mentioned Quin-Coco to you on the first two calls?

A. I don't remember.

X Q. 34. Did you buy any of his line at that third call?

A. I did.

X Q. 35. Is it considered the square thing for a druggist to pass off one preparation on a doctor's prescription for another?

A. No, sir.

X Q. 36. Or on a customer over the counter?

A. No, sir. I consider it substitution in either case.

X Q. 37. And you consider that substitution is not the part of an honest or ethical druggist.

A. It is not.

X Q. 38. Now, will you please run your mind back to that third call of McCarty and state just what each of you said. Try to give his exact words and your exact words?

432 A. I can't give the exact words. Mr. McCarty asked me if I sold much Coco-Quinine and I replied that I sold a good deal. Mr. McCarty then asked me if I wouldn't buy a preparation of chocolate quinine at a price considerably lower than that of Coco-Quinine, which contained the same amount of quinine in the same form and would answer every purpose of Coco-Quinine. Mr. McCarty then made me a price on five gallons of this preparation which I think was about $3.25 a gallon. He also made me a price in single gallon quantity of $3.50 per gallon delivered. I gave Mr. McCarty my order for one gallon.

X Q. 39. Have you now stated the entire conversation between you that day on Quin-Coco?

A. To the best of my recollection I have.

X Q. 40. And you can't think of anything else he said.

A. I cannot.

X Q. 41. On the "few occasions" when you sold Quin-Coco on calls for Coco-Quinine (Q. 19) I suppose you had a good reason for doing so, hadn't you?

A. That was when I first began dispensing Quin-Coco, when I dispensed it as Coco-Quinine, when I had been told by Mr. McCarty that Quin-Coco was exactly the same as Coco-Quinine, and believing what Mr. McCarty said, I dispensed it as such.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 42. Did your opinion change as to whether or not Quin-Coco was the same thing as Coco-Quinine?

By Mr. Rawle: Objected to as immaterial.

A. It did.

R. D. Q. 43. What was the reason for your change of view on this point?

Same objection.

433 A. I had one customer to whom I had sold Quin-Coco in place of Coco-Quinine, who came back with the bottle of Quin-Coco and stated that it had had no effect whatever on his little girl who had a slight spell of fever. I explained this difference in the two preparations to the customer and then went out and secured the same amount of Coco-Quinine to replace the Quin-Coco which I had previously sold him. This proved satisfactory and I changed my opinion. The bottle of Quin-Coco which I had furnished that customer I had labeled "chocolate quinine."

Deposition closed.

JOHN B. REID.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN M. MOSELEY, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in response to interrogatories to him by counsel.

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John M. Mosely, age 42, Geneva, Ala., retail druggist, manager and part owner of McInnis Drug Company.

Q. 2. How long have you been in the drug business?

A. About twenty years, I have been with the McInnis Drug Company in my present position since 1910. For about seven years

prior to that time I was the senior member of the firm of
434 J. M. Moseley & Company, druggists, of the same town. These two concerns were consolidated in 1910. Prior to 1903 I was employed in other drug stores in Geneva.

Q. 3. Are you familiar with a pharmaceutical preparation known as Coco-Quinine?

A. Yes, sir.

Q. 4. How long have you been familiar with it?

A. I should say twelve years or more.

Q. 5. Whose preparation do you recognize it to be?

A. Eli Lilly & Company's.

Q. 6. Has it been handled at other stores where you have been associated and also is it handled at your present store?

A. Yes, sir.

Q. 7. How is this product dispensed so far as your experience as a druggist is concerned?

A. We dispense it on physicians' prescriptions and sell it on calls of the laity, in quantities as prescribed or called for.

Q. 8. How do physicians so far as your experience goes write prescriptions for this product?

A. "Coco-Quinine," just as "Coco-Quinine."

Q. 9. How do customers ask for it over the counter?

A. "Coco-Quinine," "chocolate quinine." About fifty per cent I believe call it "chocolate quinine."

Q. 10. Whose product do you understand is intended when a customer asks for "chocolate quinine."

By Mr. Rawle: Objected to as res inter alias acta.

A. Lilly's.

Q. 11. Why do you think that they intend Lilly's?

A. That is the preparation we handle and has been giving satisfaction and this is what they have been accustomed to getting.

Q. 12. Did you ever receive prescriptions written for "Quin-Coco"?

A. No, sir.

435 Q. 13. Did you ever have a customer ask for Quin-Coco?

A. No.

Q. 14. Has Quin-Coco been offered to you for sale and if so by whom?

A. Yes, by Mr. McCarty, I don't know his given name or initials, representative of William R. Warner & Co.

Q. 15. Please state as near as you can recollect what Mr. McCarty said to you when he offered to sell you Quin-Coco?

A. Well, he was in my prescription room looking over my wants and asked me if I needed some "Coco-Quinine," and I don't know just what reply I made to that, but the question came up that his people did not make Coco-Quinine and he told me his was a similar and just as good a preparation.

Q. 16. What else did he say about it, if anything?

A. He said his sales on that preparation were larger than Coco-

Quinine. He told me the other people were using it, that there was a saving in the price, but I don't remember the exact amount.

Q. 17. What did he tell you that other people were using it for and what did he tell you that you could use it for?

By Mr. Rawle: Objected to as leading.

A. For Coco-Quinine.

Q. 18. What do you mean by that it could be used "for Coco-Quinine?"

By Mr. Rawle: Objected to as leading and because the only proper question is as to what was said by the salesman.

A. I gave my testimony that it was used on physicians' prescriptions and dispensed on calls. That is the only way I could use it. There is no other purpose for it.

Q. 19. Do you mean that there was no other purpose for
436 Quin-Coco except to fill prescriptions and calls for Coco-Quinine? If not what do you mean?

By Mr. Rawle: Same objection.

A. I do.

Q. 20. Did you buy any of the Quin-Coco from Mr. McCarty?

A. No, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 21. How often has McCarty called on you to solicit trade for Warner goods?

A. Every three or four or six months, I am not sure about it, for the last two or three years.

X Q. 22. Have you ever bought any of his line?

A. Yes.

X Q. 23. When did that conversation take place?

A. To the best of my recollection sometime within a year and eighteen months ago.

X Q. 24. Did he tell you then Quin-Coco was competing with Coco-Quinine?

A. He did.

X Q. 25. And in substance that he was trying to sell his product in place of Coco-Quinine?

A. That is what I understood from the conversation.

X Q. 26. It isn't considered honest in a druggist to pass off one preparation for another without telling the doctor or the customer, is it?

A. There is a great difference of opinion on that subject. I mean that when a U. S. P. article is prescribed that any pharmaceutical house make, some druggists hold that they have a right to dispense any reputable manufacturing house's goods.

437 X Q. 27. But that doesn't apply to specialities, does it?

A. No.

X Q. 28. And in specialties you include Quin-Coco, do you?

A. Specialties, yes.

X Q. 29. And Quin-Coco could be sold by a druggist with entire honesty in case he should get the consent of the doctor on the prescription or explain the matter to the customer over the counter. Is that correct?

A. I think so.

X Q. 30. And that is the only way you as an honest druggist, would do it. Is that correct?

A. I haven't handled any Quin-Coco and haven't had any trial on that.

X Q. 31. Of course it could be honestly sold on a doctor's prescription or to a customer when "chocolate quinine" is called for, couldn't it?

A. If I believe it to be the same thing.

X Q. 32. I don't understand you to say that Mr. McCarty that day, made any suggestion to you that you should buy his Quin-Coco and dishonestly pass it off on the doctors or the customers?

A. I don't know whether he considered it dishonest.

X Q. 33. (Question repeated.)

A. He suggested that I buy Quin-Coco.

X Q. 34. But he didn't suggest to you that you should sell it in a way that you have said was dishonest?

A. He suggested that there was a saving in price to me, that I could save so much per gallon.

X Q. 35. But did he tell you that you could sell it dishonestly and make money?

A. Well, honor wasn't mentioned.

X Q. 36. What did he say on this subject. I will ask you to repeat the entire conversation, using the form "He said" and "I said."

438 A. A conversation having taken place as long ago as that would be right hard to repeat verbatim.

X Q. 37. Repeat it as nearly as you can?

A. Well, Mr. McCarty solicited me to buy Quin-Coco or their preparation of chocolate quinine; I don't know as he used the word "Quin-Coco." He told me that there was a saving in price and that other druggists were buying it.

X Q. 38. What else did he say?

A. In regard to Quin-Coco. He said it was as good a preparation as Coco-Quinine. I don't remember all that was said. We talked about business in general. I couldn't tell everything that Mr. McCarthy said to me or that I said to him.

X Q. 39. I have been asking you to search your memory and state the entire conversation on the subject of Quin-Coco. Is there anything else that you can remember on that subject?

A. I think that I have given during my examination practically all that is connected with the subject.

X Q. 40. I read you Q. 19 and your answer. I take it that you

hardly mean that there is no way to sell Quin-Coco except to fill prescriptions and calls for Coco-Quinine, dishonestly.

A. No, I don't say that.

X Q. 41. And you don't mean to say, do you, that Mr. McCarty suggested to you that you should dispense Quin-Coco dishonestly and sell it to customers dishonestly?

A. He didn't suggest to me to do anything he called dishonest.

X Q. 42. How many drug stores are there in Geneva and its territory?

A. Two in Geneva at present.

X Q. 43. What population?

A. About fifteen hundred.

X Q. 44. How far is it from Montgomery?

A. A hundred and thirty-eight miles by rail, nearly South of Montgomery.

439 X Q. 45. You said you had calls for chocolate quinine and supplied Coco-Quinine. And I understood you to say that the customer didn't always know very much about what they were asking for, but as you keep only Coco-Quinine, you sell them Coco-Quinine. Is that correct?

A. I didn't say the customers didn't know much about what they were calling for.

X Q. 46. When customers call for chocolate quinine, being of all ages and conditions of life, do you mean that each one of them understands clearly that what he wants is Coco-Quinine?

A. Yes, when they call on me for it.

X Q. 47. That is because that is the only such preparation that you have ever sold them?

A. With one exception. I bought one gallon some time in the past and did not use it all up. It was a preparation of chocolate and quinine.

X Q. 48. Whose make was it?

A. I do not remember.

X Q. 49. Was it William R. Warner & Co., of Philadelphia, or Searle & Hereth Company?

A. I can't say.

X Q. 50. What is your best recollections on that subject?

A. Either William R. Warner's or Henry K. Wampole's.

X Q. 51. How long ago was that?

A. To the best of my recollection six or seven years ago.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 52. Why did you not use the gallon of the preparation you say you bought six or seven years ago?

By Mr. Rawle: Objected to as immaterial.

440 A. Because it deteriorated before I could use it.

R. D. Q. 53. What character of relations exist between yourself and Mr. McCarty?

A. Very friendly.

R. D. Q. 54. Would you care to make any statement on the record that would reflect on Mr. McCarty's character or integrity?

A. No, sir.

Deposition closed.

JOHN M. MOSELEY.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

By Mr. Rawle: I object to R. D. Q. 54 and the answer thereto, which question was asked and answered during my absence from the room, the ground of objection being that the question is incompetent and inadmissible and is inconsistent with the oath taken by the witness.

By Mr. Bradford: As to R. D. Q. 54 being propounded in the absence of defendant's counsel, the facts are that plaintiff's counsel advised defendant's counsel at the conclusion of his cross-examination that he wished to ask the witness another question or two and that R. D. Q. 53 was propounded before defendant's counsel left the room, and that plaintiff's counsel is in no wise responsible for defendant's counsel absenting himself at that time.

NOTE.—After the conclusion of the examination, on reading the deposition, the witness (Moseley) corrects his answers to X Q. 39 by inserting before "practically" the words "during my
441 examination;" and his answer to X Q. 41, by inserting before "dishonest" the words "he called," stating that these corrections were necessary to make the meaning of these answers clear. These corrections were made after Mr. Rawle, counsel for defendant, had left the room, for recess. The witness had previously called Mr. Bradford's attention to these answers and to his desire to correct these two answers and he was told by Mr. Bradford to write in pencil what he wanted as corrections and to explain to the Special Examiner who would attend to having the corrections inserted in the typewritten copy. This was done accordingly. Mr. Bradford also states that in formulating the corrections, especially the correction to the answer to X Q. 41, he suggested the two words used by the witness to take the place of a longer and more elaborate explanation to the same purport suggested by the witness. This was done purely to simplify the correction and to express what the witness stated he meant, in the simplest form possible.

By Mr. Rawle: Under the circumstances stated, I take exception to the correction in the answer to X Q. 39, because it makes the answer irresponsive to my question. And the same objection to the correction to the answer to X Q. 41. And inasmuch as the correc-

tions were made by the witness in the absence of defendant's counsel, during recess, and after a discussion between the witness and the plaintiff's counsel, I object to the corrections as forming a part of the deposition.

By Mr. Bradford: The witness Moseley was asked by the Special Examiner to read his deposition and if correct to sign it. The corrections were made as above stated and neither plaintiff's counsel nor the witness are to blame that defendant's counsel did not
442 remain until the witness's signature was affixed to the deposition.

CHARLES E. RIORDON,
Special Examiner.

Recess.

After Recess.

WILLIAM A. CUNNINGHAM, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William A. Cunningham; age 35; Montgomery, Ala.; Retail Druggist, I am a partner in the Persons Drug Company.

Q. 2. How long have you been in the retail drug business, and where?

A. For the past three years I have been a partner in the Persons Drug Company of this city. Prior to that time I was with the Exchange Drug Company for about a year and a half. Prior to that time I was with the Jacobs Pharmacy here, for about the same length of time. Prior to that I was with W. D. Taylor at Bessemer, for about six months. Before then I was with Wilkinson Drug Company, at Marion, Alabama. I have been in the drug business in all about fifteen years.

Q. 3. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. Yes, sir; I am familiar with it. It is the product of Eli Lilly & Co.

443 Q. 4. Did you know of any similar syrup chocolated quinine prior to the introduction of Coco-Quinine by Eli Lilly & Co.?

A. No, sir.

Q. 5. Do you handle Coco-Quinine at your present store?

A. Yes, sir.

Q. 6. How do you dispense it?

A. Mostly on physicians' prescriptions and sometimes on calls by customers, in quantities as called for.

Q. 7. How do physicians usually write their prescriptions for this product?

A. As a usual thing just "Coco-Quinine." Sometimes like all preparations of that kind they specify "Lilly's," but as a usual thing just "Coco-Quinine."

Q. 8. Have you ever seen a prescription written for Quin-Coco?
A. No, sir.
Q. 9. Have you ever had a customer ask for Quin-Coco?

By Mr. Rawle: The last two questions are objected to as irrelevant.

A. No, sir.
Q. 10. Did you handle Coco-Quinine before being connected with your present store I mean at the other places where you have stated you were employed or in business?
A. Yes, sir.
Q. 11. Do you handle Quin-Coco at your store, and if so, how long have you handled it?
A. Well, since I have been there, it was being handled when I went there. We still handle it.
Q. 12. How do you dispense Quin-Coco?
A. Well, we usually label it "chocolate quinine." That is the way it is usually called for.
Q. 13. What percentage of customers ask for "chocolate quinine" and what percentage for "Coco-Quinine?"
444 A. Nearly all of them ask for "chocolate quinine."
Q. 14. How long have you been selling this as chocolate quinine?
A. Ever since I have seen it I have dispensed it as "chocolate quinine."
Q. 15. Is Quin-Coco ever given to customers in your store when they ask for Coco-Quinine?

By Mr. Rawle: Objected to as incompetent, as calling for matter which is res inter alias acta and cannot bind the defendant.

A. No, sir.
Q. 16. But you do supply it when they ask for "chocolate quinine?"
A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. I understand you to mean in your answer to Q. 9, that you never had a customer ask for Quin-Coco by that precise trade name. Is that correct?
A. That is correct, yes, sir.

Cross-examination closed.

Deposition closed.

WILLIAM A. CUNNINGHAM.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

J. JOHNSTON MOORE, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

445 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. J. Johnston Moore; age, 35; Montgomery, Ala.; Retail Druggist, Proprietor of Moore's Drug Store. I have been in business on my own hook for five years, and prior to that time I was a clerk with two of the leading stores in the city, Persons Drug Company and G. A. Knabe & Brother.

Q. 2. Does your store do a large prescription business?

A. Yes, sir. Our prescription business is about as large as any in the city.

Q. 3. Do you handle Coco-Quinine at your store?

A. Yes, sir.

Q. 4. Whose product do you recognize it to be?

A. Eli Lilly & Company.

Q. 5. How do you dispense it?

A. We dispense it on prescriptions and on calls.

Q. 6. How do physicians designate the product on their prescriptions?

A. Usually "Coco-Quinine," occasionally adding the name of the manufacture-.

Q. 7. How do customers usually ask for it over the counter?

A. They ask for "Coco-Quinine."

Q. 8. Does your store receive prescriptions from the physicians generally all over the city?

A. Yes, sir.

Q. 9. What proportion of the physicians of Montgomery prescribe Coco-Quinine so far as you experience goes?

A. I should say all of them prescribe it occasionally. I don't know any of them that don't.

Q. 10. Have you ever received a prescription written for "Quin-Coco?"

A. No, sir.

446 Q. 11. Have you ever had a customer ask for Quin-Coco over the counter?

A. No, sir.

Q. 12. As I understand it you do not handle the product called Quin-Coco?

A. I do not.

Q. 13. Do your customers ever ask for "chocolate quinine?"

A. Yes, sir, occasionally.

Q. 14. What product do you understand they mean when they ask for chocolate quinine?

A. Coco-Quinine, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 15. What proportion call for chocolate quinine, or use some such name as sweet quinine, or tasteless quinine, or syrup of quinine?

A. Three to five per cent., very few.

Cross-examination closed.

Deposition closed.

J. JOHNSTON MOORE.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Marshallville, Ga., tomorrow, Wednesday, April 14th, 1915, a- 9 a. m.

Marshallville, Ga., April 14, 1915—9 a. m.

Met pursuant to adjournment.
Parties present as before.

447 WILLIAM A. JOLLY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William A. Jolly; age 23; Marshallville, Ga.; Retail Druggist, Proprietor of Jolly's Pharmacy.

Q. 3. How long have you been in the retail drug business?

A. Twenty-one months for myself. Prior to that time I worked three years for M. J. O. Booton, of this town.

Q. 3. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if you are, whose product do you recognize it to be?

A. I am familiar with it and it is the product of Eli Lilly & Co.

Q. 4. How long have you handled it both in your own store and the other store, if you handled it there?

A. Four years and nine months.

Q. 5. How do you dispense it?

A. From "ten cents worth" on up, to customers as they call for it, and also on prescriptions.

Q. 6. How do physicians designate the product on their prescriptions?

A. "Coco-Quinine."

Q. 7. Whose product do you recognize as specified when a prescription comes in written for "Coco-Quinine?"

A. Eli Lilly & Company's.

Q. 8. How do people ask for this product over the counter?

A. "Coco-Quinine," "Chocolate Quinine," "Quinine Syrup."

Q. 9. Whose product do you understand the customer in-
448 tends when either of these names is used?

By Mr. Rawle: Objected to as immaterial and res inter alias acta.

A. Why, Eli Lily's Coco-Quinine.

Q. 10. About what proportion of your customers ask for the product by the name "Coco-Quinine" and what proportion by the other names such as "chocolate quinine?"

A. About half, fifty per cent.

Q. 11. Did you ever have a customer call for a product called "Quin-Coco?"

By Mr. Rawle: Objected to as irrelevant.

A. No, sir.

Q. 12. Did you ever have a physician's prescription for Quin-Coco?

(Same objection.)

A. No, sir.

Q. 13. Have you been handling Coco-Quinine continuously in your store since you started in business?

A. I have.

Q. 14. Is Coco-Quinine used quite generally in this locality?

A. It is.

Q. 15. Both by physicians and the laity?

A. Yes.

Q. 16. Do you know anything about the preparation called "Quin-Coco," and if so, what?

A. The only thing I know. I don't believe I could tell you the formula for it. It was represented to me as a chocolate quinine, the same as Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay and not connected with the defendant.

449 Q. 17. Who represented Quin-Coco to you to be the same as Coco-Quinine?

(Objected to as leading and for the same reasons.)

A. Warner's salesman, Nottingham. I think that is his name.

Q. 18. You mean William R. Warner & Company's salesman?

A. Yes, William R. Warner & Company.

Q. 19. What did this William R. Warner and Company's salesman say to you on this subject?

A. His question to me was "How is your stock of Coco-Quinine." My stock of Coco-Quinine was low, and then he brought out a sample. I believe, of Quin-Coco. He says that this product, this Quin-Coco

is the same as Coco-Quinine, and it comes much cheaper. I think that is about all there was to it. There may have been some few other words like that.

Q. 20. Did he say anything about whether or not you could use it to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to as leading because the only proper question is as to what was said.

A. He did.

Q. 21. What did he say as near as you can remember?

A. All he said was that it is the same as Coco-Quinine and you can supply your trade accordingly.

Q. 22. Did you buy the Quin-Coco on these representations?

A. I did, one gallon.

Q. 23. And have you used it in the way it was represented to you that you could use it?

A. I have not.

Q. 24. How have you used it?

450 A. I have given it to customers calling for "chocolate quinine," "quinine syrup," etc.

Q. 25. I believe, however, you have stated, that your customers were accustomed to asking for "Coco-Quinine, Lilly," by these names, prior to your purchase of the Quin-Coco. Is this correct?

By Mr. Rawle: Objected to because the witness has not so stated.

A. They called for "Coco-Quinine," "chocolate quinine," "quinine syrup," before I bought this Quin-Coco.

Q. 26. And they had been furnished the Lilly product all of the time in response to such calls before you put the Quin-Coco in stock?

By Mr. Rawle: Objected to as leading and as immaterial and irrelevant.

A. Yes.

Direct examination closed at 9:20 a. m.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 26. When did Nottingham call on you?

A. Inside of six months ago.

X Q 27. How often has he called on you?

A. Three or four times a year.

X Q. 28. Have you bought Quin-Coco from him more than once?

A. No.

X Q. 29. Was the interview you have referred to the first time he ever talked Quin-Coco to you?

A. The first time.

X Q. 30. Now will you please repeat again the entire conversation that took place at that interview on the subject of Quin-Coco, giving

it near as you can, in narrative form, and the words used by him and by you?

451 A. He said "How are you fixed on Coco-Quinine." I looked over my stock and found I was low. He offered me a product by the name of Quin-Coco, at a very much better price than Coco-Quinine, claiming that it was the same as Coco-Quinine. He said that "you can use it for Coco-Quinine." I compared the prices of Coco-Quinine and Quin-Coco, finding that Quin-Coco was cheaper. I told him to give me one gallon.

X Q. 31. In showing you his Quin-Coco did he mention the formula or tell you what it had in it?

A. No, I don't think he did.

X Q. 32. He surely must have mentioned the amount of quinine contained in it?

A. I don't remember.

X Q. 33. Wouldn't you naturally ask him about that?

A. I think I would.

X Q. 34. Why would you buy it without knowing something about what the preparation contained?

A. Thinking it was the same as Coco-Quinine.

X Q. 35. The same in what respect?

A. Proportion of quinine and syrup.

X Q. 36. Have you now in answer to my questions stated the entire conversation as to Quin-Coco?

A. Yes, I have.

X Q. 37. I am asking whether in answer to my questions alone and without regard to Mr. Bradford's questions you have now stated the entire conversation?

A. I have stated the entire conversation to the best of my knowledge.

X Q. 38. Do you want to add anything to what you have said in order that you may be sure that you have stated the entire conversation in answer to my questions?

A. I know I have stated it to the best of my knowledge.

X Q. 39. Upon what kind of calls by customers have you

452 sold Quin-Coco? Are they any other than "chocolate quinine" and "quinine syrup"?

A. "Chocolate quinine," "quinine syrup," or "quinine mixed with syrup."

X Q. 40. You stated in answer to Q. 23 that you had not used Quin-Coco in the way it was represented to you that you could use it? Please state what was said by the Warner salesman which you had in your mind in answering that question?

A. I filled my customers' orders as nearly correct as possible. I use Quin-Coco when I have a call for "chocolate quinine," or "quinine with syrup."

X Q. 41. Did Nottingham tell you that you could sell it on such calls?

A. I don't remember. I think he did.

X Q. 42. Is it considered square business in a druggist to use one

drug or preparation in filing a prescription or in a sale over the counter when a different drug or preparation is called for?

A. No.

X Q. 43. It is not considered either honest or ethical in a druggist, is it?

A. No.

X Q. 44. And that is the view that you take of the subject, is it?

A. Yes.

X Q. 45. You have known Nottingham pretty well as a salesman?

A. Yes.

X Q. 46. And regard him as a square man?

A. To the best of my knowledge.

X Q. 47. Did Nottingham make you any proposition that day which you considered dishonest?

A. Yes.

X Q. 48. Please give the words he used in that connection? I thought that you had told me that you had already stated the entire conversation in your answers to my questions?

453 By Mr. Bradford: Objected to as calling for unnecessary repetition, even in cross-examination.

A. When he told me that you could use Quin-Coco for Coco-Quinine.

X Q. 49. Please give his exact words?

(Objection repeated.)

A. I don't remember his exact words.

X Q. 50. Did he say anything more than that you could carry it in stock in place of carrying Coco-Quinine?

(Objection repeated.)

A. I have answered this in previous questions. He said "You may use it in place of Coco-Quinine."

X Q. 51. Did he mean anything more than that you could use it on calls for "chocolate quinine" or "quinine syrup?"

A. Yes.

X Q. 52. What more did he mean?

A. As a substitute for Coco-Quinine.

X Q. 53. What do you mean by the word "substitute" as you use it?

A. Having a call or a prescription for Coco-Quinine that I could use Quin-Coco.

X Q. 54. Did he suggest to you that you could dishonestly use it in this way?

A. Yes.

X Q. 55. Please give the words in which he suggested that?

By Mr. Bradford: Objected to as unnecessary repetition, the witness having several times stated the facts; and as an improper question, being for the plain purpose of attempting to pervert the facts by some confusion thereof.

By Mr. Rawle: The objection is objected to as entirely improper.

454 A. He said that Quin-Coco was the same as Coco-Quinine and could be sold as Coco-Quinine.

X Q. 56. Did he use the word "substitute?"

A. I don't remember.

X Q. 57. Did he tell you that Quin-Coco could be sold as Coco-Quinine without informing the doctor or the customer calling for Coco-Quinine?

A. He did.

X Q. 58. What words did he use in telling you that?

By Mr. Bradford: Objected to as unnecessary repetition.

A. I don't remember.

X Q. 59. Don't you see that you are charging Nottingham as a salesman with making a dishonest suggestion to you?

A. I don't look at it in that light.

X Q. 60. Do you mean that he didn't make a dishonest suggestion to you?

By Mr. Bradford: Objected to as the witness has already answered the same question several times.

A. After his representation it was left entirely up to me.

X Q. 61. Do you mean that it was left up to you to dispense Quin-Coco honestly or dishonestly, as you should see fit?

A. Yes.

X Q. 62. Haven't you testified that you consider "substitution" as a dishonest practice in a druggist?

A. I have.

X Q. 63. I assume that you wish to consider yourself as carrying on your business honestly and ethically in that respect. Am I correct?

A. You are.

X Q. 64. If, then, Nottingham made you any dishonest suggestion as to selling Quin-Coco, did you express to him any re-

455 sentment for impugning your honesty in your business?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. He did not approach me in that light.

X Q. 65. Do you mean that he didn't approach you in a dishonest light?

By Mr. Bradford: Objected to as this is a question for the court and not for the witness to decide: the only thing the witness can state is as to the facts.

A. You may construe his conversation that I could sell Quin-Coco for Coco-Quinine honestly without being dishonest.

X Q. 66. Is that the way you construed it?

A. It is when I bought it.

X Q. 67. Is it possible that he meant no more than that you could sell Quin-Coco on calls for "chocolate quinine" or "syrup of quinine," and do it honestly, realizing that you had been previously supplying such demands with Coco-Quinine?

A. No.

X Q. 68. Previously to buying Quin-Coco I understand you had been supplying calls for "chocolate quinine" or "syrup of quinine" with Coco-Quinine exclusively. Is that correct?

A. Yes.

X Q. 69. Wasn't Nottingham's suggestion that you could supply that demand, viz., for "chocolate quinine" or "syrup of quinine," with Quin-Coco?

By Mr. Bradford: Objected to as unnecessary repetition, the witness having already answered this same question.

A. Yes, and all my Coco-Quinine trade.

X Q. 70. Did you yourself consider it honest to use Quin-Coco on calls for Coco-Quinine?

456 A. No.

X Q. 71. Then you considered that the suggestion which you say Nottingham made you was a dishonest suggestion from your point of view?

A. When Mr. Nottingham stated that "you could sell Quin-Coco for Coco-Quinine to customers calling for Coco-Quinine" it was a dishonest suggestion.

X Q. 72. But you testified in answer to X Q. 65 and X Q. 66 that that wasn't the way you construed it "when I bought it." Can you explain?

A. I bought the Quin-Coco to sell for Coco-Quinine upon calls for "quinine with syrup" and "chocolate quinine," and not to sell it for "Coco-Quinine," and not to use it as a substitute for Coco-Quinine upon a prescription calling for "Coco-Quinine." Therefore I do not use it entirely as a substitute.

X Q. 73. I read you:

"X Q. 65. Do you mean that he didn't approach you in a dishonest light?

"A. You may construe his conversation that I could sell Quin-Coco for Coco-Quinine honestly without being dishonest.

"X Q. 66. Is that the way you construed it?

"A. It is when I bought it."

"X Q. 71. Then you considered that the suggestion which you say Nottingham made you was a dishonest suggestion from your point of view?

"A. When Mr. Nottingham stated that "you could sell Quin-Coco for Coco-Quinine to customers calling for Coco-Quinine," it was a dishonest suggestion."

Can you explain the difference between these answers?

A. When I bought Quin-Coco I did not buy it with the intention to substitute it for Coco-Quinine. I looked at it in the light that

I could use Quin-Coco for "chocolate and quinine" or could
457 use it as "quinine mixed with syrup."

X Q. 74. What I want to know is how you can explain your having testified in one place that Nottingham's suggestion could be construed as honest and in another place that it was dishonest? I am referring to X Q. 65, 66 and 71, which I have just quoted in the last question.

A. At the time I bought Quin-Coco my intention was to use Quin-Coco when I had a call for chocolate mixed with quinine, and chocolate quinine. When Mr. Nottingham suggested that I could use Quin-Coco for Coco-Quinine it was a dishonest suggestion, but when he suggested that I could use Quin-Coco for chocolate quinine and quinine mixed with syrup, I construed this could be done honestly.

X Q. 75. But you said above in answer to X Q. 65 and X Q. 66, that his entire conversation on this point could be construed as honest. How do you reconcile that statement with the one you have just made?

By Mr. Bradford: Objected to as not justified by the witness's answer in that he did not use the words "entire conversation;" also as useless repetition and calling for no facts that can be of any possible assistance to the court in deciding the issues herein.

A. I do say that it was dishonest for Mr. Nottingham to represent Quin-Coco to be the same as Coco-Quinine. But I sell Quin-Coco for "quinine mixed with chocolate," etc.

X Q. 76. Is that all that he represented about Quin-Coco, that it was the same as Coco-Quinine?

A. And it could be sold for Coco-Quinine, showing me a larger profit than Coco-Quinine could.

X Q. 77. X Q. 73 repeated.

By Mr. Bradford: I protest against this useless repetition,
458 useless padding of the record, and useless waste of time and money when the witness has answered, as counsel must know, fully and frankly as to every fact within his knowledge that can be of any use to the court. Such questions are purely a technical effort to confuse the record, and are improper and entirely out of place in a suit of this kind.

By Mr. Rawle: Mr. Rawle objects to the objection as an improper interference with cross-examination.

By Mr. Bradford: Mr. Bradford replies that he regrets exceedingly that he has to call the court's attention to such a gross violation of the privilege of cross-examination in an equity cause, outside of the court room, as is being perpetrated in this case.

A. My answer is the same.

X Q. 78. Why have you testified at one time that Nottingham's conversation was not dishonest and at another time that it was dishonest in its suggestion?

By Mr. Bradford: Objected to as not a correct statement of what the witness has testified to; also as immaterial and irrelevant.

A. My answer to X Q. 65 and X Q. 71 will explain.

X Q. 79. You have testified that you construed Nottingham's conversation to the effect that you could sell Quin-Coco for Coco-Quinine honestly without being dishonest. You have also testified that Nottingham's statement to you that you could sell Quin-Coco for Coco-Quinine was a dishonest suggestion. How do you reconcile these two statements?

By Mr. Bradford: Objected to because it is not a correct statement of what the witness has testified.

459 A. I have not testified to this effect, referring you to answer to X Q. 65.

X Q. 80. I again call your attention to X Q. 65, X Q. 66 and X Q. 71, and ask you how you reconcile the difference between the statements therein made?

A. When Mr. Nottingham said that Quin-Coco was the same as Coco-Quinine or could be sold for Coco-Quinine, it was a dishonest representation. But when Mr. Nottingham represented it that way and that it could be sold as chocolate quinine or quinine in syrup, this was an honest representation, to my best knowledge.

X Q. 81. But again I point out to you that you have said that you did not construe Nottingham's conversation in a dishonest light? Apparently you meant his entire conversation. Now you say that you construed part of it in a dishonest light. How do you reconcile these two statements?

By Mr. Bradford: Objected to as not a correct statement of the witness's testimony; and further that the witness has in several answers explained how he reconciles the two statements, and clearly what he means.

A. When Mr. Nottingham represented Quin-Coco to be the same as Coco-Quinine, it was dishonest. But when he made it plain enough for me to see that I could sell it for chocolate quinine, or quinine with syrup, I looked at it in an honest way.

X Q. 82. That is your answer, is it?

A. Yes.

— Q. 83. And that was his suggestion that you say was dishonest?

By Mr. Bradford: Objected to as a clear attempt to trap the witness, a practice wholly out of place in an equity court, and as improper.

460 By Mr. Rawle: Mr. Rawle objects to the objection as an exceedingly improper interference with his cross-examination.

By Mr. Bradford: Mr. Bradford replies that the objection is believed to be fully justified by his duty to the court.

A. And that Quin-Coco is the same as Coco-Quinine and could be sold or substituted for Coco-Quinine that was the dishonest suggestion or representation.

X Q. 84. But you have said before that you did not remember whether Nottingham used the word "substitute." Is that correct?

A. To the best of my knowledge it was represented to me to be used as a substitute. The word "substitute" may have been used, but at the same time it was made plain enough to me that you could use Quin-Coco as a substitute for Coco-Quinine.

X Q. 85. Do you swear that the word "substitute" was used by Nottingham?

A. I cannot, but I will refer you to my answer to X Q. 84.

X Q. 86. In answer to X Q. 84 you swear that Nottingham said that Quin-Coco could be substituted for Coco-Quinine. You have just said that you cannot so swear. Which is correct?

By Mr. Bradford: Objected to as a clear misstatement of the witness' testimony.

A. I cannot swear postively that the word "substitute" was used, but refer you to my answer to X Q. 84.

X Q. 87. If you say that you considered Nottingham a square man why do you place a dishonest construction on what he said to you, or assume that he was asking you to do a dishonest thing?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. When he represented Quin-Coco to be the same as Coco-Quinine; but in every other respect I do say Mr. Nottingham did
461 everything on the square, to the best of my knowledge.

X Q. 88. Was Nottingham's statement to you that Quin-Coco was the same as Coco-Quinine, the one which you considered dishonest, as you have just said in your last answer?

By Mr. Bradford: The question is objected to as the witness has answered the identical question before and the same question in substance many times, and for these reasons as being entirely improper and out of place.

A. Yes, and that it could be sold for Coco-Quinine.

X Q. 89. What is the population of this settlement?

A. Between eleven and twelve hundred.

X Q. 90. Any more drug stores here?

A. One.

X Q. 91. How many doctors?

A. Three.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 92. What surrounding territory does your store serve?

A. Four miles North of Marshallville; five miles West of Marshallville; ten miles South of Marshallville, and six miles East of Marshallville.

R. D. Q. 93. What is the population approximately of this territory?

A. I don't believe I could come within two or three thousand of it; it is pretty thickly settled. I would guess from eight to ten thousand people, easily.

R. D. Q. 94. About what is the annual volume of your business?

A. Between ten and eleven thousand dollars.

Re-direct-examination closed.

462 Recross-examination.

By Mr. Rawle:

R. X Q. 95. Does the broader territory you have specified include any other town, village or hamlet?

A. Winchester, Georgia, which has one general store, but no drug store, and a population of about twenty or twenty-five persons. That is the only settlement in the territory which I have named.

R. X Q. 96. Do you mean to say that in the territory you have indicated there are from seven to eight thousand more inhabitants outside of Marshallville, it being, as I understand you, a purely farming country?

A. It is not only farming, it is peach growing and everything else, asparagus, cotton, grain, potatoes, oranges, bananas, etc. The answer that I gave for the population of the surrounding country was a guess one.

Deposition closed at 1 o'clock p. m.

WILLIAM A. JOLLY.

Subscribed and sworn to before me this 14th day of April 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet this evening (April 14, 1915) at 8 o'clock at Hotel Dempsey, Macon, Georgia.

Macon, Georgia,
Hotel Dempsey, April 14, 1915—8 p. m.

Met pursuant to adjournment.
Parties present as before.

463 R. H. GREENE, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. R. H. Greene; age, 27; Macon, Ga.; Retail Druggist. I am prescription clerk in the employ of the Taylor-Bayne Drug Company, Midland Branch. They have six retail stores in this city, and I am transferred from one to another, but chiefly employed at the Midland Branch. I have been employed by this concern for

over two years and prior to that time was with C. F. Barrett, druggist at Millersville, Ga., for nearly four years. I have been filling prescriptions in all for about six years.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?

A. I am. It is the product of Eli Lilly & Company.

Q. 3. How long have you been familiar with this product?

A. Ever since I have been in the drug business.

Q. 4. How is it dispensed in the stores where you have been employed?

A. On prescriptions and calls.

Q. 5. How do physicians designate this product on their prescriptions as a rule, so far as your experience goes?

A. Sometimes they put "Lilly's" behind it and sometimes it is written "Coco-Quinine."

Q. 6. When a prescription is written just "Coco-Quinine," without the word "Lilly," what product do you understand is intended by the physician?

A. Lilly's Coco-Quinine.

464 Q. 7. Do the stores where you have been employed do a large prescription business?

A. Yes, sir.

Q. 8. Receive prescriptions from physicians generally all over the city?

A. Yes, sir.

Q. 9. Have you personally ever seen a prescription written for "Quin-Coco?"

A. I don't remember that I have.

Q. 10. Have you ever heard a customer ask for "Quin-Coco?"

A. I don't remember that I have.

Direct-examination closed.

No Cross-examination.

R. H. GREENE.

Subscribed and sworn to before me this 14th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN H. VINSON, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age residence and occupation?

A. John H. Vinson; age, 33; Macon, Georgia; Traveling Salesman for Eli Lilly & Company, covering Central Georgia, with headquarters at Macon, Ga.

Q. 2. Among other preparations which you handle or for which you solicit orders do you include the item of Coco-Quinine?

A. Yes.

465 Q. 3. Please state what you can relative to the conditions of the trade in this item in your territory?

A. I find that the sale of Coco-Quinine has materially decreased on account of the sale of the item Quin-Coco sold by William R. Warner & Co. On soliciting orders for Coco-Quinine I have quite a number of customers who decline to give me orders for Coco-Quinine stating that they can buy Quin-Coco at a very much less price. I should judge the sale of Quin-Coco is at least fifty per cent. of that of Coco-Quinine, naturally reducing the sale of Coco-Quinine very materially.

By Mr. Rawle: The last two sentences of the answer are objected to as hearsay, as res inter alias acta, and as incompetent. The question is objected to as incompetent.

Q. 4. In what proportion of the drug stores in your territory have you personally seen packages or bottles of the William R. Warner & Company preparation called Quin-Coco?

A. I should say at least forty per cent.

Q. 5. Have you ever discussed with druggists the question of demand for Quin-Coco, and if you have, do you know of any druggist who claims to have ever had any demand for Quin-Coco as such?

By Mr. Rawle: Objected to as incompetent, as calling for transactions between third parties, not parties to the record, and for hearsay, and for other reasons too numerous to mention.

By Mr. Bradford: And which perhaps may as well be left unmentioned by defendant.

A. I have discussed it and know of no one who has any demand for Quin-Coco, or has ever claimed to have had any.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 6. How many drug stores are there in your territory?

466 A. I should say at least a hundred and fifty. In Macon and suburbs there are about twenty-eight.

X Q. 7. How often do you average your calls on each of these in your territory?

A. Every six weeks.

X Q. 8. You have spoken of the reduction of the sale of Coco-Quinine. Is it possible that this may have in some part been the result of the decrease in malarial diseases?

A. I don't think so.

X Q. 9. Have you any knowledge or information in your business as to whether there has been, in the last five years, a decrease in malarial diseases in your territory?

A. I couldn't say that there had been a decrease. The conditions seem about normal, the malarial conditions.

Cross-examination closed.

Deposition closed.

JOHN H. VINSON.

Subscribed and sworn to before me this 14th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Thursday, April 15, 1915, at 8.30 a. m., at same place.

Macon, Georgia, April 15, 1915—8.30 a. m.

Met pursuant to adjournment.
Parties present as before.

STEPHEN D. COLEMAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

467 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Stephen D. Coleman; age 27; Fort Gaines, Georgia; retail druggist; proprietor of the People's Drug Store at Fort Gaines, Ga.
Q. 2. How large a place is Fort Gaines, Ga.?
A. Between twelve and fifteen hundred.
Q. 3. How many drug stores?
A. Three.
Q. 4. What territory does your store serve around Fort Gaines?
A. In General all over Fort Gaines and within the territory fifteen miles surrounding Fort Gaines.
Q. 5. What is the population of this territory approximately?
A. I couldn't give any accurate guess, but I should estimate about as many more as in Fort Gaines.
Q. 6. Do you do a considerable prescription business?
A. Yes, sir; I do a right nice business.
Q. 7. About how many physicians have prescriptions filled at your store?
A. Three, but one of them not all of his business. He sends some of his prescriptions to another drug store.
Q. 8. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if you do, whose preparation is it?
A. I do. It is Lilly's.
Q. 9. How do you dispense Coco-Quinine?
A. On prescriptions generally and sometimes on call.
Q. 10. Do all of the physicians who have prescriptions filled at your store use this preparation in their practice?

A. One of them mostly. I have had prescriptions from all of them.

468 Q. 11. How do they designate the preparation?

A. Just "Coco-Quinine."

Q. 12. Whose product do you understand is intended when prescriptions are just written "Coco-Quinine?"

A. Lilly's.

Q. 13. Is Coco-Quinine used to a considerable extent or only in small degree in your territory?

A. To a pretty good extent. I buy it in gallon quantities.

Q. 14. How long have you been in the retail drug business?

A. About two years, for myself. I worked in a drug store about three years and then went to school and then came back and opened a drug store for myself.

Q. 15. In what other drug store did you work?

A. The City Drug Store at Fort Gaines, Ga.

Q. 16. Did this drug store handle Coco-Quinine while you were with them?

A. They did.

Q. 17. Did you ever see a prescription written for "Quin-Coco" at either your store or the other store where you worked?

By Mr. Rawle: Objected to as irrelevant.

A. I have not.

Q. 18. Did you ever hear a customer ask for Quin-Coco over the counter?

Same objection.

A. I don't think that I have. I am not positive. I don't think though that I have.

Q. 19. Do you mean that you don't remember ever hearing a customer ask for Quin-Coco?

Same objection?

A. No, sir; I don't remember.

Q. 20. Have you ever had such a preparation offered to you, and if so, will you relate the circumstances and what was said at the time.

A. I had a gentleman, a drummer, to ask me did I need
469 any Coco-Quinine and I made the remark that I didn't know whether he handled Coco-Quinine or not, that I thought Lilly was the only one who made Coco-Quinine. He said that it was the same thing and he gave the name of it, but I don't remember the name he gave.

Q. 21. When was this?

A. I don't remember just exactly the date.

Q. 22. Please state the date as nearly as you can remember.

A. I believe that it was the latter part of last year.

Q. 23. Probably what month?

A. I couldn't say. I can't remember. I hadn't thought of it any more.

Q. 24. Did you buy any?

A. I did not.

Q. 25. Did you buy any other goods of the same drummer at the same time?

A. I did not.

Q. 26. Did he offer you any other goods and if he did can you recall some of the items that he offered?

A. I couldn't say positively, but I am under the impression now that it was Sloan's Liniment or something like that.

Q. 27. Did he offer you any King's New Discovery?

A. I don't remember just exactly.

Q. 29. Have you ever seen the man since?

A. I don't think I have.

Q. 29. Had you ever seen him before?

A. That I couldn't say. I don't know that I had.

Q. 30. Do you handle Sloan's Liniment?

A. I do.

Q. 31. Do you handle King's New Discovery?

A. I do.

Q. 32. From whom do you buy these goods?

A. Lamar, Taylor & Riley Drug Company, wholesale druggists, of Macon, Ga.

Q. 33. Do you know the name of the man who made this proposition to you?

470 A. I don't remember very clearly.

Q. 34. You didn't recall having had any business dealings with him before?

By Mr. Rawle: The further examination along these lines is objected to as leading the witness.

A. No, sir.

Direct examination closed.

By Mr. Rawle: I object to Q. 20 and all questions thereafter, because there is nothing to connect the testimony with the defendant.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 35. How far is Fort Gaines from Macon?

A. A hundred and some odd miles, about a hundred and thirty-five miles, southwest of Macon.

X Q. 36. Do you buy most of your goods from those wholesale druggists, Lamar, Taylor & Riley Drug Co.?

A. Yes, sir, I do.

X Q. 37. You have some financial arrangement with them to that effect, haven't you?

By Mr. Bradford: Objected to as irrelevant, immaterial and improper, and impertinent.

A. I have.
X Q. 38. Are they financially interested in your drug store?
A. No, sir.

Cross-examination closed.

Deposition closed.

S. D. COLEMAN.

Subscribed and sworn to before me this 15th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

471 WILLIAM C. PUMPELLY a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. William C. Pumpelly; age 39; Macon, Ga.; physician.
Q. 2. How long have you been practicing?
A. Between twelve and thirteen years.
Q. 3. Do you use a pharmaceutical preparation known as Coco-Quinine, in your practice?
A. Yes, sir.
Q. 4. Whose product do you recognize Coco-Quinine to be?
A. Lilly & Company.
Q. 5. How do you write your prescriptions?
A. Just "Coco-Quinine."
Q. 6. Whose product do you intend the druggist to understand by such designation?
A. Lilly & Company's Coco-Quinine.
Q. 7. Do you use this preparation regularly and generally in your practice?
A. I use it quite often.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Has there been rather a diminution of malarial disease in this part of the world within the last five years?

By Mr. Bradford: Objected to as not cross-examination.

472 A. I can't say as to that.

Cross-examination closed.

Deposition closed.

WM. C. PUMPELLY.

Subscribed and sworn to before me this 15th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

JOSEPH B. RILEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Joseph B. Riley; age 54; Macon, Ga.; wholesale druggist. I am manager of Lamar, Taylor & Riley Drug Company.
Q. 2. What territory does your company serve?
A. Middle and South Georgia, and a portion of North Georgia.
Q. 3. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?
A. We do. It is the product of Eli Lilly & Company.
Q. 4. How long have you handled this preparation?
A. I would say eight to ten years.
Q. 5. Does your store stock a general line of the products of various manufacturing concerns for which there is a demand in your territory?
A. It is our custom to do it.
Q. 6. Will you please state how you regard the house of Eli Lilly & Company and its preparations?

By Mr. Rawle: Objected to as immaterial.

473 A. I regard them as one of the highest standing and one of the foremost in their line as pharmaceutical manufacturers.

JOSEPH B. RILEY.

Direct-examination closed.

No cross-examination. JOSEPH B. RILEY.

Subscribed and sworn to before me this 15th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

E. G. JACOBS, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. E. G. Jacobs; age 44; Macon, Ga.; wholesale drugs. I am assistant manager of the Lamar-Taylor & Riley Drug Company.
Q. 2. In your position do you have personal knowledge of the sales orders and buying.
A. I do.

Q. 3. Please state as to the demand for Coco-Quinine Lilly, at your store, approximately about what it amounts to?

A. To the best of my knowledge it is about fifty gallons a month.

Q. 4. Do the orders come in from various parts of the territory covered by your store or from special localities?

A. Pretty well scattered throughout the territory.

Q. 5. Have you ever had an order for a product called
474 Quin-Coco and if so, what can you tell us about the demand for this product?

By Mr. Rawle: Objected to as immaterial and irrelevant.

A. We have had an occasional order for Quin-Coco.

Q. 6. Do you fill such orders as you receive?

A. We have possibly marked out a package or two in the last year or two.

Q. 7. Have you ever stocked this preparation, and if so, to what extent?

Same objection.

A. Our records show that we have had two gallons and two five pints, purchased in 1913, from William R. Warner & Co.

Q. 8. Were these gallons and five pint packages sold to supply the demand from your trade?

Same objection.

A. They were.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 9. Approximately how many drug stores are there in the territory that you serve?

A. I am unable to say, I don't know. We cover pretty nearly the entire State of Georgia. Offhand I would say there are probably seven or eight hundred, but there might be fifteen hundred.

X Q. 10. I understand that you carry the Lilly lines of pharmaceuticals and specialties?

A. Yes.

X Q. 11. Do you carry an equally complete line of any other manufacturing concern?

475 A. Yes, we carry a larger and more complete line of Sharpe & Doehme's than we do of Lilly's.

Deposition closed. E. G. JACOBS.

Subscribed and sworn to before me this 15th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Friday, April 16, 1915, at Hotel Piedmont, Atlanta, Georgia, at 9 a. m.

Atlanta, Georgia,
Hotel Piedmont, April 16, 1915, 9 a. m.

Met pursuant to adjournment.
Parties present as before.

WILLIAM B. FRANKLIN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William B. Franklin; age 34; Atlanta, Ga.; retail druggist; manager of Brown & Allen Drug Company, of Atlanta, Ga. I do the buying of all pharmaceuticals and have general supervision of the business. Coco-Quinine is included in pharmaceuticals.

Q. 2. Does your store do a large prescription business?

476 A. We do around a hundred and fifty prescriptions per day on an average the year around.

Q. 3. Are these prescriptions received from physicians generally from all parts of the city?

A. From a general run of doctors all over the city.

Q. 4. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?

A. We do, and it is Lilly's product.

Q. 5. How long have you handled this preparation?

A. For eight or ten years. I don't know exactly.

Q. 6. How do your physicians write their prescriptions for this product?

A. For "Coco-Quinine."

Q. 7. Whose product do you understand is intended by the physician when you receive a prescription written "Coco-Quinine"?

A. Lilly's.

Q. 8. Do you dispense this product largely on prescription or partly on call from customers?

A. Both.

Q. 9. How do your customers designate it when they ask for this product?

A. "Coco-Quinine."

Q. 10. Have you ever received a prescription or a call for a product called "Quin-Coco"?

By Mr. Rawle: Objected to as immaterial.

A. I don't know of any such preparation.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 11. How many drug stores are there in this city and suburbs, approxmiately?
A. It is estimated at 256.
X Q. 12. How long since you have personally compounded prescriptions and sold drugs over the counter?
477 A. I still do that sort of work.
X Q. 13. Do you have calls for a chocolate quinine preparation or a sweet quinine or a syrup of quinine or a tasteless quinine from customers?
A. Yes, we have calls for chocolate quinine, and we then dispense Lilly's Coco-Quinine. We have calls for sweet quinine on which we frequently dispense a syrup of quinine made by Sharpe & Doehme, which is not a coco-quinine. I think I have had calls for tasteless quinine, and we dispense on that syrup of quinine of Sharpe & Doehme. We have calls for syrup of quinine and dispense on that Sharpe & Doehme.
X Q. 14. Do you remember calls for a brown syrup of quinine?
A. No.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 15. Is the Sharpe & Doehme preparation you refer to either flavored or colored with chocolate or cocoa?
A. No.

Deposition closed.

W. B. FRANKLIN.

Subscribed and sworn to before me this 16th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

THOMAS C. MARSHALL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupa-
478 tion?
A. Thomas C. Marshall; age 36; Atlanta, Ga.; retail druggist; proprietor of Marshall's Pharmacy. For the last four years I have been in business for myself and prior to that time I was with the Elkin-Watson Drug Company, of this city, one of the largest

drug stores in Atlanta. I had stock in the company and was prescription clerk.

Q. 2. Have you handled a pharmaceutical preparation known as "Coco-Quinine," and if so, whose product do you recognize it to be?

A. I have. It is manufactured by Lilly.

Q. 3. How long have you handled this preparation?

A. For the last twelve or fifteen years.

Q. 4. How is it dispensed in the stores where you have been associated?

A. Principally on prescriptions and over the counter as "Coco-Quinine."

Q. 5. How do physicians usually designate this preparation on their prescriptions?

A. "Cocoa-Quinine, Lilly's," and some call it "Chocolate Quinine."

Q. 6. Do they always write the word "Lilly's" on the prescription?

A. Not always.

Q. 7. Do you have any doubt when a prescription is received written "Coco-Quinine," without the name of the manufacturer, whose product the prescription calls for?

A. No, sir. I understand it means "Lilly's."

Q. 8. Did you ever receive a prescription for "Quin-Coco" or a call from a customer for "Quin-Coco"?

By Mr. Rawle: Objected to as immaterial.

A. No, sir.

Q. 9. When the call is for "chocolate quinine" whose prescription do you understand is intended?

A. Lilly's.

Q. 10. Does your store do a large prescription business?

479 A. About fifty a day.

Q. 11. Did the other store with which you were connected do a large prescription business?

A. Yes; they ran from a hundred to a hundred and fifty a day.

Q. 12. Do the physicians, so far as your experience goes, prescribe Coco-Quinine generally over this city?

A. Yes, sir; they do.

Q. 13. And have they been doing so during the twelve or fifteen year which you say is the period of time you have been dispensing this product?

By Mr. Rawle: This and the previous question is objected to as immaterial.

A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. You say you sometimes have calls over the counter for "chocolate quinine." Is that correct?

A. Yes, sir.
X Q. 15. Rather frequently?
A. Well, we have calls for Coco-Quinine—yes, we have calls for chocolate quinine.
X Q. 16. Rather frequently?
A. No, sir.
X Q. 17. How many calls over the counter do you average a week for "Coco-Quinine" or "Chocolate Quinine?"
A. That is a seasonable product. During the winter season we will have two or three calls a day.
X Q. 18. For what is such a preparation used in the winter?
A. Colds.
X Q. 19. How many calls do you average in summer?
A. Not practically any.
X Q. 20. What is the summer use of it?
480 A. For colds, the same as during the winter?
X Q. 21. And for malaria?
A. We don' have any malaria up here.
X Q. 22. Do the doctors ever prescribe "chocolate quinine" in their prescriptions?
A. Not the doctors, usually the laity.
X Q. 23. (Question X Q. 22 repeated.)
A. Not to my knowledge.
X Q. 24. Do you have calls for a sweet quinine or a tasteless quinine or a syrup of quinine, or brown syrup of quinine?
A. We have calls for a tasteless quinine and a syrup of quinine.
X Q. 25. Somewhat frequently?
A. No, sir; not frequently.
X Q. 26. Do you handle a product known as "Quin-Coco?"
A. No.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. In your answer to Q. 5 you stated that physicians designate this preparation on their prescriptions as "Coco-Quinine, Lilly's," and "some call it chocolate quinine." In answer to Mr. Rawle's question I understand you to say that the physicians write their prescription for "Coco-Quinine" but that the laity sometimes call for "chocolate quinine." Will you please explain if there is any correction needed to your answer to Q. 5, which I show you?
A. No, I don't think there is any.
R. D. Q. 28. Well, you have said in one place that the physicians do prescribe "chocolate quinine" and in another place that the physicians don't prescribe "chocolate quinine?"
A. I said "usually." The question was "How do physicians usually."
481 R. D. Q. 29. In X Q. 22, Mr. Rawle asked you do the doctors ever prescribe "chocolate quinine" in their prescriptions?

You answer was, "Not the doctors, usually the laity." I merely want to give you an apportunity to straighten out the apparent inconsisteney between these two answers, nothing more?

By Mr. Rawle: Objected to as leading the witness.

A. There is nothing inconsistent about that. Every now and then the physician gets balled up on what he prescribes, but ninety-nine out of a hundred you will see them "Coco-Quinine." If they should prescribe "chocolate quinine" we give them "Coco-Quinine."

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 30. Might there not be a larger percentage of prescriptions in which the doctors designate "chocolate quinine?"
A. No, sir.

Deposition closed. THOS. C. MARSHALL.

Subscribed and sworn to before me this 16th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

LYNN FORT, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

482 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Lynn Fort; age 45; Atlanta, Ga.; wholesale druggist. I am general manager of the Lamar and Rankin Drug Company.
Q. 2. What territory does your house serve?
A. North Georgia, a small section of Alabama, a small section of Tennessee, also a small section of North and South Carolina.
Q. 3. Do you handle a pharmaceutical preparation known as "Coco-Quinine" and if so, whose product do you recognize it to be?
A. Yes, sir; we handle Coco-Quinine. It is made by Eli Lilly & Company.
Q. 4. How long have you been familiar with this preparation?
A. I have been handling it in a jobbing way for ten years approximately. Prior to that time as a prescription clerk for several years, I don't remember exactly how long. I was prescription clerk in E. J. Eldrige's drug store in Americus, Ga.
Q. 5. Is the demand for "Coco-Quinine" general throughout the territory served by your store?
A. Yes, sir.
Q. 6. So far as you know has your jobbing house ever received an order from the retail trade for a product called "Quin-Coco?"

By Mr. Rawle: Objected to as immaterial.

A. Not that I recall.

Q. 7. Do you stock all pharmaceutical preparations for which there is a demand among the retail trade in your territory?

A. We stock all pharmaceuticals for which there is any appreciable demand.

Direct examination closed.

483 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 8. I take it there may be a demand in your territory for pharmaceutical preparations, which demand is filled direct by the manufacturers? Is that correct?

A. If there is any appreciable demand for the goods the jobber would have some orders for the item.

X Q. 9. (Question repeated.)

A. I don't know how to answer it any better than the answer I gave. It is true that there may be a demand in one locality which might be filled by the manufacturer, or in one town, but if that demand is general throughout the territory the jobber would certainly have orders for the item.

X Q. 10. How many different drug manufacturing concerns have, to your knowledge, salesmen soliciting business for their houses in your territory?

A. I can't answer that. There are quite a number.

X Q. 11. Name those that you know?

A. Parke, Davis & Company, Nelson-Baker & Co., William R. Warner & Co., Frederick Stearns & Company, Sharpe & Doehme, Eli Lilly & Co., the Harvey Company. These are all that I recall. Some of these houses solicit business for direct shipment or shipment through the jobber. Some of the houses solicit business to be shipped through the jobber only.

X Q. 12. Do some of these houses solicit business in your territory, to be shipped direct to the retail druggist, only?

A. Only to what is known as "preferred" customers. The customers that are not classed as "preferred" customers are often shipped through the jobber. This, however, does not apply to the Harvey Company, as they solicit business from the physician, for direct shipment only.

X Q. 13. What do you mean by "preferred" customers?

484 A. It is a class of customers that buy pharmaceuticals in such quantities as to get the benefit of the forty per cent. discount on Part One Products from Parke, Davis & Co., and Sharpe & Doehme.

X Q. 14. You have mentioned Frederick Stearns & Co. Do you know some of the lines manufactured, sold and distributed by that concern?

A. Yes.

X Q. 15. Please name them?

By Mr. Bradford: This line of examination from X Q. 10 is objected to as immaterial and irrelevant and wholly outside of any issue herein.

A. Stearns Wine of Cod Liver Oil; Stearns Headache Wafers.

X Q. 16. (Question repeated.) Please notice that I am asking you for the names of the manufacturing concerns whose lines Frederick Stearns & Company manufacture or distribute?

Same objection, and further because such a question has not previously been asked, and as wholly incompetent, immaterial and impertinent.

A. Frederick Stearns and Company are manufacturers themselves, and the items above mentioned are manufactured by Frederick Stearns & Co.

X Q. 17. Do you believe that Frederick Stearns & Co., manufacture the products known as the "Nyall Products"?

Objection repeated, and the Court's attention is directed to the waste of plaintiff's time and money in wholly irrelevant, immaterial and incompetent examination; also examination that is in no sense cross-examination.

A. I do not know.

By Mr. Rawle: Mr. Rawle calls attention to Q. 7.

X Q. 18. I call your attention to answer to X Q. 11.
485 Please add the names of any other concerns, if you can?

By Mr. Bradford: Objection repeated.

A. That is so broad, sir, that I don't know how to answer it. There are patent medicine houses, jobbing houses, chemical houses, non-secret houses, though the list given above refers to pharmaceutical houses.

X Q. 19. I call your attention to the following pharmaceutical manufacturers: Henry K. Wampole & Co.; Burrows Brothers; Hance Brothers & White; William S. Merrill & Co.; Frederick Ingram, and John Wyeth & Brother. Are these manufacturers and distributors of pharmaceutical preparations and do they or any and which of them employ salesmen in your territory, soliciting the sales of pharmaceutical preparations for their respective houses?

By Mr. Bradford: Objection repeated.

A. Henry K. Wampole & Co., William S. Merrill Chemical Company and John Wyeth & Brother employ salesmen and solicit business in this territory. William S. Merrill & Co., and the Henry K. Wampole Company solicit business for direct shipment and also solicit business for shipment through the jobber. I do not think that Frederick Ingram & Co., Hance Brothers & White or Burrow Brothers travel salesmen in this territory.

X Q. 20. What jobbers of pharmaceutical preparations have traveling salesmen in your territory or part of it, soliciting sales of pharmaceutical products?

By Mr. Bradford: Objection repeated.

A. Solomon & Company, of Savannah; Columbia Drug Company, Savannah; Lamar, Taylor & Riley Drug Company, Macon; Brannon & Carson Company, Columbus, Ga.; Durr Drug Company, Montgomery, Ala.; Greil Brothers Drug Company, Montgomery, Ala.; Doster-Northington Drug Company, Birmingham, Ala.;
486 Bradfield Drug Company, La Grange, Ga.; Curry Arrington Company, Rome, Ga.; Fritz & Weil, Chattanooga, Tenn.; Spurlock, Neil & Co., Nashville, Tenn.; Berry Demovil Company, Nashville, Tenn.; Chapman Drug Company, Knoxville, Tenn.; Sanford Chambers & Alvers Co., Knoxville, Tenn.; Smith Drug Company, Asheville, North Carolina; M. C. Brown, Gainsborough, Ga.; Geer Drug Company, Spartanburg, South Carolina; Murray Drug Company, Columbia, South Carolina; Augusta Drug Company, Augusta, Ga.; Lynn & Finck, New York, N. Y.; McKesson & Robbins, New York, N. Y., and others.

X Q. 21. And these jobbing concerns are all, in a sense, competitors of yours, are they not?

Objection repeated.

A. On some lines, yes.

X Q. 22. Now referring to your answer to Q. 7, in which you say "We stock all pharmaceuticals for which there is any appreciable demand," I take it that there is a large or a very large bulk of pharmaceutical preparations sold in your territory, which does not pass through your jobbing house. Is that correct?

A. There is a good big volume of pharmaceutical business done in our territory that we do not handle. However, where there is any big demand for any particular item in the pharmaceutical line, we necessarily have orders for that item.

Cross-examination closed.

Deposition closed.

LYNN FORT.

Subscribed and sworn to before me this 16th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

487 WALTER R. BELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Walter R. Bell; age 32; Atlanta, Ga.; traveling salesman for Eli Lilly & Co., covering Northern Georgia.

Q. 2. Please state in reference to the product called "Quin-Coco" and the character of interference you find therefrom in the sales of the Lilly product known as "Coco-Quinine" in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial, as calling for hearsay, and transactions between other parties who are not on the record, and as incompetent.

A. In my territory I find probably twenty-five to thirty per cent. of my trade using Quin-Coco. By their admissions it is used principally as a "replacer" for Coco-Quinine.

By Mr. Rawle: Objection is repeated to the answer and notice given of a motion to strike the same out for the reason stated.

Q. 3. Please state as to the normal demand for Coco-Quinine, in your territory, as to whether it is considerable or limited?

A. Of course in Northern Georgia the demand for an anti-malarial is rather limited, but there is considerable Coco-Quinine used in other conditions. I would say that for this territory the sale on Coco-Quinine is very good.

Q. 4. How do you know that Quin-Coco is used in twenty-five to thirty per cent. of the drug stores in your territory?

Same objections.

488 A. From observation in calling on the trade and seeing Quin-Coco in stock in this proportion of the drug stores.

Q. 5. Have you any personal knowledge of Quin-Coco being used for or sold as Coco-Quinine?

A. I have.

Q. 6. Please explain.

A. In one particular instance I saw the clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine." He was pouring it out of a Quin-Coco bottle into bottles for retail, and labeling these bottles "Coco-Quinine."

By Mr. Rawle: The answer is objected to as res inter alias acta and as incompetent.

Q. 7. Have you ever had druggists admit to you that they sell Quin-Coco, labelled as "Coco-Quinine," and if so, please explain fully?

By Mr. Rawle: Objected to as calling for hearsay, for matters res inter alias acta and as inadmissible.

A. Yes. I purchased a package so labeled and later, on presentation to the druggist, he reluctantly admitted that it was Quin-Coco. This druggist also admitted that such labeling was customary with him.

Q. 8. Have you the bottle in question, and if you have, will you produce it and offer the same in evidence?

Same objection.

A. I have the bottle and here produce it.

By Mr. Bradford: The bottle produced is offered in evidence and marked "Complainant's Exhibit, Bell's Sample Bottle."

By Mr. Rawle: Same objection to the offer.

Q. 9. Do I understand you to say that this druggist admitted selling Quin-Coco under the label that is on this bottle which you have offered in evidence?

489

Same objection and as leading.

A. Yes, I do.

Q. 10. Did he explain why he didn't label it "Quin-Coco?"

Same objection except as to leading.

A. He said there was no demand for Quin-Coco, no call for Quin-Coco, but there was a demand for Coco-Quinine.

Q. 11. Are the conditions relating to the sale of this particular product, which you have related, a fair sample of the conditions that prevail in your territory among the twenty-five to thirty per cent. of the drug stores which you have referred to, as relating to the sale of this particular product?

By Mr. Rawle: Objected to as calling for hearsay, for matters inter alias acta, inadmissible and because samples of facts are not evidence in a court of justice.

A. This particular condition is probably a little more exaggerated than conditions generally in that the druggists are not always quite so free to admit their guilt in substitution.

In a general way, however, I believe this condition is rather usual.

Q. 12. Was this particular druggist asked to testify in this case? I mean the druggist from whom you bought the sample bottle?

A. He was.

Q. 13. What did he say in response to the request?

By Mr. Rawle: This and the preceding question is objected to as inadmissible and this question is objected to for reasons given above.

A. He said that he would not testify, first, because it was none of his business; next that if he could make ten cents on a bottle of Quin-Coco and five cents on a bottle of Coco-Quinine, he would certainly sell Quin-Coco.

490

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. Where is Christian's Drug Store, and where is East Point, Ga.?

A. Christian's Drug Store is in East Point, Ga., a suburb of Atlanta, Ga., with a population of about 2,000 people.

X Q. 15. You testified as to seeing a clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine;" give the name of the drug store and the place and the date?

A. Christian's Pharmacy at East Point, Ga., about three months ago.

By Mr. Rawle: Objected to as irrelevant and immaterial, as calling for hearsay, and transactions between other parties who are not on the record, and as incompetent.

A. In my territory I find probably twenty-five to thirty per cent. of my trade using Quin-Coco. By their admissions it is used principally as a "replacer" for Coco-Quinine.

By Mr. Rawle: Objection is repeated to the answer and notice given of a motion to strike the same out for the reason stated.

Q. 3. Please state as to the normal demand for Coco-Quinine, in your territory, as to whether it is considerable or limited?

A. Of course in Northern Georgia the demand for an anti-malarial is rather limited, but there is considerable Coco-Quinine used in other conditions. I would say that for this territory the sale on Coco-Quinine is very good.

Q. 4. How do you know that Quin-Coco is used in twenty-five to thirty per cent. of the drug stores in your territory?

Same objections.

488 A. From observation in calling on the trade and seeing Quin-Coco in stock in this proportion of the drug stores.

Q. 5. Have you any personal knowledge of Quin-Coco being used for or sold as Coco-Quinine?

A. I have.

Q. 6. Please explain.

A. In one particular instance I saw the clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine." He was pouring it out of a Quin-Coco bottle into bottles for retail, and labeling these bottles "Coco-Quinine."

By Mr. Rawle: The answer is objected to as res inter alias acta and as incompetent.

Q. 7. Have you ever had druggists admit to you that they sell Quin-Coco, labelled as "Coco-Quinine," and if so, please explain fully?

By Mr. Rawle: Objected to as calling for hearsay, for matters res inter alias acta and as inadmissible.

A. Yes. I purchased a package so labeled and later, on presentation to the druggist, he reluctantly admitted that it was Quin-Coco. This druggist also admitted that such labeling was customary with him.

Q. 8. Have you the bottle in question, and if you have, will you produce it and offer the same in evidence?

Same objection.

A. I have the bottle and here produce it.

By Mr. Bradford: The bottle produced is offered in evidence and marked "Complainant's Exhibit, Bell's Sample Bottle."

By Mr. Rawle: Same objection to the offer.

Q. 9. Do I understand you to say that this druggist admitted selling Quin-Coco under the label that is on this bottle which you have offered in evidence?

489

Same objection and as leading.

A. Yes, I do.

Q. 10. Did he explain why he didn't label it "Quin-Coco?"

Same objection except as to leading.

A. He said there was no demand for Quin-Coco, no call for Quin-Coco, but there was a demand for Coco-Quinine.

Q. 11. Are the conditions relating to the sale of this particular product, which you have related, a fair sample of the conditions that prevail in your territory among the twenty-five to thirty per cent. of the drug stores which you have referred to, as relating to the sale of this particular product?

By Mr. Rawle: Objected to as calling for hearsay, for matters inter alias acta, inadmissible and because samples of facts are not evidence in a court of justice.

A. This particular condition is probably a little more exaggerated than conditions generally in that the druggists are not always quite so free to admit their guilt in substitution.

In a general way, however, I believe this condition is rather usual.

Q. 12. Was this particular druggist asked to testify in this case? I mean the druggist from whom you bought the sample bottle?

A. He was.

Q. 13. What did he say in response to the request?

By Mr. Rawle: This and the preceding question is objected to as inadmissible and this question is objected to for reasons given above.

A. He said that he would not testify, first, because it was none of his business; next that if he could make ten cents on a bottle of Quin-Coco and five cents on a bottle of Coco-Quinine, he would certainly sell Quin-Coco.

490

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. Where is Christian's Drug Store, and where is East Point, Ga.?

A. Christian's Drug Store is in East Point, Ga., a suburb of Atlanta, Ga., with a population of about 2,000 people.

X Q. 15. You testified as to seeing a clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine;" give the name of the drug store and the place and the date?

A. Christian's Pharmacy at East Point, Ga., about three months ago.

X Q. 16. And both of your instances relate to Christian's Pharmacy?

A. Both specific instances mentioned, yes.

X Q. 17. How many drug stores in your territory?

A. That would be a guess, probably 250.

X Q. 18. About how often do you visit each of them or make the rounds?

A. About every eight weeks, some oftener.

X Q. 19. How many of them have you visited since the first of March approximately?

A. Approximately half of them.

X Q. 20. Have you any knowledge as to why there is a label on the bottle you produced, partly covering up another label?

A. I don't know that one label is covered. Presumably it isn't covered but in cases where a man buys an old store he simply covers his predecessor's label with his own, a practice very common among retail druggists.

491 X Q. 21. Had the proprietor of Christian's pharmacy taken over that drug store recently?

A. My understanding is that he bought that store about four years ago.

Cross-examination closed.

Deposition closed.

W. R. BELL.

Subscribed and sworn to before me this 16th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I, Charles E. Riordon, a Notary Public within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the Plaintiff, in the above-entitled cause, were taken before me pursuant to notice of record as follows:

492 At Detroit, Mich., March 24, 1915:

Rockwell Roman,
William H. Martin,
John M. Francis,
Clifton H. Briggs,
William M. Merithew,
Ernest G. Swift.

At Saginaw, Mich., March 24, 1915:

Albert F. Knowles,
Bertram A. Wright,
Otto Kessler.

At Chicago, Ill., March 25, 1915:

Raoul R. Haas,
Robert A. Havenor,
Cornelius P. Van Schaak.

At Indianapolis, Ind., March 26, 1915:

Walter D. Hoskins.

At Cape Girardeau, Mo., March 27, 1915:

Joseph N. Wolsey,
James A. Kinder,
George W. Walker.

At Cairo, Ill., March 27, 1915:

Harry W. Schuh,
Herbert N. Henckell,
Will J. Bryant,
John B. Messenger.

At Nashville, Tenn., March 29, 1915:

Chesley W. Jennings,
Alva Lee Kelton,
Jerome B. Sand,
Charles L. Koellein,
Gus A. Blodau.

At Memphis, Tenn., March 30, 1915:

Carl O. Manning,
John R. Tague,
493 Robert L. Winchester,
William M. Scott.

At Little Rock, Ark., March 31, 1915:

John B. Bond, Jr.,
Carl Bordeaux,
Samuel V. Bracy,
Stephen D. Knox.

At Alexandria, La., April 1, 1915:

Walter L. Bolden,
Alfred L. Soulier,
R. L. Randolph,
Field V. Grinmellion,
Camille F. Gravel.

At Lake Charles, La., April 1, 1915:

Allen J. Perkins,
Charles C. Broussard.

At Jennings, La., April 2, 1915:

Richard D. Bowden,
Berna C. Fry,
Valleix B. Richard.

At Beaumont, Texas, April 2, 1915:

Wm. C. Chestnutt,
Robert L. Grigsby,
John S. Foster,
Ed. P. Ferguson.

At Houston, Texas, April 3, 1915:

Geo. H. Spurlock,
Wm. A. Schaefer,
Bryan P. Gilmer,
William O. Schuler,
Walter L. Griffin.

At Houston, Texas, April 3, 1915:

Julius R. Prochnow,
Fred B. Burns.

494 At New Orleans, La., April 5 and 6, 1915:

Howard S. Smith,
Charles H. Porter,
Edmund F. Barnes,
Charles C. Broussard (recalled),
Max Samson,
Lucien E. Lyons,

Frank Austin Fitch,
Ralph G. Persell,
Charles Heno,
Harry W. Lyle,
Edmund H. Walsdorf.

At Brook Haven, Miss., April 7, 1915:

Dr. O. H. Arrington,
Sol C. Ray.

At Hattiesburg, Miss., April 7, 1915:

Floyd L. Ames.

At Laurel, Miss., April 8, 1915:

Wesley S. Ames,
Anthony Fly.

At Collins, Miss., April 8, 1915:

Ellis B. Stovall,
O. S. Mayfield.

At Mobile, Ala., April 9, 1915:

Samuel H. Colvin,
Edwin R. Albright,
Quintus S. Adams,
Oscar J. McMillan,
Emmet S. Shepherd.

At Marion Junction, Ala., April 10, 1915:

O. C. Tisdale.

At Cuba, Ala., April 10, 1915:

Amos L. Vaughan.

495 At Birmingham, Ala., April 12, 1915:

Fred R. Daly,
Ezra H. Walker,
Don. J. Barber,
Hill W. Howell,
Merrill P. Northington,
Arrington C. Fancher.

At Montgomery, Ala., April 13, 1915:

Terry T. Greil,
Coleman F. Pearson,
John B. Reid,

John M. Moseley,
William A. Cunningham,
J. Johnston Moore.

At Marshallville, Ga., April 14, 1915:

William A. Jolly.

At Macon, Ga., April 14 and 15, 1915:

R. H. Greene,
John H. Vinson,
Stephen D. Coleman,
Wm. C. Pumpelly,
Joseph B. Riley,
E. G. Jacobs.

At Atlanta, Ga., April 16, 1915:

W. B. Franklin,
Thomas C. Marshall,
Lynn Fort,
W. R. Bell.

That each of said witnesses was by me first duly sworn in accordance with the law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said wit-
496 nesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for Plaintiff, and by Mr. Francis Rawle, attorney for Defendant, as appears in the record; that the depositions of each of said witnesses was read over by or to him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit.

I further certify that the exhibits placed in evidence before me in the course of the examination of said witnesses were duly marked by me and in accordance with stipulation of counsel retained by the Plaintiff who introduced same.

In testimony whereof I have hereunto set my hand and seal this 21st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

497 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY & COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

Richmond, Virginia,
Jefferson Hotel, May 20th, 1915—10 a. m.

Depositions of Witnesses Taken on Behalf of the Plaintiff, Before Charles E. Riordon, Special Examiner, Commencing Thursday, May 20th, 1915, at Richmond, Virginia.

Met pursuant to agreement of counsel and notice.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

J. L. RIDENOUR, Sr., a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

498 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. J. L. Ridenour; age, 56; Highland Park, a suburb of Richmond, Virginia; Druggist, Manager of the Prescription Department of the Tragle Drug Company, at 817 East Broad Street, this City. The Tragle Drug Company is a retail drug store, one of the largest in Richmond.

Q. 2. How does the prescription business of your store compare with the prescription business of other retail drug stores of Richmond, in volume, or number of prescriptions filled?

A. I think we do equally as much if not more than the average drug store. We fill about fifty prescriptions per day on an average.

Q. 3. Do these prescriptions come to your store from a large number of physicians in this vicinity or from only a few?

A. They come from all over the city. They come from as far as North and South Richmond, from nearly all physicians.

Q. 4. Do you receive prescriptions for a pharmaceutical preparation known as "Coco-Quinine?"

A. Yes, sir.

Q. 5. Are such prescriptions received from a considerable number of physicians in this community?

A. Yes, sir, we have a great many of them, from most all of them. We have a great many, especially in the winter.

Q. 6. How are these prescriptions usually written by the physicians?

A. They are written "Coco-Quinine;" all that I have received. I have never seen them written any other way.

Q. 7. In writing prescriptions for "Coco-Quinine," do the physicians specify "Lilly" or simply write "Coco-Quinine?"

499 A. "Coco-Quinine;" I think mostly written "Coco-Quinine," but I have seen them written "Lilly."

Q. 8. Whose product do you understand the physician intends you to supply on prescriptions written simply "Coco-Quinine?"

A. Lilly's. I know that a doctor when he writes that means "Lilly's."

Q. 9. Have you ever seen a prescription at your store written for a product called "Quin-Coco?"

A. As far as my recollection goes I never have.

Q. 10. How long have you been in your present position as manager of the prescription department for this store?

A. About twelve years.

Q. 11. Have you handled prescriptions for "Coco-Quinine" during all of this period?

A. Yes, sir, I have.

Q. 12. How many prescription clerks are employed in your department?

A. Two only. I only have two. We have assistants sometimes, not all the time. I mean two besides myself.

Q. 13. If prescriptions for "Quin-Coco" were received in your department would you be apt to know it?

A. Yes, sir, I would know it, because I always look over the file. In fact we keep a record of all our prescriptions on our books, refilled and new ones.

Q. 14. Did you ever know of a customer asking for "Quin-Coco" at your store?

A. I think not. I don't remember anyone ever asking for it.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 15. Do you carry "Quin-Coco?"

A. No, sir, we do not. I had one one gallon bottle about

500 four or five years ago and sold it out and I wouldn't get any more because I couldn't sell it, couldn't use it in prescriptions at all. They must have sold it at the counter as we couldn't use it on prescriptions as we never had prescriptions for it.

X Q. 16. When you are at the counter do customers call for "choc-

olate quinine" or "syrup of quinine" or "sweet quinine" or any of those names?

A. I am seldom in the front of the store. I can't remember any such calls when I have been in the front of the store.

X Q. 17. About how many drug stores are there in Richmond and suburbs?

A. I suppose there are seventy-five or eighty of them.

Cross-examination closed.

Deposition closed. J. L. RIDENOUR, SR.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

G. W. BURTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. G. W. Burton; age 35; Richmond, Virginia; Druggist, Manager of the Prescription Department of the Childrey Drug Company, of this City.

Q. 2. The Childrey Drug Company, as I understand it, is a retail drug store?

A. Yes, sir.

501 Q. 3. About what volume of business, I mean precription business, does the Childrey Drug Company do, estimated by the number of prescriptions per day or any given period?

A. We fill forty to seventy-five prescriptions a day.

Q. 4. How many prescription clerks are there in your department?

A. We have four registered men including myself.

Q. 5. Do you receive prescriptions from the general run of physicians in this community or from just special physicians?

A. I would say from the large majority of physicians in Richmond.

Q. 6. Do you know anything of a pharmaceutical preparation known as "Coco-Quinine" and if so, what can you tell us about it?

A. I know it as a product of Eli Lilly & Co. It is prescribed for colds, fever, grippe, malaria.

Q. 7. Do the physicians in this community prescribe it quite generally?

A. They do, yes sir.

Q. 8. How do the physicians write prscriptions for "Coco-Quinine?" I mean how do they designate the product?

A. As a rule they write "Coco-Quinine, Lilly". However, we understand when they write "Coco-Quinine," that it is Lilly's and dispense it.

Q. 9. Do the majority of prescriptions specify "Coco-Quinine, Lilly" or are they merely written "Coco-Quinine?"

A. The majority of prescriptions are written "Coco-Quinine" and specify "Lilly's."

Q. 10. Do you receive a good many prescriptions designating the product simply by its name, without the word "Lilly?"

A. Yes, we do.

Q. 11. And whose product do you understand the physician
502 intends when he writes a prescription in this way?

A. Eli Lilly's.

Q. 12. How long have you been manager of the prescription department of the Childrey Drug Company?

A. Six years last February.

Q. 13. Have you been handling prescriptions for "Coco-Quinine" during all of this period?

A. Yes, sir, I have.

Q. 14. Have you ever received a prescription at your store for a product known as "Quin-Coco?" If so, state what you know about it?

A. About six months ago we received a prescription written by Dr. Parker for "Quin-Coco." This is the only one to my knowledge we have ever received for "Quin-Coco."

Q. 15. Have you ever heard a customer ask for "Quin-Coco" at your store?

A. No, sir, I have not.

Q. 16. Do you spend any part of your time in the front of the store waiting on customers, and if so, about what part?

A. Yes, about two hours in the morning, an hour and a half to two hours in the middle of the day, and some time at night.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 17. Do you carry "Quin-Coco" made by William R. Warner & Co.?

A. Yes, sir.

X Q. 18. Do you know the difference between the labels on that product and on "Coco-Quinine" made by Eli Lilly & Co.?

A. I do, yes.

X Q. 19. What class of customers at the counter call for
503 products of this nature, combination of quinine and chocolate? I mean as to age or social conditions or sex.

A. I would say all classes.

X Q. 20. Do they sometimes ask for "chocolate quinine," or a "chocolate quinine preparation?"

A. I don't remember any request of this nature.

X Q. 21. Do they sometimes call for "sweet quinine" or "syrup of quinine" or other names of that sort?

A. We have some calls for "syrup of quinine."

X Q. 22. Any other name called for?

A. I can't recall any other.

X Q. 23. On a call for "Quin-Coco" what would you understand to be meant?

A. A preparation made by Warner.

X Q. 24. Do physicians ever write "chocolate quinine" in their prescriptions?

A. I don't remember of ever seeing such a prescription.

X Q. 25. Has malaria decreased in this part of the world in the last five years?

By Mr. Bradford: Objected to as not cross-examination and as immaterial.

A. Not to my knowledge.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 26. You stated that your store carries "Quin-Coco." Explain for what purpose you carry it?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. About six months ago we had a prescription for "Quin-Coco" and we purchased a small bottle from a wholesale drug house, part of which bottle we still have on hand.

504 R. D. Q. 27. Do I understand from your last answer that you purchased this bottle in order to have some of this product to fill this prescription with?

By Mr. Rawle: Same objection and as leading.

A. We purchased said bottle to fill the prescription in question.

R. D. Q. 28. Have you ever sold any more of the contents of this bottle of "Quin-Coco" than was required to fill the prescription in question?

(Same objection.)

A. No.

Deposition closed.

G. W. BURTON.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

E. C. FISHER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. E. C. Fisher; age, 39; Richmond, Va.; Practicing Physician.
Q. 2. In your practice do you use a pharmaceutical preparation known as "Coco-Quinine," and if you do, whose product do you recognize it to be?
A. I do. Eli Lilly's.
Q. 3. How do you designate this product on your prescriptions?
A. As "Coco-Quinine."
505 Q. 4. Do you ever use the name of the manufacturer in addition to the name of the product? If so, under what circumstances and for what reason?
A. I always specify "Eli Lilly's" if in doubt as to what druggist will fill the prescription.
Q. 5. In what cases do you not add the word "Lilly" to the prescription?
A. In cases where I know the druggist is a reputable prescription druggist and does not substitute.
Q. 6. When you write a prescription and designate the product by its name "Coco-Quinine," only, whose product do you intend this prescription to designate?

By Mr. Rawle: The last two questions and the answers are objected to as irrelevant and immaterial.

A. Lilly's, Eli Lilly's.
Q. 7. How long have you been using "Coco-Quinine" in your practice?
A. Several years.
Q. 8. Do you find it a satisfactory remedy?
A. In cases where it is indicated.
Q. 9. Is it, or is it not, important to the physician that his prescriptions be filled with the product which he designates therein? Give your reasons for your answer.

(Same objections.)

A. Well, a physician certainly would not write for anything he did not want. If the physician wishes his patient to have quinine and writes for same he fully expects the druggist to dispense quinine.
Q. 10. Does it or does it not make any difference to the physician what manufacturer's product is used when a special manufacturer is specified in the prescription?

(Same objections.)

A. We prescribe certain products as the result of the
506 formula which is given us by the manufacturer and expect when we prescribe these products to get this formula. There-

fore we generally specify on our prescriptions the manufacturer of this particular product.

Q. 11. How is substitution by the druggist regarded by the medical profession in this community?

(Same objections and as calling for opinion evidence.)

A. We do everything that we can to prevent it, and if we find a druggist substituting on us we try to keep other prescriptions from going there.

Q. 12. Do you regard it of importance to your practice or to your patients that your prescriptions be filled with the products you specify, and if you do, why?

(Same objections.)

A. It is important to both doctor and patient, for if the druggist substitutes we don't know what results are to be derived from a prescription, as we expect definite results from each drug used in every prescription.

Q. 13. When you fail to get the results expected what or whom do you blame?

(Same objections.)

A. It is hard to answer this question in this particular form.

Q. 14. To be more specific let us suppose that you write a prescription for "Coco-Quinine," believing that this remedy is indicated in a particular case, and your patient after taking the medicine received from the druggist fails to respond to the treatment, in accordance with your previous experience in similar cases, say with the same patient. In such a case where would you place the blame for the failure to get the results desired?

By Mr. Rawle: Objected to as irrelevant and immaterial and to this entire line of examination as futile.

507 A. Either that I had made a mistaken diagnosis, my directions had not been carried out in regard to administering the medicine, or that the druggist had substituted other drugs, or some other preparation, for those prescribed.

Direct examination closed.

No cross-examination.

Deposition closed.

E. C. FISHER.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILLIAM S. CAVEDO, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William S. Cavedo; age, 31; Richmond, Va.; Pharmacist, Manager of the Grant Drug Company, a retail drug store at 7th & Broad Streets, Richmond.

Q. 2. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so, whose product is it recognized to be?

A. Yes, we do. It is the product of Eli Lilly & Co.

Q. 3. How long have you handled this product at your store?

A. Since the opening of this store, which was five years ago. Prior to that time I was with T. A. Miller Company, 519 East
508 Broad St., Richmond. I was there eight years and I handled it all during that period I have handled it altogether at least thirteen years.

Q. 4. Do you receive many prescriptions for it at the Grant Drug Company?

A. We receive a great many. I don't know how many, but a whole lot of them.

Q. 5. From physicians generally in this community?

A. Yes, sir.

Q. 6. Does your store handle prescriptions from the general run of physicians of Richmond?

A. Yes, sir, I should say we get prescriptions from at least ninety per cent of the physicians of Richmond.

Q. 7. Did you ever see a prescription written for a product called "Quin-Coco"?

A. No, sir.

Q. 8. Does this answer cover your experience while you were with the T. A. Miller Company as well as your experience with the Grant Drug Company?

A. Yes, sir.

Q. 9. Have you sold "Coco-Quinine" over the counter to customers both at the Grant Drug Company and while you were with the T. A. Miller Company?

A. Yes, sir.

Q. 10. Did you ever hear a customer ask for "Quin-Coco"?

A. No, sir.

Q. 11. How do physicians usually designate this product on their prescriptions?

A. "Coco-Quinine."

Q. 12. Do they follow the name of the product with the name of the manufacturer in some cases, and if so, in about what proportion, roughly speaking?

A. I would say about twenty-five per cent designate "Lilly's" and the other seventy-five per cent simply specify "Coco-Quinine."

Q. 13. Whose product do you understand is intended by the

physician when he simply writes on his prescription "Coco-Quinine," without any other designation?

509 A. Eli Lilly & Company's.

Q. 14. About how many prescriptions does your store fill per day on an average?

A. From seventy-five up per day.

Q. 15. Name a half dozen of the drug stores of Richmond that have the reputation of doing the largest prescription business?

By Mr. Rawle: Objected to as immaterial.

A. The Grant Drug Company. I think we stand first. The Childrey Drug Company, the Tragle Drug Company, the T. A. Miller Company, J. Blair. These I think are the largest.

Q. 16. Do you know Dr. E. C. Fisher?

A. Yes, sir.

Q. 17. How does he rank in the profession among the physicians of Richmond?

A. Very good, very high; he has a good practice.

Q. 18. How many prescription clerks at your store?

A. We have five registered prescription clerks, five registered druggists, including myself.

Q. 19. Do you have personal knowledge of all or practically all of the prescriptions that are received at your store?

A. Practically all of them, yes.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 20. Is it not true that chocolate quinine preparations are mostly given to children and that adults usually take their quinine in direct form?

A. Yes.

X Q. 21. Do women and children ask for preparations of this sort at your counter?

A. They ask for "Coco-Quinine," and I always give them that.

X Q. 22. How often do they ask for "chocolate quinine" or "syrup of quinine," or the like?

510 A. I reckon about ten per cent of the time they ask for "syrup of quinine" or "chocolate quinine." I always tell them that I don't have anything but "Coco-Quinine" and give it to them.

X Q. 23. Do the other ninety per cent ask for "Coco-Quinine"?

A. Yes, sir.

X Q. 24. When these customers call for "Coco-Quinine" do they give you the name of the maker of "Coco-Quinine"?

A. The majority of them.

X Q. 25. Do you mean to say that the majority of those who ask for "Coco-Quinine" at your counter, say to you that they want the preparation of that name made by Lilly, or words to that effect?

A. Yes, sir.

X Q. 26. Do you say that your customers when asking for "Coco-Quinine" are careful to add "Lilly"?

A. Yes, sir.

X Q. 27. In what proportion of the cases?

A. In the majority of the cases. The man who uses "Coco-Quinine" knows who makes it as a rule.

X Q. 28. How about the children and the women who ask for it?

A. The women know as much about it as the men. The children, a majority of them have notes from their parents and mostly specify "Lilly's." They always say "Coco-Quinine."

X Q. 29. And you say that they mostly add the word "Lilly"?

A. Yes, sir.

X Q. 30. Do you carry in stock "Quin-Coco, Warner"?

A. No, sir.

X Q. 31. When inspecting a bottle of "Coco-Quinine, Lilly," with its appropriate label, what is there on the label that indicates to you that it is the Lilly product?

A. I always know by the label. "Eli Lilly & Company" is right on the bottom of the label.

511 X Q. 32. Are you familiar with the word "Lilly" on the Lilly labels, printed in red?

By Mr. Bradford: Objected to as irrelevant and immaterial.

A. Very familiar; yes, sir.

X Q. 33. Is that on all Lilly products that you have seen?

Same objection.

A. I think so.

X Q. 34. To your eye is it distinguishing as indicating a Lilly product?

Same objection.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 35. You referred to a "syrup of quinine." What product do you mean by this name?

A. Sharpe & Doehme's syrup of quinine. Febriline is a syrup of quinine but I don't know that it is the same thing as Sharpe & Doehme's.

R. D. Q. 36. Are either of these products colored or flavored with chocolate or cocoa?

A. No, sir.

R. D. Q. 37. What is the color of Sharpe & Doehme's syrup of quinine?

A. Light straw color.

Deposition closed. WILLIAM S. CAVEDO.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet this evening at 8 o'clock at Hotel Virginia, in Emporia, Virginia.

512 Emporia, Va., May 20th, 1915.

Met pursuant to adjournment, and by agreement of counsel proceeded to the residence of witness Albert B. Garber.

Parties present as before.

ALBERT B. GARBER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Albert B. Garber; age 26; North Emporia, Va.; Manager Greenville Drug Company, of North Emporia, Va. I have been in the retail drug business for about eleven years, starting as a clerk in the store of Waynesboro Drug Company, at Waynesboro, Va., where I worked for about three years. I went from there to the store of Goodykoontz Drug Company, at Bluefields, W. Va., where I worked for six months. I went from there to the store of W. E. Armstrong, at Petersburg, Va., where I worked for five months. I then came here and worked for the Greenville Drug Company as a clerk for five years. I then went to school for five months and afterwards took charge of a drug store at Lawrenceville, Va. That was in November, 1913. I came from there here as manager of the Greenville Drug Company, in April, 1915.

Q. 3. Have you handled in your experience as a druggist a pharmaceutical preparation known as "Coco-Quinine?"

A. Yes, sir.

Q. 4. Whose product is this recognized to be?

A. Eli Lilly's.

513 Q. 5. How is this product dispensed by the drug stores with which you have been connected?

A. It is dispensed when called for. For instance, if a person calls for a quarter's worth of "Coco-Quinine" we give it to him and label it "Coco-Quinine." It is also dispensed on prescriptions for "Coco-Quinine."

Q. 6. Do the doctors generally prescribe this preparation so far as your experience goes?

A. We sell more of it to the people direct than we do through the doctors.

Q. 7. But do the doctors prescribe it?

A. Yes, sir.

Q. —. Quite generally?

A. Yes, sir.

Q. 9. In your experience as a druggist have you ever seen a prescription written for a product called "Quin-Coco?"

A. No, sir.

Q. 10. Have you ever had a customer ask for "Quin-Coco?"

A. No, sir.

Q. 11. Have you ever been solicited to buy "Quin-Coco," and if so, by whom and on what representations?

A. I have been solicited by Mr. Moon, representing Warner & Co. I have never come in contact with him misrepresenting it as taking place of "Coco-Quinine." I have always been taught in the drug stores that it is cheaper than "Coco-Quinine," and that is the reason it has been used, at least the men I have been working under for some time have been buying it.

Q. 12. What did Mr. Moon say to you when he solicited your order for "Quin-Coco?"

A. He stated that the store had been buying it in five gallon quantities and wanted to know if he could duplicate the order for the same amount that we had been buying.

514 Q. 13. Did he say anything further?

A. Not that I know of.

Q. 14. Did he say it was the same thing as "Coco-Quinine?"

A. He never mentioned that to me as the store had been using it when I went there.

Q. 15. Do you sell it at your store?

A. Yes, sir.

Q. 16. On what kinds of calls do you dispense "Quin-Coco?"

A. On all calls for "Coco-Quinine," and we label it "Coco-Quinine."

By Mr. Rawle: The question and answer is objected to irrelevant and immaterial and calling for transactions between third parties.

Q. 17. Do you dispense it on prescriptions written for "Coco-Quinine?"

Same objection.

A. Yes, sir.

Q. 18. Why do you do this?

Same objections.

A. The main thing is because we have not got "Coco-Quinine" in the house, and it has been used on account of the cheapness.

Q. 19. Has this practice prevailed in other drug stores where you have worked during the past eleven years?

By Mr. Rawle: Same objections and because the question calls for matters not known to the witness.

A. In one other at Lawrenceville, Va. I don't think that "Quin-Coco" was on the market when I worked at the other stores.

Direct examination closed.

515 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 20. What is the population of Emporia?
A. About three thousand.
X Q. 21. How many drug stores and doctors have you here?
A. Five drug stores and nine doctors.
X Q. 22. What is "Coco-Quinine" or "Quin-Coco" used for chiefly?
A. It is used as an anti-periodic for malaria and for bad colds.
X Q. 23. When customers call for a preparation of this kind do they ask for "chocolate quinine"?
A. They ask for "Coco-Quinine" and "chocolate quinine." Nine-tenths ask for "Coco-Quinine."
X Q. 24. Are you familiar with the labels on the bottles of Lilly's Coco-Quinine and Warner's Quin-Coco?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.
X Q. 25. Are you familiar with the word "Lilly" in red letters on the Lilly products?

Same objection.

A. Yes, sir.
X Q. 26. Do you consider that a distinguishing mark of their products?

Same objection.

A. Yes, sir.
X Q. 27. You are now being examined while confined to your bed by an injury to your ankle arising from an automobile accident and at the hour of eight o'clock in the evening. Is that correct?
A. That is correct.

Cross-examination closed.

516 Redirect examination.

By Mr. Bradford:

R. D. Q. 28. Has the injury to your ankle referred to in the last question had any effect upon your memory or other mental faculties?
A. No, sir.
R. D. Q. 29. Has it in any way influenced your answers to questions in this deposition?
A. No, sir.
R. D. Q. 30. I take it that in some of the stores where you have been previously employed "Coco-Quinine" was sold. Is that so?

By Mr. Rawle: Objected to as leading and irrelevant.

A. Yes, sir.

R. D. Q. 31. Was it sold under the original Lilly label in the original Lilly package or in prescription bottles?

A. In prescription bottles.

Deposition closed.

ALBERT B. GARBER.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

At the conclusion of deposition of witness Garber, the taking of depositions was continued at the office of the Emporia Drug Company, with parties present as before.

WALTER S. LINDSAY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

517 A. Walter S. Lindsay; age 32; North Emporia, Virginia; pharmacist; Vice-President and Manager of the Emporia Drug Company, retail druggists. I have been in the drug business about eight years in all, and at this store since March 1st, 1911.

Q. 2. Do you handle a preparation known as "Coco-Quinine" and if so whose produce do you recognize it to be?

A. Yes, sir; we handle a produce known as "Coco-Quinine" and recognize it to be a product made by Eli Lilly & Co.

Q. 4. How is this product dispensed at your store?

A. The largest part of it is sold over the counter, I should say about two-thirds sold over the counter and about one-third dispensed on physicians' prescriptions.

Q. 5. In what kind of packages and under what kind of labels is it dispensed?

A. We use the label "Coco-Quinine," with our name on it, "Emporia Drug Company, North Emporia, Va.," put up in our own bottles.

Q. 6. Does your store do a considerable prescription business?

A. Yes, for a town of this size, I should say we do.

Q. 7. Do you receive prescriptions from practically all of the physicians in this community?

A. All of the physicians in this town and also South Emporia and about four physicians in the county adjacent to Emporia.

Q. 8. Do physicians generally in this locality prescribe "Coco-Quinine"?

By Mr. Rawle: Objected to as irrelevant.

A. Yes, sir; and they all write for it by the full name, write the name "Coco-Quinine."

Q. 9. Do you receive some prescriptions written with the name of the manufacturer following the name of the product and if so what proportion are written this way and what proportion are written simply "Coco-Quinine"?

518 A. I don't recall ever seeing the name written after it on prescriptions, because I knew that the doctor meant "Coco-Quinine."

Q. 10. Did you ever have any doubt as to whose product was intended by any prescription written simply "Coco-Quinine"?

A. Not the least in the world, no, sir. That means "Lilly's."

Q. 11. Did you ever receive a prescription written for a product called "Quin-Coco"?

A. I remember once or twice Dr. Lofton here who is connected with this firm, he wrote for it I think once and he said he meant Lilly's preparation, "Coco-Quinine," he just got it backwards. That was about three years ago when I first came here. But since that time he has already written for it as "Coco-Quinine."

By Mr. Rawle: Objected to as irrelevant and hearsay.

Q. 12. Q. 12. Did you ever have a customer ask for "Quin-Coco"?

A. No, sir. They all ask for it as "Coco-Quinine" or "chocolate quinine."

Q. 13. About what proportion ask for "Coco-Quinine" and what proportion for "chocolate quinine"?

A. I don't think I have ever known a white person to ask for it as "chocolate quinine." The negroes often call for it under the name "chocolate quinine." A negro very rarely ever buys over ten cents' worth of it at a time. The "Coco-Quinine," the white people buy from a pint down.

Q. 14. What product do you understand people intend when they ask for "chocolate quinine"?

By Mr. Rawle: Objected to as irrelevant.

A. I always know that they mean "Lilly's Coco-Quinine," because a colored person will bring in his bottle with a "Coco-Quinine" label on it and ask for ten cents' worth of "chocolate quinine."

519 Q. 15. Have you ever handled "Quin-Coco" in your store?

A. Yes, sir. I bought a bill of goods from William R. Warner & Co., on October 2nd, 1914. They had a special price at that time and have now where you bought five gallons of their preparations and at that time to make up an order to five gallons we put in an order for one gallon of "Quin-Coco."

Q. 16. Who sold you this order?

A. Mr. Moon, representative of William R. Warner & Co., who travels this territory for them.

Q. 17. What did Mr. Moon say to you in reference to this product when he solicited your order?

A. Why he said that "Quin-Coco" was the same as "Coco-Quinine"

and cost you a whole lot less. That he had just sold a man up the street five gallons.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 18. Did he give you the formula of "Quin-Coco" or did you know it at the time?

A. No, sir; he did not give me any formula other than he said that it was the same as "Coco-Quinine." I didn't know the formula except that it was a preparation they were selling here to take the place of "Coco-Quinine."

By Mr. Rawle: The last part of the answer is objected to as hearsay.

X Q. 19. Is "Coco-Quinine" generally dispensed for children?

By Mr. Bradford: Objected to as immaterial.

A. My experience has been here that Dr. Lofton in writing for "Coco-Quinine" or medicine for any child he always puts the age of the child on the prescription and I don't remember of him ever writing for it for a grown person.

520 X Q. 20. In what form do adults take their quinine?

Same objection.

A. It looks to me as though that question should be asked the doctor. I ought not to be expected to answer it.

X Q. 21. Was your purchase of "Quin-Coco, Warner," in October, 1914, the first Quin-Coco that you had handled here?

A. To my best recollection the first in about four years. When I came here four years ago there was a five-pint bottle of Quin-Coco in the store, and I don't remember buying any since until I bought this on October 2nd, 1914, although there might have been a bottle bought in the meantime, but I don't recollect buying any except this one bottle on October 2, 1914.

Deposition closed. WALTER S. LINDSAY.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

The witness WALTER S. LINDSAY was excused and immediately recalled by Mr. Bradford, who propounded the following questions:

Q. 22. Did you sell the gallon of "Quin-Coco" which you say you bought last October from William R. Warner & Company, and if so, on what kind of calls and to supply what demand?

By Mr. Rawle: Objected to as irrelevant and immaterial and because the acts of the witness do not affect the rights of the defendant.

A. I sold about half of that gallon and sold it as "chocolate
521 quinine." In the meantime we ran out of "Coco-Quinine" and I used the other half for that purpose, for supplying the demand for "Coco-Quinine."

Q. 23. How was it labeled?

A. On the last half of the gallon we used our regular printed labels "Coco-Quinine."

By Mr. Rawle: Question and answer objected to for the same reason.

Q. 24. I believe you have already testified that when "chocolate quinine" is asked for this means "Coco-Quinine." Am I correct?

By Mr. Rawle: Question objected to as repetition and as irrelevant.

A. Yes, sir.

Cross-examination.

By Mr. Rawle:

X Q. 25. You mean that when you had nothing but "Coco-Quinine" and there was a call for "chocolate quinine" you sold the customer "Coco-Quinine." Is that correct?

A. Yes, that is correct; I sold him "Coco-Quinine" when he called for "chocolate quinine."

Deposition closed.

WALTER S. LINDSAY.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

LE GRAND E. WETZEL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

522 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Le Grand E. Wetzel; age 39; Richmond, Va.; traveling salesman for Eli Lilly & Co., covering south-eastern Virginia.

Q. 2. What are your duties as traveling salesman for Eli Lilly & Co.?

A. Selling their products to the retail drug trade and dispensing physicians, and also detailing physicians. By "detailing physicians" I mean leaving samples and literature of our various specialties, and explaining the merits of them to the best of my ability.

Q. 3. Please explain in relation to the trade in the Lilly specialty known as "Coco-Quinine" in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial and vague.

A. When I first went with Lilly & Co., nearly ten years ago, this specialty had a fair sale in this territory, but by hard work among the physicians we succeeded in creating a very large demand. There is hardly a physician or druggist in this territory that has not been sampled and talked to in regard to "Coco-Quinine." The demand has increased enormously and we regard it as one of our best sellers.

By Mr. Rawle: The answer is objected to as irrelevant and immaterial.

Q. 4. What do you know, if anything, concerning a product called "Quin-Coco"?

A. This product is sold throughout my territory in considerable quantities to some of the druggists who use it as a substitute for "Coco-Quinine," which undoubtedly has hurt the sale of "Coco-Quinine."

By Mr. Rawle: Objected to as irrelevant and immaterial and as hearsay and as referring to matters that do not affect the defendant.

523 Q. 5. On what information or knowledge do you base the statements in your last answer?

By Mr. Rawle: Objected to as calling for hearsay and for evidence based on information and for matter which can not affect the rights of the defendant.

A. By seeing packages of "Quin-Coco" on the shelves of the druggists and yet you can't find any physician who writes for it, and the druggists themselves admit that the public know nothing about "Quin-Coco."

By Mr. Rawle: What the druggists admit is objected to as inadmissible and hearsay, and the entire answer is objected to for the same reasons as the question.

Q. 6. Do you have access to the prescription departments of the retail drug stores in your territory?

By Mr. Rawle: Objected to as irrelevant.

A. Yes.

Q. 7. In about what proportion of the retail drug stores in your territory have you personally seen bottles of "Quin-Coco" in the prescription departments?

A. At last forty per cent.

Q. 8. Have you ever discussed the sale of "Quin-Coco" with any of the druggists who handle it and if you have can you repeat what some of these druggists have said to you on the subject?

By Mr. Rawle: Objected to as calling for hearsay and as calling for matter between third parties which can not bind the defendant and because no act of druggists in respect to the matters inquired of can affect the defendant's rights.

A. I have discussed it with a number of them and invariably they answered that their only reason for selling "Quin-Coco" is because they can buy it cheaper than "Coco-Quinine."

524 Q. 9. Have any of them or a considerable number of them admitted to you that they sell it on calls and prescriptions for "Coco-Quinine"?

By Mr. Rawle: Same objections.

A. Yes, several; not only admit that they sell it on prescriptions and calls for "Coco-Quinine", but do not hesitate to label it "Coco-Quinine".

Q. 10. About how many drug stores in your territory?

A. Approximately three hundred and fifty. This is just an estimate, I don't know positively.

Q. 11. Are you familiar with the reputation and character of business of the majority of drug stores in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I am.

Q. 12. Which are the leading prescription drug stores of Richmond, Va.? Name four or five.

Same objection.

A. The Grant Drug Company; the Childrey Drug Company; Tragle Drug Company; W. P. Poythress & Company; the Polk Miller Drug Company.

Q. 13. How does Dr. E. C. Fisher stand in the medical profession at Richmond, Va.?

Same objection.

A. He stands very high.

Q. 14. What are the leading prescription drug stores of Emporia, this city?

Same objection.

A. The Greenville Drug Company and the Emporia Drug Company.

Q. 15. What are the leading drug stores of Norfolk, Va.?

Same objection.

525 A. Burrow, Martin & Co.; F. D. Nelliger; H. A. Arrington; E. F. Truitt; and Sterling's Pharmacy.

Q. 16. Do you know anything about a preparation known as "syrup of quinine" and if so, what can you tell us about it?

A. There is a preparation made by all pharmaceutical houses that is now labeled "Syrup of Cinchona Alkaloid." This syrup was formerly labeled "Syrup of Quinine, Tasteless", and was so known to the public. On the passage of the Pure Food and Drug Act of 1906, there being no quinine in the preparation the label had to be

changed as there was no quinine in the syrup, it only contained some of the minor alkaloids of the cinchona bark.

Q. 17. What is its color and flavor?

Same objection.

A. It is a white syrup with a white alkaloid suspension, and it is flavored by most houses with lemon.

Q. 18. In your work as a salesman for Eli Lilly & Co., among the drug trade and in detailing physicians, have you ever heard a physician express any knowledge of the product called "Quin-Coco"?

By Mr. Rawle: Objected to as calling for hearsay.

A. Only one who admitted to me that he allowed it to be used in his prescriptions and he at the same time said that he realized that it was not right, but he is a part owner of the drug store and wanted to make all the profit possible.

Q. 19. What was your employment prior to your employment by Eli Lilly & Co.?

A. Manager of the laboratories of the Powers-Taylor Drug Company, of Richmond, Va.

Q. 20. Were you ever in the retail drug business?

A. Yes, for four years.

Direct-examination closed.

526 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 21. About how often do you visit the druggists in your territory?

A. About once in six weeks.

X Q. 22. Have you since March 15th, visited all or nearly all of them?

A. I should say that I have visited the larger per cent. of those in the territory that I call on. There are some in the territory that I don't call on.

X Q. 23. About what percentage of all of the drug stores in your territory do you never call on?

A. There wouldn't be over five per cent.

X Q. 24. About what percentage of the physicians in your territory that you know of sell their own drugs, more or less, either themselves or in connection with a drug store?

A. Not over five per cent.

X Q. 25. You have referred to syrup of quinine made by a number of drug houses. How many make it or have made it?

A. So far as I know all houses that are recognized as pharmaceutical canufacturing houses do make this article.

X Q. 26. Is it made on the same or substantially the same formula in a medicinal sense?

A. Presumably so; we presume it to be the same formula, the same medicinal strength. There are two strengths made by nearly

all of the houses. One is labeled "two grains to the dram" and the other is labeled "five grains to the dram".

X Q. 27. Does Lilly sell this preparation and has he been doing so for years?

A. Yes, sir.

X Q. 28. Have you ever seen on druggists' shelves bottles of this preparation made by different drug houses?

A. I have.

527 X Q. 29. Is it a somewhat common thing to see it?

A. Yes, sir.

X Q. 30. And perhaps you have sometimes tried to sell a druggist Lilly's preparation of that article when the druggist had been handling some other drug house's preparation. Is that correct?

A. Yes, sir.

X Q. 31. Is that a common thing to happen?

A. It is, because we recognize it as an open formula.

X Q. 32. What do you mean by an "open formula?"

A. One with no individuality and made by all the houses.

X Q. 33. What do you mean by "one with no individuality?"

A. Because it is a suspension of an alkaloid of cinchona bark in simple syrup and can be made by anybody.

X Q. 34. I take it that you are constantly soliciting from druggists the sale of Lilly preparations which druggists already have or have been previously handling correspondingly similar or substantially identical preparations of other drug houses? Is that correct?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Only so far as that applies to open formula, we never offer anything as substitutes.

X Q. 35. When two drug houses sell the same preparation on an open formula wouldn't they be substitutes for each other?

A. Not by any means. If a physician specifies anything made by one particular house and was supplied goods made by another house of same formula, that might be termed "substitution."

X Q. 36. Would you so term it?

A. I certainly would.

X Q. 37. Then there is no reason for saying that "substitution" as you call it, can not be practiced by druggists in dispensing

528 what you call "open formula preparations?"

A. "Substitution" can be practiced on open formula preparations where one particular make is prescribed for reasons perhaps best known to the doctor and his prescription is filled with another make.

X Q. 38. Isn't it true that any thoroughly equipped drug store has a number or a large number of open formula preparations in respect of which the druggist could, if he were evilly minded, practice what you call "substitution?"

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. He certainly could, as there are a number of open formula preparations of identical color, odor and taste.

X Q. 39. And when you find that one of your druggists is handling one of such open formula preparations made by another drug house, you do not hesitate to urge him to buy and handle Lilly's similar preparation, do you?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. My instructions from the home office is not to offer any of our products as a substitute for any similar preparation made by a competing house, as it is our intention to market our goods on their own merits.

By Mr. Rawle: The answer is objected to as irresponsive and irrelevant and immaterial.

X Q. 40. (Question repeated.)

A. If it is an open formula preparation I offer the Lilly product for sale.

X Q. 41. Then you would be offering such druggist a preparation which you have just testified he could use if he were evilly minded as a substitute for a similar preparation made by another house?

529 By Mr. Bradford: Objected to as irrelevant and immaterial.

A. No, that is not correct. On all open formula preparations made by the several pharmaceutical houses, it is not a question of who made it, either by the physician or the public, but it is the formula that they want.

X Q. 42. But if a physician specifies an open formula preparation and writes "Parke, Davis" and the druggist fills it with the same open formula preparation made by Lilly, you say that that would be substitution by the druggist, do you not?

A. I certainly do.

X Q. 43. And you also say that in cases of open formula preparations you do not hesitate to solicit the sale of Lilly's open formula preparations although the druggist has already the same open formula preparation made by another house and although you know and admit that if the druggist were evilly minded he could substitute on prescriptions in the way you have just qualified as wrong. Am I correct?

By Mr. Bradford: Same objection to this question and also to X Q. 42.

A. No, sir. When we offer the open formula made by Eli Lilly & Co., we do not want the druggist to use it where Parke, Davis, or any other make open formula has been specified.

X Q. 44. (X Q. 43 repeated.)

Same objection.

A. We do offer preparations of open formula to the retail druggists such as made by other houses but with the understanding that they are to be supplied when Lilly's is specified or he can sell same where there is no specification.

X Q. 45. Could you give me any estimate of the number of open formula preparations which are sold by the best drug houses which fairly come within the class which we have just been dis-
530 cussing? Would there be ten such, or a hundred such, or more?

Same objection.

A. There would be a great many more.

X Q. 46. Five hundred?

Same objection.

A. Our catalogue carries about approximately five thousand items. I think at least five hundred of them would be open formula.

X Q. 47. And these five hundred are probably made by one or more of the other leading drug houses?

Same objection.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 48. In Mr. Rawle's questions relative to syrup of quinine you have answered as if this product was still labeled "syrup of quinine." I understood in your direct examination that such labeling had been discontinued under the provisions of the Pure Food and Drugs Act. Do I understand then in your answer to Mr. Rawle's questions you refer to this product meaning syrup of cinchona alkaloid?

A. Yes, sir.

R. D. Q. 49. As a part of your business do you seek to develop a demand for the Lilly open formula preparations as well as the other Lilly preparations by presenting the merits of such preparations to the physicians and seeking to induce the physicians to use them?

A. I do.

Deposition closed.

L. E. WETZEL.

531 Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Friday, May 21st, 1915, at 10 o'clock at Hotel Fairfax, Norfolk, Virginia.

Norfolk, Virginia, May 21, 1915.

Met pursuant to adjournment and by agreement of counsel proceeded to the office of the Sterlings Pharmacy.

Parties present as before.

EDGAR B. ALLEN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edgar B. Allen; age 44; Norfolk, Va.; pharmacist; one of the proprietors of the Sterlings Pharmacy.

Q. 2. Do you handle a preparation known as "Coco-Quinine," and if so, whose product do you recognize it to be?

A. We have handled "Coco-Quinine" for the past thirteen years and recognize none other except that made by Eli Lilly & Co.

Q. 3. How do you dispense it?

A. We don't dispense it at all except as "Coco-Quinine" on prescriptions and on calls for "Coco-Quinine," very little of the latter. Our work is chiefly prescription work.

532 Q. 4. How do physicians write prescriptions for this product?

A. For "Syrup of Coco-Quinine, Lilly" and for "Syrup of Coco-Quinine," without the word "Lilly." And just the word "Coco-Quinine."

Q. 5. When a prescription comes to your store written for "Coco-Quinine," without any other specification, whose product do you understand the physician intends?

A. We only know one "Coco-Quinine," and that is Lilly's.

Q. 6. Have you ever received a prescription for a product called "Quin-Coco"?

A. I have not.

Q. 7. Have you ever had a customer call for "Quin-Coco"?

A. I have not.

Q. 8. Do you receive prescriptions from a considerable number of physicians or only a few?

A. Our prescription business covers between thirty and thirty-five physicians.

Q. 9. Do the most of them use "Coco-Quinine" in their practice.

A. They all use some, and some use a great deal.

Q. 10. Have you ever been solicited to buy the product called "Quin-Coco" and if so by whom, and what did he say?

A. Mr. Moon, the representative of William R. Warner & Co., on several occasions has offered us a preparation which he called "Quin-Coco," which he stated we could use the same as "Coco-Quinine," and that it would be almost impossible to tell it from "Coco-Quinine."

Q. 11. Who did he say, if any one, could not tell it from "Coco-Quinine"?

A. That the physician couldn't distinguish it, that the products were identical.

Q. 12. Did he say whether or not the patient could tell the difference.

533 A. The patient would be impossible to tell the difference for the reason that the patient don't know what he is getting.

Q. 13. Can you tell when or about when Mr. Moon made these statements to you?

A. It was at different times during the past two years, on his visits here, but the exact dates I do not know.

Q. 14. Do you recall Mr. Moon's exact words in making these statements?

A. No; but as near as I can remember as to what he said. As to his exact words it would be impossible to state.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 15. Is it the case that "Coco-Quinine" is chiefly prescribed for children and straight quinine mostly for adults?

By Mr. Bradford: Objected to as immaterial and also because this witness has not qualified as a physician to answer such questions.

A. In very few cases "Coco-Quinine" is used alone. When it is used alone it is used for children or infants. In adult cases it is used in combination with quinine, phenacetin and kindred drugs.

X Q. 16. How many drug stores are there in Norfolk and suburbs?

A. I suppose in the neighborhood of sixty.

X Q. 17. When did Moon first call on you and offer you Warner's products?

A. Mr. Moon has been calling on us during the past, I suppose, four or five years. I couldn't tell you exactly. He comes about twice a year, and we purchase from him his line of goods.

X Q. 18. Did Mr. Moon at each of these calls take up "Quin-Coco" with you?

534 A. He went through his catalogue of pharmaceuticals showing us products made by William R. Warner & Co., among which was "Quin-Coco."

X Q. 19. Have you in your mind in testifying a distinct recollection of any one interview and as to what he said then and his words or have you given only a general impression that he left on your mind at a number of these calls.

A. On his visit about one year ago he called our attention to "Quin-Coco," Elaborating upon its pharmaceutical qualities, and stating the same was a product practically identical with Lilly's Coco-Quinine, and that same could not be distinguished from it.

On the visit during May of this year, 1915, in talking of chocolate quinine syrups, he again stated that he had as good a piece of goods as Lilly's and one that could be used for all purposes that "Coco-Quinine" could be used.

X Q. 20. Have you now given the conversation between you on the subject at these two calls?

A. As near as I can remember it.

X Q. 21. In your dealings with Moon have you regarded him as a square man?

A. I always found Mr. Moon a perfectly reliable straightforward business man.

X Q. 22. I take it that filling a prescription with a drug other than the one specified by the physician is not honest work and of course you do not do it? Is that correct?

A. It is.

X Q. 23. Did you understand at these two conversations that Moon was making a suggestion to you that you would buy his "Quin-Coco" and use it dishonestly?

A. Mr. Moon has always known that we do not substitute in any case and that we only fill prescriptions as written and with the identical drugs prescribed by the physician, and he also knew that he could not sell us "Quin-Coco" for we had told him on
535 his first visit that we had never handled anything but Lilly's "Coco-Quinine." Consequently I do not believe he was suggesting to me a substitute.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 24. Having no demand for "Quin-Coco" either from physicians or the laity, as you have already testified, how did Mr. Moon suggest or suppose you would dispose of the "Quin-Coco" if you purchased it on his representations? Or do I understand that he did not really solicit your order but told you of its virtues and possibilities? Please explain more fully your understanding of the matter.

By Mr. Rawle: Objected to as not proper for re-direct, the witness having testified to conversations; as improper because the only proper question is to ask as to what was said; and as leading.

A. Mr. Moon and the salesman with him, I don't know this salesman's name, on his last visit here, solicited our business on "Quin-Coco" with a statement that we might have calls for syrup of chocolate quinine for which it could be dispensed. The sale-man with Mr. Moon was very insistent in getting us to put it in.

R. D. Q. 25. On Mr. Moon's visit when he first offered you "Quin-Coco," was he alone?

A. He was.

R. D. Q. 26. And at that time as I understand your deposition he stated that it was practically identical with Lilly's Coco-Quinine and could be used the same as Lilly's Coco-Quinine, and that the physician could not tell the difference. Is this correct?

By Mr. Rawle: Objected to as not re-direc- examination and as grossly leading.

536 A. Mr. Moon not knowing on his first visit our objection to substitution, did offer us "Quin-Coco," but we refused to buy same. He at that time stated "Quin-Coco" was a preparation which could be dispensed in place of "Coco-Quinine."

R. D. Q. 27. And that the physician could not tell the difference?

A. Yes, he did.

By Mr. Rawle: The question is objected to for the same reason as last above given.

Re-direct-examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 28. You have on cross-examination more particularly referred to two specific interviews with Moon, one of which was in May, 1915, and the other about a year before. In answer to R. D. Q. 26 you refer to his first visit. What I want to know is whether the first visit was an earlier visit than the two visits, one in May, 1915, and the other about a year before?

A. As near as I can recollect this conversation occurred on the first visit of Mr. Moon when he had "Quin-Coco" for sale, which was previous to the two last visits spoken of.

R. X Q. 29. You testified in answer to X Q. 23 that "Mr. Moon has always known that we do not substitute in any case." Have you any doubt that when Mr. Moon first called on you he knew the high reputation you had as a druggist in this community?

A. Mr. Moon came to us a perfect stranger and I do not know what he thought our standing as to substitution was. But from his conversation at that time he led us to believe that we could use "Quin-Coco" instead of "Coco-Quinine" without detection.

R. X Q. 30. But I point out to you again that in answer to X Q. 23 you said that "Mr. Moon has always known that we do
537 not substitute in any case," and ask you if that is what you mean to testify?

By Mr. Bradford: Objected to as the witness has already explained what he meant.

A. Our conversation with Mr. Moon on his first visit to us was such that he could make no sales on any product which could be used as a substitute.

R. X Q. 31. Did you understand that at that first conversation

Moon was making a suggestion to you that you should buy his "Quin-Coco" and use it dishonestly as a druggist?

By Mr. Bradford: Objected to as the witness has already testified as to how Moon suggested it could be used, and the question of whether it was honest or dishonest is a question for the court and not for the witness.

By Mr. Rawle: The interference by opposing counsel with the cross-examination is objected to and protested against. Such objections have no place in the cross-examination of the witness.

By Mr. Bradford: As to this it is also a question for the court and not for the decision of defendant's counsel.

A. Mr. Moon suggested that we use it. As to the honesty it is up to the druggist.

R. X Q. 32. Haven't you on your shelves in the drug store where we are now sitting, a considerable number, or a large number of identical or quite similar pharmaceutical preparations made by different drug houses respectively, which identical or very similar preparations could be medicinally used one for the other in a proper case?

By Mr. Bradford: Objected to as immaterial and irrelevant and not cross-examination.

A. In the drug store we carry a great many products the formulas of which are identical and which are called similar articles,
538 the formulas of which are taken from the United States Pharmacoepae or from the National Formulary. These preparations are made by a number of houses and are used without reference as to the name of the manufacturer. We also carry a great many preparations known as proprietaries, some of which are similar or identical in composition, but which carry trade names placed on same by the manufacturer. A physician in prescribing for these proprietaries uses the trade name, and we feel compelled and do only use on such prescriptions the article called for by trade name and not an article of similar chemical construction made by another manufacturer, claiming that the physician has a perfect right to call for drugs under trade marks and that we have no right to substitute anything else for same.

R. X Q. 33. Then you do carry in stock certain proprietary medicines made by more than one drug house which are substantially or entirely similar to each other? Is that correct?

Same objection.

A. Yes.

R. X Q. 34. Could you give me any estimate of the number of such? Whether a dozen or fifty.

Same objection.

A. Among the manufacturers we have a number of houses which make it a business to offer formulas which they claim to be practically

the same as trade marked formulas and they advocate the use of same. As to the number of such preparations I judge we may carry twelve or fifteen, and they are only used when the physician writes for them under the name by which the manufacturer who makes them places them on the market.

R. X Q. 35. Give me an estimate of about how many drug houses products having open formulas taken from the N. F. or U. S. P., you carry?

Same objection.

539 A. About five hundred.

R. X Q. 36. And these are practically interchangeable on prescriptions, in a proper case, are they not?

Same objection.

A. Where the physician fails to specify the name of the manufacturer and uses only the letters U. S. P. or N. F., we feel at liberty to use drugs made by any manufacturer of standard repute.

Deposition closed.

EDGAR B. ALLEN.

Subscribed and sworn to before me this 21st day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

At the conclusion of deposition of witness Allen proceeded to the Hotel Fairfax where the taking of depositions was continued, with parties present as before.

F. D. NELLIGAR, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. F. D. Nelligar; age, 40; Norfolk, Va.; Pharmacist; Proprietor of Nelligar's pharmacy at No. 453 Church St., Norfolk, Va.

Q. 2. Do you do a large prescription business?

A. Yes, fairly.

Q. 3. One of the leading prescription stores of the city?

A. Yes.

540 Q. —. Do you handle a preparation known as "Coco-Quinine," and if you do, whose product do you recognize it to be?

A. We do. It is Eli Lilly & Company's product.

Q. 5. Do you receive prescriptions for this product at your store?

A. I do.

Q. 6. Are these prescriptions written by a large number of physicians or by only a few?

A. By the majority.

Q. 7. How do the physicians generally designate this product on their prescriptions?

A. They prescribe "Coco-Quinine" and follow it with the name "Lilly." Some just write "Coco-Quinine," but the majority specify "Lilly's."

Q. 8. Whose product do you understand is intended when a prescription is written merely "Coco-Quinine"?

By Mr. Rawle: Objected to as irrelevant.

A. Lilly's.

Q. 9. Do you sell this product over the counter at your store to the laity?

A. Yes.

Q. 10. In what character of packages and under what kind of labels is it usually dispensed?

A. We usually label the package "Coco-Quinine" unless the customer asks for "chocolate quinine" and then we write "Chocolate Quinine." We dispense it in our own bottles, from bulk packages.

Q. 11. Have you ever had a prescription at your store for a product called "Quin-Coco"?

A. No.

Q. 12. Have you ever had a customer ask for "Quin-Coco"?

A. No.

Q. 13. How long have you been handling "Coco-Quinine"?

A. Since it first came out, I don't remember how long, about four or five years.

541 Q. 14. Do you have knowledge of all or substantially all of the prescriptions that are received at your store?

A. All.

Q. 15. Have you ever been solicited to buy "Quin-Coco," and if so, by whom?

A. Yes, by Victor M. Moon, representative of William R. Warner & Co.

Q. 16. What did Mr. Moon say to you on this subject when he offered you "Quinn-Coco"?

A. "This is a product identical in composition and physical appearance with 'Coco-Quinine' of Lilly's, but is much more economical."

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 17. When did he say that?

A. Eact time he visited the store.

X Q. 18. How many times and during how many years has he visited you?

A. During a period of three years, about four times each year.

X Q. 19. Do you handle Warner's line of goods?

A. Yes.

X Q. 20. Have you handled "Quin-Coco"?
A. No, not to my knowledge.
X Q. 21. You say that Moon has visited you about twelve times, in three years. To which of the interviews did you have reference when you just stated what he said to you?
A. I think he spoke of it every time he called.
X Q. 22. In precisely the same words?
A. Well, yes, perhaps the phraseology was different but they had the same meaning.
X Q. 23. Did he exhibit a bottle of "Quin-Coco" to you?
A. Yes, each time.
542 X Q. 24. So that you physically observed the similarity of physical appearance between the two products, did you?
A. Yes.

Deposition closed.

F. D. NELLIGAR.

Subscribed and sworn to before me this 21st day of May, 1915.
CHARLES E. RIORDON,
Special Examiner.

HARRY S. ARRINGTON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Harry S. Arrington; age 39; Norfolk, Va.; Pharmacist, Proprietor of Arrington's Pharmacy, 244 Church St. I have been located at my present store for about eleven years and was located across the street from there for about six or seven years previous.
Q. 2. Does your store do a comparatively large prescription business?
A. Yes, sir, I do a pretty large prescription business. I suppose we fill in the neighborhood of ten thousand prescriptions a year on an average.
Q. 3. As I understand it you are the President of the Virginia State Board of Pharmacy. Is this correct?
A. I am.
Q. 4. At your store do you handle a product known as "Coco-Quinine"? And if so, whose product do you recognize it to be?
A. "Coco-Quinine" is Eli Lilly & Co's. product and we do
543 handle it. I suppose we have handled it for four or five years.
Q. 5. Do the physicians generally prescribe this product?
A. Yes.
Q. 6. How do they designate it in their prescriptions?
A. They write it "Coco-Quinine" and some add the name "Lilly" in parenthesis.
Q. 7. When you receive a prescription written simply "Coco-

Quinine," whose preparation do you understand the physician intends you to supply?

A. I supply Eli Lilly & Company's because I haven't any other chocolate syrup of quinine, that is with a chocolate base.

Q. 8. Did you ever know of any chocolate syrup of quinine prior to the introduction of "Coco-Quinine" by Eli Lilly & Co.?

A. I can't say that I did.

Q. 9. Did you ever know of any other manufacturer's product under the name "Coco-Quinine"?

A. No, sir.

Q. 10. When you receive a prescription written "Coco-Quinine," do you have any doubt that the physician means Lilly's Coco-Quinine?

A. I couldn't say what they mean other than if they prescribe "Coco-Quinine" I would suppose they meant Eli Lilly & Company's, not knowing of any other Coco-Quinine.

Q. 11. Did you ever receive a prescription at your store for a product called "Quin-Coco"?

A. No, I never have.

Q. 12. Did you ever have a call from a customer for "Quin-Coco"?

A. Never for "Quin-Coco," no, sir.

Q. 13. How do you put up "Coco-Quinine" at your store for dispensing purposes?

544 A. In the amount the physician usually writes for, in our own bottles, under our own labels.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. Did you ever dispense a chocolate quinine preparation of your own make?

A. No, sir.

X Q. 15. Do you have any calls over the counter for "chocolate quinine" or "syrup of quinine," or the like?

A. Yes, sir; I have had calls for "chocolate quinine," "chocolate syrup of quinine," and "tasteless syrup of quinine."

X Q. 16. Are such calls common?

A. Yes, sir.

X Q. 17. What proportion would they bear to calls for "Coco-Quinine," specifically?

A. I suppose it is called for as "chocolate quinine" or "tasteless syrup of quinine." Probably three to one or two to one are for "Coco-Quinine." In other words possibly one-quarter to one-third of the calls may be under those other names.

X Q. 18. Do you handle "Quin-Coco" made by Warner?

A. No, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 19. Are the calls for "chocolate quinine," etc., from the same people who have been accustomed to using "Coco-Quinine"?
A. I couldn't say. If they ask for "chocolate quinine" I give them Eli Lilly's because I haven't anything else. If they ask for
545 "tasteless syrup of quinine" I give them the tasteless syrup of quinine known as "Febriline." Then there is a syrup of cinchona alkaloid, which is called a tasteless syrup of quinine made by Sharpe & Doehme. Neither of these two contain chocolate.

Deposition closed.

HARRY S. ARRINGTON.

Subscribed and sworn to before me this 21st day of May, 1915.

CHARLES E. RIORDON,
Special Examiner

At the conclusion of the deposition of witness Arrington proceeded to the office of Dr. Edward T. Hargrave, where Dr. Hargrave's deposition was taken, with parties present as before.

Dr. EDWARD T. HARGRAVE, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Edward T. Hargrave; age, 44; Norfolk, Va.; Physician.
Q. 2. In your practice do you prescribe a preparation known as "Coco-Quinine," and if you do, whose product is it?
A. Yes, it is Eli Lilly & Company's product.
Q. 3. How do you usually designate this product on your prescriptions?
A. "Coco-Quinine."
546 Q. 4. Do you usually specify "Lilly," and if not, why not?
A. No, I expect the druggists to give me "Lilly's" when I write for "Coco-Quinine," because they are the only people I know in connection with "Coco-Quinine."
Q. 5. Do you find Lilly's "Coco-Quinine" a satisfactory preparation in the treatment of cases where it is indicated?
A. Yes.
Q. 6. Is it or is it not important that the physician should have his prescriptions filled with the drug specified on his prescription?
A. It is. The reason is because substitution is dangerous.
Q. 7. Can you elaborate that answer a little and explain why?
A. It would be dangerous in this preparation because often it is important to get the patient under the influence of quinine promptly.

A preparation that is not palatable would prevent this, in some cases. It seems to me that the answer that it is dangerous answers the question thoroughly.

Direct-examination closed.

No Cross-examination.

Deposition closed.

EDWARD T. HARGRAVE, M. D.

Subscribed and sworn to before me this 21st day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet subject to notice and agreement of counsel.

547 Washington, D. C., June 3, 1915.

Met pursuant to notice and agreement of counsel, at the offices of Chas. E. Riordon, Special Examiner, in the Washington Loan & Trust Building, Washington, D. C.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

FRANK S. HERETH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Frank S. Hereth; age, 57; Brooklyn, N. Y.; Pharmaceutical Chemist. I am Chief Pharmacist for E. R. Squibb & Son, of New York, N. Y.

Q. 2. Do you know anything about the concern known in the drug trade as the Searle & Hereth Co., and if so, what can you tell us concerning this concern?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I know very little of it since June, 1905, when I left the company. Sometime in March, 1905, I resigned my position as president of the Searle & Hereth Company and subsequently sold all of my stock in the company.

Q. 3. Then you are the same Hereth who was formerly a part of The Searle & Hereth Company?

A. Yes, sir.

548 Q. 4. Did you have knowledge of all of the pharmaceuticals and medicinal preparations manufactured by The Searle & Hereth Company?

A. I did.

Q. 5. Did The Searle & Hereth Company prior to the time you left that concern ever manufacture or sell a preparation called "Quin-Coco?"

A. No, sir.

Q. 6. Are you familiar with the pharmaceutical preparation known as "Coco-Quinine," and if so, what can you tell us of this preparation, as to its origin?

A. I know the preparation and handled it frequently while I was in the employ of Eli Lilly & Company, and I have seen the manufacturing formula by which it is made.

Q. 7. Did you ever know of a chocolated syrup quinine preparation prior to the time Coco-Quinine was brought out by Eli Lilly & Company?

A. I do not recollect of ever having heard of any such preparation.

Q. 8. Do you remember while president of The Searle & Hereth Company whether or not this company made any efforts to produce a preparation similar to "Coco-Quinine" or whether or not the matter was considered by said company?

If so, will you please explain what you know about this question?

By Mr. Rawle: Objected to as irrelevant and immaterial and as calling for matter res inter alios acta.

A. No experiments to produce an article similar to it were ever made at my instigation or with my knowledge. I have no recollection of the company ever considering putting out a preparation of this nature. I am sure it was never taken up in an official way.

Q. 9. Was it ever taken up unofficially with you?

Same objection.

549 A. I know that at various times our salesmen asked us if we would not make a preparation similar to "Coco-Quinine" but I never acceded to the request.

By Mr. Rawle: The answer is further objected to as hearsay.

Q. 10. Did you express any reasons for not acceding to such requests at the time, and if so, what were they?

By Mr. Rawle: Object-s repeated.

A. One reason why I declined to consider them was that I thought that Eli Lilly & Company had originated the article and since I regarded them as personal friends I did not care to make a competing product, in the same line.

By Mr. Rawle: The answer is objected to because the state of mind of the witness is not evidence.

Q. 11. Do you mean that The Searle & Hereth Company declined to make any preparations which would compete with preparations manufactured by Eli Lilly & Company?

Same objections and because the question is leading.

A. No, I do not mean this, since we made many preparations that were in a sense competitors, but I regard the form in which this preparation was made as original and felt that we should not make a preparation similar to it in composition and appearance in order that it might be used as a substitute for "Coco-Quinine."

Q. 12. As a pharmaceutical chemist have you considered whether or not the chocolate or cocoa in "Coco-Quinine" is essential to the medicinal or therapeutic value of the medicine, and if so, what is your opinion on this subject?

A. I think the therapeutic value of the medicine resides solely in the quinine sulphate and that it is not modified any by the
550 presence of the chocolate, or cocoa.

Q. 13. Would or would it not be possible to make a preparation which could compete with "Coco-Quinine" as a medicine and flavored with other flavoring syrups than chocolate and of different color than chocolate?

By Mr. Rawle: Objected to as immaterial.

A. I think other preparations might be made to compete with it as far as their ability to disguise the taste of quinine is concerned and at the same time retain the therapeutic efficiency of the quinine.

Q. 14. Do you know when The Searle & Hereth Company was taken over by the Pfeiffer Chemical Company, and if so, please state?

A. I do not know the exact time since I was then residing in Brooklyn, but I think it was some time in May or June of 1906, since it was at that time that I signed over my stock in The Searle & Hereth Company.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 15. Do you know of any satisfactory liquid preparation of quinine sulphate now on the market not containing cocoa or chocolate?

A. I regard Quinimel as a very good one.

X Q. 16. Does Quinimel contain quinine sulphate?

A. No, sir, it does not. In that way it would not be a substitute, excepting that it is used as a base for disguising quinine sulphate.

X Q. 17. As you have just stated that Quinimel does not contain quinine sulphate, please answer X Q. 15.

A. I see I misapprehended that first question. I do not know of any at all.

X Q. 18. I understood you to say that The Searle & Hereth Co. had manufactured many preparations which were competitors with corresponding Lilly preparations? Is that correct?
551 A. Yes, sir.

X Q. 19. Could you give me some idea of about how many such there were?

A. There are a good many hundreds which The Searle & Hereth Company made in common with other manufacturers of pharmaceutical preparations which were all competitors with each other. I include Lilly among the other manufacturers. This would perhaps include a full line of fluid extracts, many elixirs, syrups and tablets, for which no proprietorship in same was claimed.

X Q. 20. And wouldn't this list include some specialties as they are called?

A. I think it would.

X Q. 21. How many?

A. It would be impossible for me to say. A score, more or less.

X Q. 22. What do you mean by "specialties" in this connection?

A. Those preparations upon which some special effort was made to introduce them by the house introducing them.

X Q. 23. Could you name one or two preparations which at that time fell within this definition of "specialties," of which you say there was a score?

By Mr. Bradford: Objected to as irrelevant and immaterial and not cross-examination.

A. I might mention Syrup of Yerba Senta Aromatic afterwards called Yerbazin by Eli Lilly & Company. The Searle & Hereth Company made a preparation called "Quinimel" which was used in a similar way and for a similar purpose as Syrup Yerba Senta Aromatic or Yerbazin was used. We also made a Syrup Hypophosphites Compound Hematic which was supposed to be similar to Fellows Syrup of Hypophosphites.

X Q. 24. Is it not true that other drug houses made
552 preparations similar to Searle & Hereth preparations originated by the latter?

Objection repeated.

A. Yes, sir.

X Q. 25. And is the same thing true of Lilly? Did Lilly make preparations similar to preparations originating from Searle & Hereth?

Objection repeated and the further objection is noted that counsel is plainly endeavoring to use witness as his own witness and the question is therefore improper.

A. They made some preparations that were similar to some preparations made by The Searle & Hereth Company and originated by The Searle & Hereth Company, but whether they were exact duplicates of them or not, I do not know. I do not know whether they were offered as substitutes.

X Q. 26. Could they not have been offered as substitutes, being similar, or identical in therapeutical effect?

Objection repeated.

A. They might have been offered as substitutes as far as composition and therapeutical effect was concerned, but I can not at the

present time say whether or not they were the same in physical appearance as to flavor and color, &c.

X Q. 27. I take it that what you mean by a "substitute" is a preparation which could be sold or dispensed on prescription or over the counter in place of a similar article made by another drug house? Is that correct?

Objection repeated.

A. If specified by the physician for that purpose, yes.

X Q. 28. Then, I take it from your testimony that in all these cases of similar preparations put out by different drug houses,
553 substitution by a druggist on prescription specifying a particular drug house as the maker of the prescribed drug would have been possible? Is that correct? I mean to ask whether if a physician wishing to prescribe one of the particular preparations you have referred to as similar, should write in his prescription the name of the maker, could not the druggist fill this prescription by the same drug, but made by a different house? And would this come within your definition of "substitution"?

Objection repeated.

A. A druggist would not be justified in dispensing A's preparation if a physician's prescription called for B's. If he did I would call it "substitution."

X Q. 29. I take it that you mean that the druggist could fill such prescription with the drug of a house other than the one specified. Is that correct? By "could," I mean would it be possible?

Objection repeated, and the court's attention is asked to the flagrant abuse by counsel for defendant of the privilege of cross-examination, in taking plaintiff's time and wasting plaintiff's money in seeking to take a deposition on behalf of defendant to sustain defendant's theories of defense.

By Mr. Rawle: Defendant's counsel means to keep and believes that he has kept clearly within proper cross-examination. The witness has stated under objection that Searle & Hereth were unwilling, while he was a member thereof, to manufacture a chocolated quinine preparation because it would compete with Lilly's "Coco-Quinine." Defendant's counsel seeks to develop the fact that at that very time Searle & Hereth were manufacturing large numbers of preparations and a score of specialties which did compete in the same way with preparations of other drug houses, including Lilly. Counsel
554 regrets to take the time of the court in obvious explanations.

By Mr. Bradford: Counsel for plaintiff repeats his objection and repeats his request that the court take judicial notice of the line of examination being indulged in by counsel for defendant and contends that there is absolutely no basis in the direct-examination for this line of cross-examination.

A. It would be physically possible.

X Q. 30. When you say that it would be "physically possible," I understand you to have in your mind the entire class of preparations

including the specialties which are at any time manufactured by more than one drug house and which are similar preparations pharmaceutically?

Objection repeated.

By saying it would be "physically possible" I mean that it would be possible in the same manner that a druggist might dispense cinchonidine sulphate when quinine sulphate is specified on the prescription.

By Mr. Rawle: The answer is objected to as irresponsive.

X Q. 31. X Q. 30 repeated.

Objection repeated.

A. Yes, it is "physically possible" to. I mean that a druggist can dispense anything he wishes to dispense as a substitute for anything else, but I say nothing as to his justification for so doing.

X Q. 32. In X Q. 19 you said that there were a good many hundreds of preparations which The Searle & Hereth Company made in common with other manufacturers of pharmaceutical preparations which were all competitors with each other, and you included Lilly among the other manufacturers.

555 By "competitors" in this answer I infer that you mean preparations of like therapeutical effect. Is that correct?

Same objection.

A. I mean preparations of like therapeutical effect and identical composition.

X Q. 33. I now ask you whether a druggist filling a prescription specifying one of such preparations and giving the name of the house that made it, could not fill such prescription with the like drug of another house without the doctor or the customer discovering it?

Same objection.

A. He could do it but he shouldn't. It might not always be possible to discover it.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 34. You have referred to Yerbazin, Lilly, and Quinimel S. & H. As to these two products is Quinimel used or can it be used as a substitute for Yerbazin, using the term "substitute" in the trade sense?

A. No, because it is not the same color.

Deposition closed.

FRANK S. HERETH.

Subscribed and sworn to before me this 3rd day of June, 1915.
CHARLES E. RIORDON,
Special Examiner.

ROBERT J. GROVES, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

556 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert J. Groves; age, 40; Philadelphia, Pa.; Travelling Salesman for Eli Lilly & Company, of Indianapolis, Indiana. I cover Southeastern Pennsylvania.

Q. 2. How long have you been employed by Eli Lilly & Co.?

A. Four years and three months.

Q. 3. Where were you employed prior to your employment by Eli Lilly & Co.?

A. William R. Warner & Co., of Philadelphia, Pa.

Q. 4. What were your duties while you were employed by William R. Warner & Co., and how long were you in their employ?

A. I was with them five years and two months. The first three years I was employed in the laboratory as general helper. For the last two years of my employment with them I was a travelling salesman.

Q. 5. I show you a document marked "Complainant's Exhibit, R. J. Groves Copy of Document No. 3," and ask you if you have ever seen this document before, and what it is?

A. It is a comparative sheet showing the goods manufactured by William R. Warner & Co., which could be sold against goods manufactured by other pharmaceutical houses. Yes, I have seen this sheet before.

Q. 6. When and under what circumstances did you see it before?

A. The sheet was given to me by Mr. H. Pfeiffer, when I started on the road to sell for him.

Q. 7. For what purpose was this sheet used by you?

A. It enabled me to sell goods of our manufacture against the goods manufactured by other houses at a much cheaper price.

Q. 8. How did it enable you to do this?

557 A. The prices quoted in this comparative sheet were considerably cheaper than the prices quoted by our competitors.

Q. 9. Referring to the item "Coco-Quinine" do you find this on the sheet in question and if you do what information does that sheet give you relative to this item?

A. Yes, "Coco-Quinine" is found on page 2. We had a similar product under the name of "Quin-Coco" put up in pints, five pints and gallons. The product manufactured by William R. Warner & Co. was sold in gallons at $3.75 per gallon, whereas Eli Lilly & Company's product was for five pints $3.30, which netted the druggist a considerable profit over the price paid Eli Lilly & Company.

Q. 10. What do you mean by netted the druggist considerable profit. What netted the druggist considerable profit?

A. "Quin-Coco" netted the druggist considerable profit over "Coco-Quinine."

Q. 11. What were your methods in offering "Quin-Coco" to the druggists?

By Mr. Rawle: Objected to because the only "method" that is relevant and material is the method authorized by his employer.

A. I sold "Quin-Coco" as a substitute for "Coco-Quinine," as identical in appearance, containing the same amount of quinine; and said it could be sold on prescription as "Coco-Quinine."

By Mr. Rawle: The answer is further objected to because the witness states inferences and not facts.

Q. 12. Will you state in substance, as near as you can remember, what you would say to the druggist when you solicited his order for "Quin-Coco," using the language exactly as you would if talking to the druggist.

358 By Mr. Rawle: Same objection as to the last question.

A. On calling on the druggist if I found that he was a user of "Coco-Quinine," I used my best efforts to sell him "Quin-Coco," pointing out to him that the product was equally as good as Coco-Quinine and cost him less money and could be dispensed on prescriptions and sold over the counter as "Coco-Quinine."

Q. 13. On whose authority did you make such statements and representations to the druggists?

By Mr. Rawle: The question is objected to because the only proper question is as to what instructions were given to the witness by his employer. The witness has not stated that he had any authority.

A. On the authority of William R. Warner & Co.

Q. 14. By whom were you given the instructions or authority in this matter?

A. I am not sure whether it was Mr. Hagaman or Mr. H. Pfeiffer.

Q. 15. What did either of these gentlemen say to you on this subject?

A. So far as their words are concerned, I have no recollection, but I was to push "Quin-Coco" as well as other goods of our manufacture against the goods of our competitors.

Q 16. What did either of them say to you if anything as near as you can recall, in regard to "Quin-Coco"?

A. That "Quin-Coco" was an exact duplicate of "Coco-Quinine."

Q. 17. Did either of them tell you that "Quin-Coco" could be used and sold by the druggist as a substitute for "Coco-Quinine"?

By Mr. Rawle: Same objections and as leading.

359 A. Whether they told me or not I always understood and sold it as a substitute for "Coco-Quinine."

By Mr. Rawle: Objected to as to what the witness understood except as told, is not evidence.

Q. 18. During what years were you employed in the laboratory of William R. Warner & Co.?

A. From December, 1905, to January, 1909.

Q. 19. During that period was the product called "Quin-Coco" manufactured in the laboratory of William R. Warner & Co.?

A. It was in the latter part of 1908 the firm of William R. Warner & Company was taken over by the Pfeiffer Chemical Company, and "Quin-Coco" was not made in the laboratory of William R. Warner & Co. until the last month of 1908, it being supplied from the laboratories in St. Louis.

Q. 20. Was "Quin-Coco" manufactured by William R. Warner & Co. during the latter part of 1908?

A. During the latter part of 1908 they were experimenting on "Quin-Coco" in the laboratory as they had not got the working formulas from St. Louis on "Quin-Coco," and were unable to make a satisfactory product.

I do not recollect whether it was made during the latter part of 1908 or not. During the latter part of 1908 they were experimenting.

Q. 21. You spoke of the working formula for "Quin-Coco" being received from the laboratory in St. Louis. Were you in the Warner laboratory when this working formula was received?

A. I do not recollect whether the working formula was received during my time in the laboratory or not.

Q. 22. Do you know whether or not any "Quin-Coco" was ever made in the laboratories of William R. Warner & Co., in Philadelphia?

A. Yes, there was "Quin-Coco" made in the laboratories of
560 William R. Warner & Co. during the latter part of 1908, but whether it was marketed or not, I do not know.

Q. 23. Did you understand that my previous questions asked as to whether it was marketed or not?

A. No.

Q. 24. I understood you to answer one of the other questions that you do not recollect whether "Quin-Coco" was made in the laboratories of William R. Warner & Co. in the latter part of 1908 or not, and now you say that it was made but you don't know whether it was marketed or not. Please explain?

A. It was made in an experimental state, but whether they got the product perfected for market or not during the latter part of 1908 I do not know.

Q. 25. Please tell what you know about the experimental work on this product in the latter part of 1908 in the laboratories of William R. Warner & Co.?

By Mr. Rawle: Objected to as immaterial.

A. In the latter part of 1908 the superintendent in charge of the wet room department was experimenting on "Quin-Coco" to get it as near the product manufactured by Eli Lilly & Company as pos-

sible. He made several samples but none of them came up to the consistency or color of the product manufactured by Eli Lilly & Co., and it was not until the formula came from St. Louis that they found the chocolate they were using in Philadelphia was different from what they were using in St. Louis.

Q. 26. How do you know that the experiments referred to were not the same in color and consistency as the Lilly product "Coco-Quinine"?

Same objection.

A. Because we had samples of "Coco-Quinine" manufactured by Eli Lilly & Co. before us.

Q. 27. Were the results of the Warner experiments compared with the Lilly product as the experiments progressed?

Same objection.

561 A. Yes.

Q. 28. Were the efforts in the Warner laboratory directed to reproducing the identical color and consistency of the Lilly product?

Same objection.

A. I do not know what instructions were received by the superintendent, but I do know that he did his utmost to make a product similar in color to that of the Lilly product.

Q. 29. Were his experiments considered successful and if not what was the objection to the product he made?

Same objection.

A. His efforts were not a success. So far as I can remember the color was not right.

Q. 30. Did you personally have anything to do with these experiments in the way of assisting the superintendent or consulting with him on the subject?

A. No, nothing to do with the experiments, but when he was doing his experimental work he generally took me into consultation and asked me what I thought of the product, before submitting it to the General Manager.

Q. 31. Do you recall anything that the superintendent said to you on the subject at any of these consultations and if so please state what he said, if you can recall?

Same objection.

A. The only thing I remember the superintendent to say was when the formulas came from St. Louis he found that the chocolate was different from what he was using in Philadelphia.

Q. 32. What difference would this make in the product?

Same objection.

A. So far as I can remember it brought it to the required color.

562 Q. 33. How was this required color shown?

Same objection.

A. It made it the same color of the product we were trying to duplicate, Lilly's Coco-Quinine.

Q. 34. You have referred to the General Manager. Who was the General Manager?

A. Mr. G. A. Pfeiffer.

Q. 35. The same G. A. Pfeiffer who is present in the room today?

A. Yes, sir.

Q. 36. What was the usual way for the Warner salesman to refer to the Document No. 3, which you have before had called to your attention?

By Mr. Rawle: Objected to unless authority is shown; because the question calls for hearsay; because the question calls for acts of a large number of Warner salesmen as to which the witness can not possibly have any knowledge and any answer he may give will be guess work.

A. Comparative List. That was the title I always knew it by.

Q. 37. Did you ever make any sales of "Quin-Coco" to druggists on such representations as you have previously stated it was your custom to make druggists?

By Mr. Rawle: Some objection as to want of authority and as calling for a general statement instead of for facts.

A. Yes.

Q. 38. What connection did Mr. H. Pfeiffer have with the Warner Company, if you know?

A. When I was employed by William R. Warner & Co. Mr. H. Pfeiffer was then vice president and the general sales manager.

Q. 39. What connection did *the* Mr. Hagaman have with the William R. Warner & Co.?

563 A. We looked upon him on the road as assistant sales manager.

Q. 40. During the period you were on the road for William R. Warner & Co. did you have more than one of the documents Exhibit Document No. 3, and if so, how many and by whom were they furnished to you?

A. I remember having three. They were furnished by Mr. H. Pfeiffer.

Q. 41. Were they furnished all at one time or at different times?

A. They were furnished at different times.

Q. 42. What would be the reason of giving you a new list when it was given to you?

A. I remember the second list was given me because I lost the first, and the third I think was a new edition.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

By Mr. Rawle: I give notice of a motion to strike out the testimony of this witness as to his methods of selling, no admissible and valid evidence having been given of authority.

By Mr. Rawle:

X Q. 43. Did you act as a chemist in the Warner laboratory?

A. No.

X Q. 44. What did you do?

A. I had no particular duty in the laboratory. I was employed in the wet room department. I had to do whatever the superintendent instructed me to do.

X Q. 45. Who was the superintendent?

A. Mr. Harry Fritsch.

X Q. 46. I infer that you were a sort of utility man. Is that correct?

A. No.

564 X Q. 47. What did you do?

A. I was employed in the laboratory to do whatever the superintendent instructed me to do.

X Q. 48. What did you do?

A. I assisted in making fluid extracts, syrups, and elixirs.

X Q. 49. Did you assist the chemist in these "Quin-Coco" experiments personally?

A. I was the only one employed in the laboratory at the time whom he could ask as to the product.

X Q. 50. I understood you to say that he did not consult you as to "Quin-Coco." Is that correct?

A. No.

X Q. 51. You mean he did not?

A. Yes, he did consult me in regards to "Quin-Coco."

X Q. 52. Did he use chocolate?

A. He used a product which appeared to me as chocolate.

X Q. 53. Do you know whether he did or did not use chocolate?

A. It depends upon what definition you put on chocolate and cocoa. It was either one or the other.

X Q. 54. How long did these experiments last before the St. Louis formula came?

A. It might have lasted ten days and it might have lasted three weeks.

X Q. 55. Which do you swear to?

By Mr. Bradford: Objected to as improper.

A. I swear to neither.

X Q. 56. Who first suggested your becoming a travelling salesman for Warner & Co.?

By Mr. Bradford: Objected to as irrelevant, immaterial and not cross-examination.

A. I first made application to Mr. G. A. Pfeiffer about the month of October, 1908, who informed me that Mr. H. Pfeiffer was
565 away from home and would not be back until about November or later. On Mr. H. Pfeiffer's return I believe Mr. G. A. Pfeiffer spoke to him about me having made application to him for the position then rendered vacant by Mr. Joseph Barbiere leaving the firm of William R. Warner & Co. Mr. H. Pfeiffer sent to the laboratory for me and I was engaged to start the first January in the following year. He sent for me about the beginning of December.

X Q. 57. Between your appointment and January 1st, how often did you talk with Mr. H. Pfeiffer about selling methods?

A. I have no recollection how often.

X Q. 58. Was it more than once?

A. It might have been twice or three times.

X Q. 59. Do you swear that it was more than once?

A. No.

X Q. 60. How long did the interview last?

A. I have no idea how long it lasted.

X Q. 61. Do you swear it was more than ten minutes?

A. I can not swear to any length of time.

X Q. 62. Can you state the words which he used on the subject of selling methods?

A. No, I can not.

X Q. 63. During that month of December how many talks with Hagaman did you have on selling methods?

A. None.

X Q. 64. I hand you a small book on the first page of which appear the words "Salesman's Confidential and Manual." Did you receive from the company at or about the time you went on the road a manual substantially like this?

A. Yes, but the one at that time was entirely different from this one.

X Q. 65. The manual I have just handed you is marked 1913-1914, and the period you are referring to is 1909. Does the difference consist in the difference in the list of articles contained in the manual you hold in your hand and the one you received in 1909?

566 By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant. The books will show for themselves and are the only competent evidence on this point.

A. Yes, and in the number of articles listed in this book. The instructions contained in this book from page 78 to page 87 were not included in the book I received in 1909. The book that I received in 1909 was simply called "Salesman's Confidential," the word "Manual" was not on it.

By Mr. Rawle: The book shown the witness is marked by the Special Examiner for purposes of identification as "Book Shown Witness Grove June 3, 1915."

X Q. 66. What became of the book you received in January, 1909?

A. It was returned to William R. Warner & Co.

X Q. 67. Did not the book you received in 1909 have any instructions to salesmen?

A. Yes, but only regarding confidential prices.

X Q. 68. Did it not have any instructions as to how to make out orders or as to credit and collection policy?

A. No.

X Q. 69. At the time you had the talk with Mr. H. Pfeiffer, did you receive the "Salesman's Confidential" and the blue list which you call comparative list, marked "Document No. 3?"

A. No, not until the day before I started out to work.

X Q. 70. I understand that you are doubtful as to whether William R. Warner had made any "Quin-Coco" and put it on the market prior to January 1, 1909?

A. That is correct.

X Q. 71. If that is correct then the first comparative list which you received just before you went on the road did not contain the item "Quin-Coco," did it?

A. Yes, "Quin-Coco" was sold by William R. Warner & Co. prior to January, 1909, it being shipped from the laboratories in
567 St. Louis under the name of Searle & Hereth, and distributed by William R. Warner & Co.

X Q. 72. You have said that you received three comparative lists during your selling period with Warner & Co. Is the one which you have had in your hand this morning "Complainant's Exhibit, Document No. 3," the first, second or third of the three?

A. It is either the second or the third.

X Q. 73. Do you swear that the first one of the three was given you by the company before you became its salesman?

A. No.

X Q. 74. When was it given to you?

A. The evening I received my samples and confidential list, and general price list.

X Q. 75. When was that relative to January 1st, 1909?

A. About a day or two days before.

X Q. 76. How many items or different articles in the Warner line did you start out to sell January, 1909?

A. Every item that it was possible to sell manufactured by William R. Warner & Co. and the Pfeiffer Chemical Company, and goods listed in the Searle & Hereth catalogue, having the three lists with me. It may have been ten thousand or it may have been thirty thousand items, I could not tell.

X Q. 77. Do you swear that out of these ten or thirty thousand items you were to sell Mr. Henry Pfeiffer picked out "Quin-Coco" which the company had just begun to sell and gave you special instructions as to how to sell "Quin-Coco?"

A. I do not.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 78. Did you have any interviews with Mr. H. Pfeiffer or Mr. Hagaman after you started out on the road for William R. Warner & Co.?

568 By Mr. Rawle: Objected to as not proper redirect-examination.

A. Yes, I went with Mr. Hagaman after being out one week in the City of Philadelphia. After working one week in the City of Philadelphia and vicinity I went out on the road with Mr. Hagaman for instructions, working West Chester, Downingtown, Bethlehem, South Bethlehem, Sellersville, Souderton and Lansdale, Pennsylvania.

R. D. Q. 79. On this trip did you and Mr. Hagaman sell any "Quin-Coco?"

Same objection.

A. Not as far as I can recollect.

R. D. Q. 80. Do you remember whether you offered it to the druggists?

Same objection.

A. I don't remember whether we offered it or not.

R. D. Q. 81. Do you remember of Mr. Hagaman telling you anything about this preparation?

A. That was the first time that I got thoroughly familiar with the comparative list as we went through every item on it he pointing out to me some of the best sellers. Whether "Quin-Coco" was one of them or not I can not say, as there was no demand in this territory for quinine preparations of any kind.

R. D. Q. 82. Do you remember whether Mr. Hagaman at any other time spoke to you about "Quin-Coco?"

Same objection.

A. Yes.

R. D. Q. 83. When was this and what did he say?

A. At that time he was working as a salesman, Bristol being one of the towns where there was a great deal of malaria and where he had placed quite a little "Quin-Coco." He told me that Bristol was one of the towns where he could sell "Quin-Coco," and on one
569 trip to Bristol myself I found quite a number of the druggists using "Quin-Coco."

R. D. Q. 84. Did Mr. Hagaman tell you what statements he made to the druggists to induce them to buy "Quin-Coco"? Or instruct you what statements you could make in selling this product?

By Mr. Rawle: Same objection as to the question and as to the first clause objected to as secondary evidence, and as to the second

clause because it does not appear that Hagaman had any authority to instruct the witness.

A. Yes, he told me that by pushing "Quin-Coco" we were pushing as good an article as "Coco-Quinine", Lilly, the therapeutic action being the same and containing the same amount of quinine, and on subsequent trips with me after he was made assistant sales manager we pushed "Quin-Coco" along with other things.

R. D. Q. 85. How did you and Mr. Hagaman push "Quin-Coco"? What did you tell the druggists?

Objected to because not cross-examination and further objected to unless authority for the method is shown.

By Mr. Bradford: Attention is called to X Q. 63.

A. We sold "Quin-Coco" as a substitute for "Coco-Quinine," telling the druggists that it was a similar product to "Coco-Quinine" in appearance and taste, containing the same amount of quinine as "Coco-Quinine," and much cheaper in price, one gallon costing $3.75 and "Coco-Quinine" would cost them in five pints $3.30.

R. D. Q. 86. In your previous testimony you have stated that you told the druggists also that they could furnish "Quin-Coco" on calls for "Coco-Quinine." Did you and Mr. Hagaman make such representations to the druggists on the trips referred to in your last answer?

570 By Mr. Rawle: Objected to as not cross-examination and as leading and entirely improper.

A. In that territory there was very little "Coco-Quinine" sold, so we did not push "Quin-Coco."

R. D. Q. 87. My question relates to the statements you have made relative to the sales of "Quin-Coco" in Bristol. Did you tell the druggists in Bristol that they could use "Quin-Coco" for "Coco-Quinine?"

Same objection.

A. Yes.

R. D. Q. 88. Who gave you the Salesman's Confidential and the comparative list, your samples and your catalogue before you began working as a salesman for Warner & Company?

A. Mr. H. Pfeiffer.

Re-direct-examination closed.

Recross-examination, without waiving objections.

By Mr. Rawle:

R. X Q. 89. Did Hagaman work Bristol with you at that time?

A. No.

R. X Q. 90. Can you name the druggists in Bristol you solicited?

A. No.

R. X Q. 91. How long did Hagaman travel with you?

A. At intervals of about three weeks in a period of two years. I mean that I travelled with Hagaman altogether about three weeks at different intervals during two years' service.

R. R Q. 92. On your first trip with Hagaman did you go to Bristol?

A. No.

R. X Q. 93. Will you swear that you ever heard Hagaman say to a druggist that he could buy "Quin-Coco" and substitute it on calls for "Coco-Quinine?"

571 A. I have heard him tell druggists that "Quin-Coco" could be sold as "Coco-Quinine," but where I cannot say.

R. X Q. 94. Can you swear that you ever heard Hagaman advise a druggist to buy "Quin-Coco" and substitute it on calls for "Coco-Quinine?"

A. Yes.

R. X Q. 95. What did he say to them?

A. That "Quin-Coco" was a similar product to "Coco-Quinine" containing the same amount of quinine and was like it in appearance.

R. X Q. 96. That is what he said, is it?

A. That is what we all said. That was our only method of selling it.

R. X Q. 97. And that is what Hagaman said?

A. He could say nothing else.

R. X Q. 98. And that is what you used to say?

A. Yes, it being the only selling point we had.

Deposition closed.

ROBERT J. GROVES.

Subscribed and sworn to before me this 3rd day of June, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Hotel Piedmont, Atlanta, Georgia, Saturday, June 5th, 1915, at 10 a. m.

By Mr. Rawle: Mr. Rawle states that testimony has already been taken from Saginaw, Michigan, to Houston, Texas, and east to Mobile, &c., and at Atlanta, Georgia, during a period of twenty-eight days and objects to another excursion to the South for the same purpose.

By Mr. Bradford: Counsel for plaintiff regrets the necessity of taking counsel for defendant back to Atlanta, but desires to

572 place on record these facts: The witness to be examined on Saturday, June 5th, was not available when the other depositions were taken in Atlanta and counsel was unable at that time to get any definite information as to when the witness would be available, the witness being a traveling salesman and away from home at the time. Of all these facts counsel for defendant was at the time advised and the promise made that if the witness could be persuaded

to come to Washington or some other near point, this course would be pursued. Counsel for plaintiff and plaintiff's agent has made every effort possible to persuade the witness to come to Washington at this time to give his deposition, but the witness has declined and it is for this reason that it becomes necessary to return to Atlanta greatly to the regret and inconvenience of counsel for plaintiff as well as counsel for defendant.

Atlanta, Georgia, June 5, 1915.

Met pursuant to adjournment, at the Piedmont Hotel, Saturday, June 5, 1915.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

LEMUEL B. HARDY, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

573 A. Lemuel B. Hardy; age, 52; Atlanta, Georgia; Travelling Salesman for Atlas Oil Company.

Q. 2. How long have you been in your present employment and where were you employed prior thereto?

A. I have been travelling for them for about eighteen months, but have been exclusively in their employment for about three months. During the other period I travelled for them part of the time and ran a retail drug store in Atlanta, in connection with my son at the same time. Prior to that time I was a travelling salesman for Wm. R. Warner & Co., having been with that concern and the Pfeiffer Chemical Company for about six years.

Q. 3. While you were a travelling salesman for Wm. R. Warner & Co., did you among other goods sell a preparation called "Quin-Coco"?

A. I did.

Q. 4. When did you begin selling "Quin-Coco", if you remember?

A. I don't remember exactly but I think it was about 1908. During the first part of my employment I was in the northern Georgia territory where there is not a very great demand for quinine preparations and consequently did not push this particular product very hard, but after I went into South Carolina, in 1910 or 1911 and 1912, there being a greater demand for "Coco-Quinine" I then began to work harder and push "Quin-Coco", and pushed it strictly as a substitute for "Coco-Quinine".

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Q. 5. Please state what representations or statements you made to the druggists when you solicited their orders for "Quin-Coco", as near as you can remember?

A. I stated to the druggists that it was the same thing in color and contents as "Coco-Quinine", with the exception that it flowed a little more freely, and that they could use it as a substitute for "Coco-Quinine" from the fact that it contained both quinine and
574 cocoa, and the advantage they had in buying "Quin-Coco" was the cheapness in price, cheaper than "Coco-Quinine". I demonstrated to them also that it was the same color and I have had them taste of it to see that it was the same taste.

By Mr. Rawle: The answer is objected to unless proof of authority is given to make such statements.

Q. 6. On whose authority did you make such statements when soliciting orders for "Quin-Coco" from the retail druggists?

By Mr. Rawle: Objected to because the question is not on whose authority it was but who gave him authority.

A. Well, I got authority from Mr. McNulty at one time I remember and I am sure Mr. H. Pfeiffer instructed me on that too.

Q. 7. When did Mr. McNulty instruct you and state what Mr. McNulty said to you, if you remember?

A. In the latter part of 1911 or in the early part of 1912 Mr. McNulty told me that I could say to the druggists that they would have a right to sell it on doctor's prescriptions for "Coco-Quinine", as both contained quinine and cocoa.

Q. 8. Did Mr. McNulty make this statement to you more than once?

A. It was discussed several different times while he was with me; I don't remember how many different times.

Q. 9. Who is Mr. McNulty to whom you have referred and what connection has Mr. McNulty with Wm. R. Warner & Co.?

A. My understanding from Mr. McNulty he was one of the head officials and it was his business to go to see the salesmen and give them all the points and get all the points he could in assisting the salesman to sell their products.

575 Q. 10. Did you understand that his instructions were the instructions of Wm. R. Warner & Co.?

A. I did.

Q. 11. Please explain how you proceeded to demonstrate to the retail druggists the similarity in color between the product "Quin-Coco" and the product "Coco-Quinine"?

A. I would do so by pouring the two on a piece of paper to show the same color, sometimes by letting it drain out of the bottle to show that they were the same color.

Q. 12. Would you have a bottle of each preparation at the time in order to compare the two, one with the other? I mean would you have a bottle of each when you were making these comparisons?

A. I would get the druggist's bottle of "Coco-Quinine" and compare it with the bottle of "Quin-Coco" that I had with me.

Q. 13. What was the point from the selling standpoint in showing the druggists that the two products were of the same color and taste?

By Mr. Rawle: Objected to as immaterial, the facts speak for themselves, the reason is not evidence.

A. The question was to show them that it was the same piece of goods and that they could sell it in place of "Coco-Quinine".

Q. 14. Why couldn't they sell it in the place of "Coco-Quinine" if it had been of a different color and of a different taste?

Objected to as immaterial.

A. "Quin-Coco" was not advertised. The doctors did not know it. The consequence was they wrote no prescriptions for "Quin-Coco" and it was to be sold as a substitute for "Coco-Quinine".

Q. 15. Did you ever succeed in selling any of the retail duuggists in your territory the product called "Quin-Coco" on such
576 representations as you have stated you made to them when soliciting orders for this product?

A. Yes, I sold quite a lot of it.

Q. 16. I believe you stated that you have also been in the retail drug business. Have you handled the product called "Quin-Coco" while in the retail drug business?

A. I did.

Q. 17. How did you dispense it?

By Mr. Rawle: Objected to as irrelevant and because the acts of the druggist can not affect the rights of the defendant.

A. I sold it as "Coco-Quinine" and sold it to the same party more than one time.

Q. 18. How did you label it?

Same objection.

A. I label it "Coco-Quinine".

Direct-examination closed.

Cross-examinations, without waiving objections.

By Mr. Rawle:

X Q. 19. Where was Mr. McNulty when he talked to you?

A. We were in South Carolina.

X Q. 20. How many items were you selling of the Warner line?

A. They were selling an immense line. I was selling all of their line. I can't state accurately.

X Q. 21. Were there as many as a thousand items?

A. I couldn't say.

X Q. 22. Were there as many as fifty items?

A. Five or more items.

X Q. 23. Do you mean five or more items in the Warner line?

A. Yes.

577 X Q. 24. Were there more than twenty-five?

A. Five or more items.

X Q. 25. Were there more than fifty?

A. I couldn't say just how many I sold. It is impossible for me to do so.

X Q. 26. I am not asking you how many you sold, but about how many items there were in the Warner line which you could sell if there was a call for them?

By Mr. Bradford: The question is objected to as improper, the witness having stated that he represented their entire line, which was an immense line and if counsel wants the accurate number of items he can obtain it from defendant's catalogues which are the only best evidence on this point.

A. I never investigated the number at all. I tried to sell everything in their entire line.

X Q. 27. How many items were there, as you now remember in the entire line?

A. I can't remember. It is an immense catalogue.

X Q. 28. Were there a hundred?

Question is objected to as improper and also as immaterial and irrelevant.

A. I have answered the question to the best of my knowledge.

X Q. 29. Were there as many as two hundred?

Objection repeated.

A. I have answered to the best of my knowledge.

X Q. 30. Were there as many as five hundred?

Objection repeated.

A. I have answered to the best of my knowledge.

X Q. 31. Will you be good enough to answer it over again?

A. I don't know.

X Q. 32. Where was Mr. McNulty when he talked to you as you have stated?

578 A. In South Carolina. We were in Spartanburg at one time.

X Q. 33. How long was your talk with McNulty after you began to sell for the Warner house?

A. I suppose it must have been about a year, after I went back with them a second time. I went back with them the second time in 1910 or 1911.

X Q. 34. And how long after you went back with them the second time, did you have your talk with McNulty?

A. It must have been about a year; it may not have been so long.

X Q. 35. And that talk was at Spartanburg?

A. It was discussed at Spartanburg and other towns in South Carolina.

X Q. 36. How long was he with you?

A. He was with me on two occasions. I don't remember the exact number of days.

X Q. 37. Did you talk over any other items in the Warner line except "Quin-Coco"?

A. Yes; we talked over the general line.

X Q. 38. A good many of the items in the general line?

A. A good many of them, yes.

X Q. 39. As a Warner salesman, did you have any printed manual or book to aid you?

A. I had their catalogue.

X Q. 40. Did you have a manual called sometimes Salesman's Confidential?

A. Yes, sir; I did.

X Q. 41. Did you turn it in when you left their employ?

A. I guess I did. I turned in everything I had to them.

X Q. 42. Did McNulty give you that or had you had it before?

A. I had it before.

X Q. 43. Were there in it any suggestions to salesmen as to how to conduct the business?

579 By Mr. Bradford: Objected to as incompetent and irrelevant.

A. As well as I remember about the Manual it was a list of items with the lowest prices.

X Q. 44. Don't you remember whether it contained any instructions and suggestions to salesmen?

A. No, sir; I do not.

X Q. 45. Were any of the other Warner items, articles that were in competition with the products of other drug houses?

Objected to as immaterial and irrelevant.

A. There were.

X Q. 46. Were there a good many of them?

Same objection.

A. Yes.

X Q. 47. Did you solicit sales to druggists of such?

Same objection.

A. I did.

X Q. 48. And make sales?

Same objection.

A. I did.

X Q. 49. Could you give me any idea of about how many such there were?

Same objection.

A. I can not. About one or a dozen.

X Q. 50. Do you remember any of them?

Same objection.

A. Pills.

X Q. 51. Can you name any one or more Warner items which you were selling in competition with similar items of other drug houses, giving the regular name used by Warner and the other drug houses?

Same objection.

580 A. Yes; I sold one pill as Aloin Strychnine, Bella-Dona and Epicac, in connection to Lapactic Pills made by Sharpe & Doehme.

X Q. 52. Did you sell that Warner pill to be used as a substitute for that Sharpe & Doehme pill?

Same objection.

A. I did.

X Q. 53. Please name some other Warner item you sold which was similar to a preparation of another house?

Same objection.

A. I couldn't remember any other. I take it you mean specialties.

X Q. 54. Can you name any items of the general pharmaceutical line of Warner which you were selling in competition with a like item of some other house?

Mr. Bradford: Same objection and the further objection is made that this line of examination is not cross-examination and is an unwarranted waste of plaintiff's time and money by defendant in attempting to make the witness his own.

A. Their general line was in competition with other pharmaceutical houses.

X Q. 55. And a druggist who bought such Warner items could use them in substitution for items of the other house?

Same objection.

A. He could.

By Mr. Rawle: Mr. Rawle places of record a protest against these expensive trips into the same territory for taking evidence and states that the notice for this trip included possible depositions in places in North and South Carolina.

581 By Mr. Bradford: Counsel for plaintiff replies that he did advise counsel for defendant that he would investigate some reports as to evidence that might be obtained at Charlotte, N. C., and other towns in adjoining territory, and that he might wish to stop on the return trip from Atlanta to take such depositions, should it develop that in his judgment they would be of sufficient

value. That he stopped at Charlotte on his trip to Atlanta for the purpose of making the investigation in order to save possible inconvenience to counsel for defendant, and that, so far, his investigation shows the evidence that can be obtained there would only be cumulative to the evidence obtained in Virginia and other places and for this reason he has advised counsel for defendant that the possible stop at Charlotte on the return trip has been abandoned and that he may proceed directly to wherever may suit his own convenience. In order that there may be no misunderstanding counsel for defendant is here advised that plaintiff has not yet concluded taking testimony in support of its bill of complaint and that other and equally as expensive trips may yet be necessary, although it is hoped that plaintiff's prima facie case is substantially completed, with this witness' deposition.

By Mr. Rawle: Mr. Rawle asks the court to draw no inference from the words of plaintiff's counsel as to "cumulative" evidence.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 56. I hand you "Complainant's Exhibit, Document No. 3," and ask you if when you were a salesman for Warner & Co., you had a similar document and if so by whom it was given to you?

A. I had one of the same, similar to this. It was sent
582 to me by Wm. R. Warner & Co. and the Pfeiffer Chemical Co.

Deposition closed.

L. B. HARDY.

Subscribed and sworn to before me this 5th day of June, 1915.

CHARLES E. RIORDON,
Special Examiner.

Counsel for both parties agree that Dr. Frank L. Eskridge, if called as a witness for plaintiff, would testify as follows:

My name is Frank L. Eskridge; my age is 30 years; I am a resident of Atlanta, Georgia, and have been a practicing physician for eight years; I have used Coco-Quinine in my practice during the past seven years; I regard Coco-Quinine as a medicinal preparation of merit and prescribe it frequently; I write my prescriptions usually just "Coco-Quinine" and this designation is intended to specify the product of Eli Lilly & Company, being the only product, in my judgment, answering such specifications.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet subject to notice and agreement.

583 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY & COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

CITY OF WASHINGTON,
District of Columbia, ss:

I, Charles E. Riordon, a Notary Public, within and for the District of Columbia, duly appointed Special Examiner by order of Court, of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the plaintiff, in the above entitled cause, were taken before me pursuant to notice and agreement as follows:

At Richmond, Va., May 20, 1915:

J. L. Ridenour, Sr.,
G. W. Burton,
E. C. Fisher,
William S. Cavedo.

At Emporia, Va., May 20, 1915:

Albert B. Garber,
Walter S. Lindsay,
Le Grand E. Wetzel.

At Norfolk, Va., May 21, 1915:

Edgar B. Allen,
F. D. Nelligar,
Harry T. Hargrave.

584 At Washington, D. C., June 3, 1915:

Frank S. Hereth,
Robert J. Groves.

At Atlanta, Ga., June 5, 1915:

Lemuel B. Hardy.

That each of said witnesses was by me first duly sworn in accordance with law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon

a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and by Mr. Francis Rawle, attorney for defendant, as appears in the record; that the deposition of each of said witnesses was read over by or to him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit.

In testimony whereof I have hereunto set my hand and seal this 16th day of June, 1915.

CHARLES E. RIORDON,
Special Examiner.

585 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

Depositions of Witnesses Taken on Behalf of Plaintiff Before A. C. Rice, a Notary Public, Beginning Monday, July 12th, at 2 p. m., at the Office of Bradford & Doolittle, Rooms 1451-1455 Lemcke Annex, Indianapolis, Indiana, Pursuant to Notice and Agreement of Counsel.

Present:

Mr. E. W. Bradford, on behalf of plaintiff;
Mr. Francis Rawle, on behalf of defendant.

A. J. GARNER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.

A. A. J. Garner; 33 years; Yoakum, Texas; retail druggist.

586 Q. 2. How long have you been in the retail drug business?

A. About fifteen years altogether. The first two years at Hallettsville, then a year at Yoakum and then I was away from Yoakum about a year and since then have been located at Yoakum.

Q. 3. What is the name of the drug store or the firm owning the drug store where you are connected.

A. I am a partner in the business of the Weyman-Garner Drug Co.

Q. 4. Since you have been in the drug business at Yoakum have you handled a preparation called Quin-Coco?

A. Yes, sir.

Q. 5. From whom did you purchase this preparation?

A. Pfeiffer Chemical Co., I think was the firm, or Wm. R. Warner & Co. I am not sure which it was invoiced by.

Q. 6. When did you buy Quin-Coco first and give the name of the salesman, if you remember?

A. I don't remember the exact date of the first purchase. Probably four years ago. This purchase was made by the Weymouth Drug Co. and I was the manager of the business at the time. You understand that we, the Weyman-Garner Drug Co., succeeded the Weymouth Drug Co. I don't remember the name of the salesman.

Q. 7. In your experience as a retail druggist, have you ever handled a preparation known as Coco-Quinine?

A. I have.

Q. 8. How long have you been familiar with this preparation?

A. During my entire experience in the retail drug business.

Q. 9. On what representations did you purchase the Quin-Coco?

587 Mr. Rawle: Objected to because the only proper question is what was said by those parties.

A. Well, the salesman represented it to be the same preparation as Coco-Quinine, at a less price.

Q. 10. What else did he say to you with reference to Quin-Coco?

A. That you couldn't tell the difference in the taste, appearance of it, or the color of it, or the action of it. I suppose he meant from Coco-Quinine.

Q. 11. Did you have any doubt as to what he meant?

Mr. Rawle: Same objection.

A. No. None whatever.

Q. 12. Did he say anything to you about how Quin-Coco could be dispensed and if so, what did he say on this subject?

Mr. Rawle: Same objection and as leading.

A. Well he sold it to us for the same preparation as Coco-Quinine and evidently expected to use it for Coco-Quinine.

Mr. Rawle: Answer objected to as not testifying as to facts.

Q. 13. Did you so dispense it?

Mr. Rawle: The question is objected to as calling for res inter alios acta and as not affecting any right of the defendant.

A. We did.

Q. 14. In response to what kind of calls did you dispense Quin-Coco?

Mr. Rawle: Same objections.

A. On calls for Coco-Quinine.

Q. 15. On what kind of calls, over the counter or prescription calls?

Mr. Rawle: Same objection.

A. Both kinds of calls.

588 Q. 16. How did you label Quin-Coco when dispensed in response to such calls?

Mr. Rawle: Same objection.

A. As "Coco-Quinine."

Q. 17. Did you ever receive any complaints from customers or physicians to whom you had furnished Quin-Coco for Coco-Quinine?

Mr. Rawle: Same objections.

A. We had objections from one physician.

Q. 18. What was the physician's name?

Mr. Rawle: Same objection.

A. Dr. H. H. Brown.

Q. 19. What was the nature of his objection?

Mr. Rawle: Same objection.

A. He discussed that with our prescription clerk, at that time a Mr. Turner. I really don't know what he said.

Q. 20. Have you ever received a call from a customer for Quin-Coco?

A. I have not.

Q. 21. Have you ever received a prescription from a physician written for Quin-Coco?

A. I have not.

Q. 22. Do you have a considerable demand for Coco-Quinine?

A. We have.

Q. 23. Whose product do you recognize Coco-Quinine to be?

A. Eli Lilly & Company.

Direct-examination closed.

Mr. Rawle, not waiving the above objections, cross-examines as follows:

X Q. 24. Might it have been as long as five years ago that the Warner salesman called upon you?

589 A. I don't just remember. It may have been.

X Q. 25. Might it have been six years ago?

A. I am not exactly positive as to just how long?

X Q. 26. How did you happen to come so far from home in this matter?

A. Because Eli Lilly & Co. wanted me here.

X Q. 27. How large a place is Yoakum?

A. About seven thousand.

X Q. 28. How many drug stores?

A. Eight drug stores.

X Q. 29. How many doctors?

A. About twelve. Yoakum is half way between San Antonio and Houston, Texas.

X Q. 30. Is there a considerable demand for quinine products down there?

A. There is.

X Q. 31. Is it less or more than it was five or ten years ago, without considering the growth in population?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. It is effected a great deal by malarial conditions at different times.

X Q. 32. The more malaria, the more quinine?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 33. And on the whole without regard to increase in population, has malaria diminished in the last five or six years?

Mr. Bradford: Objected to as immaterial and incompetent and irrelevant.

A. I don't think there has been any great change either way.

X Q. 34. How much Quin-Coco did you buy from that salesman at that time?

A. One gallon.

X Q. 35. Did you stock Coco-Quinine at that time?

590 A. I don't remember whether we had any Coco-Quinine at that time or not.

X Q. 36. But you afterwards bought Coco-Quinine, didn't you?

A. We did.

X Q. 37. Did you afterwards buy any more Quin-Coco?

A. I am under the impression that we bought Quin-Coco three or four times. I don't remember how many times.

X Q. 38. About how long did that interview with the Quin-Coco salesman last?

A. A few minutes.

X Q. 39. Did he offer you any other items of the Warner line?

A. I don't remember whether they had the Warner line at that time or not.

X Q. 40. Did he offer you any other items of the line that he had?

A. Yes; they always do.

X Q. 41. About how many items in his line did he mention to you at that interview?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. I don't remember.

X Q. 42. Can you name any other items in his line that he offered to you at that time or that you talked about?

A. I could not. It has been too long.

X Q. 43. Do you remember whether you bought any other items in his line?

A. I think so.

X Q. 44. How many?

A. I don't know.

X Q. 45. Have the drug stores with which you have been connected carried quite a considerable line or stock of drugs and chemicals?

A. Yes, sir.

591 X Q. 46. Full stock?

A. Yes, sir. Largest in the city.

X Q. 47. Did this stock then and has it since included preparations having the same medicinal effect but made by several drug houses? I mean preparations that could be substituted one for the other with the same effect?

Mr. Bradford: Objected to as not cross-examination, immaterial and irrelevant.

A. Yes, sir.

X Q. 48. Are there a good many instances as such?

Mr. Bradford: Same objection.

A. Not in our business at the present time.

X Q. 49. Are there not a great many U. S. P. or N. F. preparations made and sold by several drug houses, several of which you carry at the same time?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 50. Are they interchangeable?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 51. And with the same medicinal effect as you understand it?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 52. And if such a preparation were called for without giving the name of the maker you would feel at liberty to sell the make of any house that you have in stock?

Mr. Bradford: Same objection.

A. I would, provided it were a U. S. P. or N. F. preparation.

X Q. 53. Do you stock any specialties made by more than one house but having the same medicinal effect?

592 Mr. Bradford: Same objection.

A. We do.

X Q. 54. How many?

Mr. Bradford: Same objection.

A. Probably—several.
X Q. 55. Can you name any?

Mr. Bradford: Same objection.

A. I could not recall the names of any at present.
X Q. 56. But you are sure there are some?

Mr. Bradford: Same objection.

A. Yes, sir.
X Q. 57. You have had calls for chocolate quinine?
A. I have.
X Q. 58. Do you have calls for sweet quinine or tasteless quinine or for any quinine preparation that is not bi.ter, under any other name?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. We have.
X Q. 59. Are the calls for chocolate quinine common?
A. No, sir.
X Q. 60. Do customers bring in bottles to be refilled?
A. They do.
X Q. 61. To a considerable extent?
A. Yes, sir.
X Q. 62. Do the larger part of the customers over the counter bring in bottles to be refilled?
A. No, sir.
X Q. 63. Half of them?
A. No—probably fifteen per cent.
X Q. 64. About what per cent call for chocolate quinine?
A. Not one per cent.
X Q. 65. Have you arranged to have your expenses paid by the plaintiff, for coming here?
A. Yes, sir.

Cross-examination closed.

593 Redirect examination.

By Mr. Bradford:

R. D. Q. 66. When you were first solicited by the salesman to purchase Quin-Coco, had you been selling Coco-Quinine at your store?

Mr. Rawle: Objected to as not proper for re-direct.

A. We had.

R. D. Q. 67. Was the demand for Coco-Quinine considerable at your store at that time?

Mr. Rawle: Same objection.

A. It was.

R. D. Q. 68. You stated that you were not sure whether you had any Coco-Quinine in the store when you bought the Quin-Coco, but on direct examination you stated that the salesman sought your order for Quin-Coco on the ground that it was the same thing as Coco-Quinine. Did the salesman ask you at the time in reference to your sales of Coco-Quinine or in reference to the demand for Coco-Quinine at your store?

Mr. Rawle: Same objection and as leading and irregular.

A. I don't remember.

R. D. Q. 69. Is it probable that you had Coco-Quinine in the store at that time?

Mr. Rawle: Same objection and because the probabilities are not evidence.

A. Yes, very probable.

R. D. Q. 70. Is Coco-Quinine a preparation that you had been carrying continuously in your store at that time?

A. It is.

R. D. Q. 71. And was the demand at your store a continuous demand?

A. It was.

594 R. D. Q. 72. Had you ever had customers call for Coco-Quinine by the name chocolate quinine, prior to that time?

Mr. Rawle: Same objection and as leading and because that it does not appear that the calls for chocolate quinine were for Coco-Quinine.

A. We had.

R. D. Q. 73. When a customer asks for chocolate quinine, what preparation do you understand is intended?

Mr. Rawle: Same objections and because the question is irrelevant if the witness' store is carrying only Coco-Quinine.

A. Coco-Quinine.

Redirect examination closed.

Recross-examination, not waiving objections.

By Mr. Rawle:

R. X Q. 74. If you were carrying only Quin-Coco and I came into the store and asked for chocolate quinine, what would you sell me?

A. Quin-Coco.

Recross-examination closed.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 75. What preparation would you understand the customer asked for by this name "chocolate quinine"?
A. Coco-Quinine.

Re-redirect examination closed.

Deposition closed.

A. J. GARNER.

595 G. H. TURNER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.
A. G. H. Turner; 25; retail druggist. My home is in Mount Vernon, Texas.
Q. 2. Have you ever been employed by the Weyman-Garner Drug Co. or the Weymouth Drug Co., the predecessors of the Weyman-Garner Drug Co. at Yoakum, Texas, and if so, when were you employed at that store?
A. Yes, sir. I don't remember the exact date. I know when I quit there the last time it was July 6th, 1914. I had been there about 14 months, I think it — as near as I can remember, when I quit. The first time I was employed there was about three months. I expect it was about two years between my first employment and my last employment at that store.
Q. 3. Where were you employed during the two years you were away from the Weymouth Drug Co. store?
A. I worked in Muskogee after I left there, for the Hadley Drug Co. of Muskogee. I can't remember just how long I worked for the Hadley Drug Co. I came back to Yoakum and worked for the Mission Drug Store, E. J. Majors, proprietor. When I left there, I went out through Colorado and Washington for my health and stayed out at Bremerton, Washington, four months, and then came back to Yoakum and went to work for the Weyman-Garner Drug Co. and after leaving them I went to Muskogee and worked for Mr. Hadley again.
Q. 4. While you were employed by the Weymouth Drug Co. or the Weyman-Garner Drug Co. do you remember anything about
596 dispensing Coco-Quinine or Quin-Coco? If you do, what do you remember?

Mr. Rawle: Objected to as calling for res inter alios acta which doesn't affect the rights of the defendant.

A. Well, sir, I used Quin-Coco in Dr. Brown's prescriptions, when he had prescribed Coco-Quinine, Lilly.

Q. 5. Give Dr. Brown's full name?
A. Dr. H. H. Brown.
Q. 6. What happened in this matter?

Mr. Rawle: Same objection.

A. Well, he claimed that the Coco-Quinine he prescribed didn't give satisfaction; that the babies couldn't retain it on their stomachs and that Lilly was evidently doing business on his past reputation and that he was going to have to give up using it.
Q. 7. Had Dr. Brown previously prescribed Coco-Quinine, frequently?

Mr. Rawle: Same objection and as calling for hearsay.

A. Yes, sir.
Q. —. Did he quit prescribing Coco-Quinine?

Mr. Rawle: Same objection.

A. Yes, sir.
Q. 9. Had he ever made any complaint as to Coco-Quinine prior to the time you gave him Quin-Coco on his prescription for Coco-Quinine?

Mr. Rawle: Same objection.

A. No, sir; he had never said it before. When I began to work there, I filled his prescriptions with Quin-Coco and he complained of it on several occasions.

Q. 10. How were the bottles labeled by you in which Dr.
597 Brown's prescriptions for Coco-Quinine were dispensed?

Mr. Rawle: Same objection.

A. They were labeled to contain his directions in accordance with his prescription.
Q. 11. Did you dispense Quin-Coco over the counter when Coco-Quinine was called for?

Mr. Rawle: Same objection.

A. Yes, sir.
Q. 12. How did you label these bottles?

Mr. Rawle: Same objection.

A. "Coco-Quinine."

Direct-examination closed.

Mr. Rawle, not waiving the above objections, cross-examines as follows:

X Q. 13. What drug store are you working in now?
A. Hadley Drug Co., Oklahoma City.

X Q. 14. Did you come all the way from Oklahoma City to testify in this case?

A. No, sir; I came from Yoakum, Texas.

X Q. 15. At whose expense?

A. Lilly & Co.

NOTE.—Counsel for complainant makes of record the fact that all expenses incurred by witnesses attending the taking of depositions here today and tomorrow are paid or are to be paid by complainant, it being the least expensive method of securing the evidence which could be arranged by him.

X Q. 16. Did you sell drugs over the counter?

A. Yes, sir.

X Q. 17. Did they used to bring in bottles to be refilled with the chocolate quinine preparation?

Mr. Bradford: Objected to as not cross-examination.

598 A. I could not be positive that they ever have, but I feel sure they have.

X Q. 18. Did the customers sometimes ask for chocolate quinine?

A. Well, I have had them ask for chocolate quinine. Coco-Quinine is generally asked for. Most everyone asks for Coco-Quinine.

X Q. 19. Did you sell it in small bottles?

A. Any amount they wanted from ten cents worth up.

X Q. 20. Did they bring these bottles in to be refilled?

A. I could not say.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 21. When a customer asked for chocolate quinine, whose preparation did you understand was asked for?

A. Well, I tell you. I don't know whether they ever asked for "chocolate." Some of them say Coco-Quinine, "that chocolate kind." Something like that from a person who is not familiar with it.

R. D. Q. 22. But whose preparation would you understand they wanted?

A. Well in a question like that, of course I always think they want Lilly's.

Redirect examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

R. X Q. 23. And if you had a chocolate quinine of some other make and none of Lilly's, you would give them the other make, would you?

A. Yes, sir.

Recross-examination closed.

Deposition closed. G. H. TURNER.

599 JOHN F. WHITLEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John F. Whitley; 41; residence, Winfield, Louisiana; retail pharmacist. I am the president of the Winfield Drug Co.

Q. 2. Do you handle a preparation at your store known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose preparation do you recognize this to be?

A. Eli Lilly & Co.

Q. 4. How long have you handled it?

A. Something like ten years.

Q. 5. Do you have a considerable demand for it?

A. Yes, sir. Very good.

Q. 6. Has this demand been continuous all the time?

A. Yes, sir.

Q. 7. How do you dispense it?

A. We dispense it on doctors' prescriptions and sell it over the counter. People who have learned what it is, ask for it.

Q. 8. Have you ever received a prescription written for Quin-Coco?

A. No, sir.

Q. 9. Have you ever had a customer call for Quin-Coco?

A. No, sir.

Q. 10. Have you ever been solicited to purchase Quin-Coco?

A. Yes, sir.

Q. 11. By whom?

600 A. I have been by the representative of, I think it was, the Pfeiffer Chemical Co. at that time. I have been buying goods from them ever since and they have changed and now bill the goods William R. Warner & Co. But it is the same salesman that sold it before.

Q. 12. What did the salesman say to you in reference to Quin-Coco, as near as you can remember?

A. Well, in going over the items we would be buying, he told us that he wanted us to let him make us prices on Quin-Coco; that we could save considerable money. He saw that we had a considerable trade on Coco-Quinine and he wanted to give us prices on Quin-Coco, where we would save money by using it.

Q. 13. What else did he say to you in reference to it?

A. Well, he said it was an identical preparation to Coco-Quinine; that we could sell it on the same prescriptions as we had been selling the Coco-Quinine.

Q. 14. Did you buy the Quin-Coco on these representations?

A. Yes, sir.

Q. 15. Did you dispense the Quin-Coco, and if so, how?

A. I dispensed it as we had been disposing Coco-Quinine; on prescriptions and calls.

Mr. Rawle: Objected to as res inter alios acta and not binding on the defendant.

Q. 16. What product was designated on the prescriptions which you filled with Quin-Coco?

Mr. Rawle: Same objection.

A. Coco-Quinine.
Q. 17. Did you dispense Quin-Coco when customers asked for Coco-Quinine over the counter?

Mr. Rawle: Same objection.

A. Yes, sir.
Q. 18. How did you label it?

Mr. Rawle: Same objection.

601 A. We had, as a rule, a printed label which was printed "Coco-Quinine," which we used.
Q. 19. Did you ever receive any complaints from physicians or customers in reference to he product Quin-Coco when you had dispensed it as Coco-Quinine?

Mr. Rawle: Same objection.

A. I had several bottles of it returned.
Q. 20. Was this by physicians or customers?

Mr. Rawle: Same objection.

A. By customers.
Q. 21. Why was it returned?

Mr. Rawle: Same objection.

A. They said that it had thickened so they could not get it out of the bottle.
Q. 22. Did you continue buying and using Quin-Coco?

Mr. Rawle: Same objection.

A. No, sir.
Q. 23. Why did you discontinue using Quin-Coco?

Mr. Rawle: Same objection.

A. After the customers complained, I did not buy any more.

Direct examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

X Q. 24. When were you solicited by the Pfeiffer Chemical Co. man to buy Quin-Coco?
A. It was about four years ago.
X Q. 25. Were you the purchasing man in your store at that time?

A. Yes, sir. But the store was run under the name of Whitley & Thomas, at that time.

X Q. 26. What was the name of the Pfeiffer salesman?

602 A. Wilkins.

X Q. 27. What time of the year was it he was there?

A. I think it was either December or January.

X Q. 28. Four years ago last December or January?

A. Yes, I think so.

X Q. 29. Did he see you personally?

A. Yes, sir.

X Q. 30. Had he dealt with you before?

A. Yes, sir; he had dealt with me at Dodson, Louisiana, where I had another store.

X Q. 31. Had he showed you Quin-Coco there?

A. I don't remember whether he did or not. It strikes me that he did, but I wouldn't say positive as I do not remember.

X Q. 32. Was this the first time he solicited trade from you personally at this establishment?

A. Yes, sir. But he had sold my partner.

X Q. 33. Did you buy any other items of his line at that time?

A. Yes, sir.

X Q. 34. Had you know him before that time?

A. Yes, sir.

X Q. 35. Could you describe him?

A. Yes, sir.

X Q. 36. Was he a pretty good salesman?

A. Pretty fair.

X Q. 37. When he offered you Quin-Coco that time about how long did the interview last?

A. Well, I suppose something like an hour or so.

X Q. 38. Did he go over a considerable number of items in his line?

A. Yes, sir.

X Q. 39. About how many items do you suppose?

A. About six or eight thousand. There are about 20 lines that he carries, all kinds of perfumes and different things.

X Q. 40. What did he say to you about buying his perfumes?

603 Mr. Bradford: Objected to as immaterial, irrelevant and not cross-examination.

A. Well, he said that he had a good line of Mellier's perfumes.

X Q. 41. Did he display any samples of them?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 42. Did you understand from this salesman that Quin-Coco is a competing preparation with Coco-Quinine?

A. Well, he said it was the same thing, two grains of quinine to the dra-hm, put up in chocolate.

X Q. 43. Now can you tell me the very words that he used in referring to its use on prescriptions?

A. Well, he said it was precisely the same thing and could be used just as we were using the Coco-Quinine.

X Q. 44. If a pharmacist dispenses one drug when another is called for in a prescription, is this considered an honest business among pharmacists?

A. No, if there is any difference in the preparations.

X Q. 45. Then if you, as a pharmacist, consider that one preparation is just the same as another medicinal, do you feel at liberty to substitute one for the other on a physician's prescription?

A. Yes, sir.

X Q. 46. Do you carry a good many items of preparations which are similar in medicinal effect but are made by different houses?

Mr. Bradford: Objected to as not cross-examination and abuse of the right of cross-examination and immaterial and irrelevant.

A. Yes, sir.

X Q. 47. Does this apply to the U. S. P. and N. F. lines?

604 Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 48. Does it apply to any specialties?

Mr. Bradford: Same objection.

A. No, sir.

X Q. 49. Sure?

Mr. Bradford: Same objection.

A. Well, not as a rule.

X Q. 50. Then I understand you to say that in your view, all these interchangeable preparations can be use indifferently, one for the other?

Mr. Bradford: Same objection.

A. No, I don't think they can all be used one for the other.

X Q. 51. Can they be used one for the other when they are similar?

Mr. Bradford: Same objection.

A. Not when they are similar but when they are identical.

X Q. 52. By identical you mean identical in medicinal effect?

Mr. Bradford: Same objection.

A. No, I mean in every way. No difference whatever.

X Q. 53. Then isn't that what the salesman told you was the case with Quin-Coco; that it was identical in every respect with Coco-Quinine, no difference whatever?

A. Yes.

X Q. 54. And isn't that really all he told you?

A. Yes, except that the said I would save money by using it and that we could dispense it the same way on calls for Coco-Quinine.

X Q. 55. Are you quite sure that he said you could dis-
605 pense it in the same way or that it was only your inference that you could?

A. He told me that I could use it and that they were using it all over his territory for Coco-Quinine.

X Q. 56. Then by that he meant that it was taking the place of Coco-Quinine in his territory?

A. It would appear to me that he was selling it and they were using it in place of Coco-Quinine.

X Q. 57. How large a place is Winfield, Louisiana?

A. Three or four thousand and it has two drug stores and four doctors.

X Q. 58. Do you personally attend to the business of selling over the counter?

A. Well, yes, sir. Fill prescriptions and sell over the counter.

X Q. 59. And do your customers buy chocolate quinine preparation in bottles and then bring the bottles back to be refilled?

A. I don't remember having them bring a bottle back to refill it.

X Q. 60. Do the customers ever call for chocolate quinine?

A. I may have had one or two calls, but very few.

X Q. 61. Did they ever ask you for sweet quinine or tasteless quinine?

A. Yes, sir. They then mean Febriline. If they get anything else they bring it back every time.

X Q. 62. Have you continued to do business with this Pfeiffer or Warner salesman up to date?

A. Yes, sir.

X Q. 63. How often does he call?

A. Three or four times a year.

X Q. 64. Is he a square salesman?

A. Yes, sir; a mighty good man.

Cross-examination closed.

Deposition closed.

JOHN F. WHITLEY.

606 C. J. THURMAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. C. J. Thurman; 43; Omaha, Nebraska; traveling salesman representing Nelson, Baker & Co., of Detroit, manufacturers of pharmaceuticals. I represent them in part of Nebraska, the larger part of Iowa and the Eastern half of South Dakota.

Q. 2. How long have you been employed by Nelson, Baker & Co.?

A. Two and a half years.

Q. 3. By whom were you employed prior to that time?

A. The Pfeiffer Chemical Co.

Q. 4. How long were you employed by the Pfeiffer Chemical Co.?

A. Ten years. Went with them in 1903 and finished the year of 1912.

Q. 5. Did you also represent Wm. R. Warner & Co.?

A. Yes, sir. We handled the Warner line. After Warner was bought by the Pfeiffer Chemical Co. I sold the Warner line.

Q. 6. While you were selling the Warner line or the line of the Pfeiffer Chemical Co. did you sell a product which was called Quin-Coco?

A. Yes, sir; I did.

Q. 7. Please explain the methods and arguments you employed in soliciting orders for Quin-Coco and where you obtained your authority for such methods and arguments?

Mr. Rawle: Objected to because the authorities should first be shown and because the general statements of methods by the
607 witness is not evidence nor is anything except a specific statement of facts.

A. Quin-Coco was sold under the Searle & Hereth label. The preparation of Quin-Coco was put on the market by the Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co., but was not pushed to any extent until after the purchase of the Searle & Hereth Co. We were instructed principally by Mr. Garwin who had charge of the pharmaceutical laboratory for the Pfeiffer Chemical Co. at that time. We were instructed by Mr. Garwin to recommend to the trade that the preparation of Quin-Coco was exactly the same as the preparation of Coco-Quinine put out by Eli Lilly & Co.; to tell the trade that Quin-Coco was identical with Coco-Quinine and our argument to get business on this preparation was to explain to the trade that our preparation of Quin-Coco was much cheaper and would answer every purpose of the Coco-Quinine and to explain to them how much money could be saved by buying Quin-Coco instead of Coco-Quinine. We were also instructed by office managers, circular letters to salesmen, etc., to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin. This Quin-Coco was one of the best selling specialties of the company.

Mr. Rawle objects to the answer so far as it refers to circular letters and the like not produced by the witness, also so far as it makes general statements as to instructions without giving the language used by the instructor and the names of the instructors.

Q. 8. Do you recall the names of any officers or men in authority from whom you obtained instruction or information relative to the sale of Quin-Coco as a substitute for Coco-Quinine, other than Mr. Garwin? If so, please state.

A. Yes, sir. There was Mr. Garfield Merner who was
608 manager of the St. Louis Co. Mr. H. Pfeiffer, who was President of the Pfeiffer Chemical Co. and has traveled with me on the road at numerous times. That is about all that I can

recollect I got direct instruction from. I would like to state that Mr. Garwin who had charge of the laboratory for the Pfeiffer Chemical Co. at St. Louis, always kept a bottle of Coco-Quinine in stock in his laboratory. In his instructions to the salesmen he would present a bottle of Coco-Quinine of Eli Lilly & Co. and also a bottle of Quin-Coco for our inspection, and would endeavor to show us where the Quin-Coco was exactly the same as Coco-Quinine. Mr. Garwin was very enthusiastic on this particular preparation of Quin-Coco.

Q. 9. You spoke of Mr. H. Pfeiffer traveling with you or being with you on some of your trips. Was he with you on some of the trips when you pushed the sale of Quin-Coco?

A. Yes, sir.

Q. 10. Did he participate with you in pushing this specialty?

A. The fact of the matter is that Mr. H. Pfeiffer knew very little about pharmaceuticals and he invariably left the selling of pharmaceuticals to me at the time he was with me but his instructions were always given to me privately. Mr. Pfeiffer never claimed to know anything about the pharmaceutical line but he did a great deal of the selling of the Pfeiffer Chemical Co. line while with me.

Q. 11. Do you know anything about the history of the preparation of Quin-Coco by the Pfeiffer Chemical Company? If so, will you please state what you know?

A. The preparation of Quin-Coco was perfected by Mr. Garwin who had charge of the laboratory since the organization of the Pfeiffer Chemical Co. This preparation was placed on the market by the Pfeiffer Company in 1905 but was not pushed to any extent until after the purchase of the Searle & Hereth Co. by the
609 Pfeiffer Chemical Co. as it was not perfected until after the time of the buying of the Searle & Hereth Co. The Searle & Hereth Co. was bought by the Pfeiffer people in 1906. Since that time they have pushed Quin-Coco as one of the leading specialties of the Searle & Hereth line.

Q. 12. Did your representations to the retail druggists include instructions to them as to how they could dispense it and if so, what did you tell them on that point?

Mr. Rawle objected to the question as inadmissible, as calling for vague generalities and not for facts and names.

A. We were instructed by the company to tell the trade that this preparation of Quin-Coco could be used and dispensed on calls for Coco-Quinine; and, that it could also be used on prescriptions for Coco-Quinine without the knowledge of the physician or the patient, as the preparation of Quin-Coco was exactly the same as Coco-Quinine.

Q. 13. Have you any evidence other than your memory as to the statement that Quin-Coco was prepared by the Pfeiffer Chemical Co. prior to its acquisition of the Searle & Hereth Company?

A. Yes, sir. I would like to present here a catalogue issued by the Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co. This catalogue lists Quin-Coco on page 106. This cata-

logue, I think, was issued in 1905. At any rate, it was issued before the purchase of the Searle & Hereth Co. of which I am very sure.

Mr. Rawle objects to all the testimony of the witness relating to any fact occurring before July 1908 because it appears that before that date the defendant had no connection with Pfeiffer Chemical Co. or Searle & Hereth Co.

The catalogue referred to in the witness' last answer is of-
610 fered in evidence and marked "Complainant's Exhibit Thurman Pfeiffer Chemical Co. Catalogue."

Mr. Rawle objects to the offer for the same reason.

Q. 14. There has been offered in evidence a Searle & Hereth Co. Catalogue of 1906 marked "Complainant's Exhibit Searle & Hereth 1906 Catalogue." I show you this exhibit and ask you if you are familiar with the same.

A. Yes, sir. I have a copy of the same before me of the same edition, my salesmen's catalogue.

Q. 15. What do you know in reference to that catalogue?

A. This catalogue was issued by the Searle & Hereth Co. before selling out to the Pfeiffer Chemical Co. in 1906,—the last catalogue issued by the Searle & Hereth Co.

Q. 16. Have you a copy of the first Searle & Hereth catalogue issued after this company was acquired by the Pfeiffer Chemical Company?

Mr. Rawle objects for the same reason.

A. I have here the first Searle & Hereth Co. catalogue issued by the Pfeiffer Chemical Co. under date of 1908 and 9. This is the first Searle & Hereth catalogue issued by the Pfeiffer Chemical Co. after the purchase of the Searle & Hereth Co. This catalogue lists Quin-Coco, page 167, listed under the specialties of the Searle & Hereth Co.

The catalogue in question is offered in evidence and marked "Complainant's Exhibit Pfeiffer-Searle & Hereth Catalogue 1908-1909.

Mr. Rawle: Same objection.

Q. 17. I show you a document marked "Complainant's Exhibit R. J. Grove's copy of Document No. 3" and ask you if you ever saw a document like this before and if you can explain to us what it is?

A. I am familiar with this list which was known to us as a
611 "replacer" list. I have had in my possession an exact copy of this list. I have here in my possession a revised "replacer" list which is virtually the same as the list presented me here, containing a few more preparations.

The revised "replacer" list referred to is produced and offered in evidence and marked "Plaintiff's Exhibit Thurman Copy of Document No. 3."

Mr. Rawle objects to the offer unless it is shown as having been used by the witness after July, 1908.

Q. 18. For what purpose were these lists used by the Pfeiffer-Warner salesmen?

Mr. Rawle: Objected to for the same reasons and for the further reason that the witness can only speak as to his own use.

A. These lists were furnished to us by the Pfeiffer Chemical Co. and known to us salesmen as a "replacer" list showing preparations put out by the different companies and also showing replacer preparations, to replace such different preparations, put out by the Pfeiffer Chemical Co.; showing prices of the original preparations and corresponding prices of the replacer preparations put out by the Pfeiffer Chemical Co.

Q. 19. Do you recall when the line known as the Warner line was added to your sales list?

A. No, I could not give the exact date. Really I could not. I really don't remember. I have no way of knowing the time the Warner Company was purchased by the Pfeiffer Chemical Co.

Mr. Rawle states that the connections between the Pfeiffer Chemical Co. and the defendant took place about July, 1908.

Q. 20. Were the sales of Quin-Coco by you continued up
612 to the time of the severance of your connection with these companies?

A. Yes, sir.

Q. 21. And by the same methods which you have previously testified you used?

A. Yes, sir; the same methods.

Direct-examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

X Q. 22. About how many items did you have on all your lines after the Warner Co. came in?

A. Well, I would not be prepared to say.

X Q. 23. Were there on the Warner, Pfeiffer and Searle & Hereth lines as many as three thousand items which you were selling?

A. Yes, I would think so.

X Q. 24. Were there as many as 5,000 items?

A. That I would not be prepared to say. I never took any particular pains to look up how many items there were in the line. There were plenty anyhow.

X Q. 25. What was the earliest date which you had in your possession as a salesman a copy of "Complainant's Exhibit R. J. Groves' Copy of Document No. 3?"

A. Well, I would not be prepared to say when I got that copy.

X Q. 26. Did you have it within a year after you first entered the employ of the Pfeiffer Chemical Co., which was in 1903?

A. I think the first copy I received of the replacer list was in 1903.

I never made any memorandum of dates of the time of receiving these copies.

X Q. 27. Did you continue to use such a list as long as you were with the concern or did something take its place?

A. Well, these lists were replaced by new lists from time to
613 time as new preparations were being added to the list. We at different times received quite a few copies of these lists.

X Q. 28. When you left these people in 1912, were you using one of these lists as a part of your equipment as a salesman?

A. Yes, sir. I was using this for my personal reference up to the time of my leaving the company. However, these lists were discontinued before my leaving the company.

X Q. 29. How long before?

A. I don't know.

X Q. 30. A year.

A. I would not be prepared to say. But I used these lists as long as I was employed by the Pfeiffer Chemical Co. They were never called in by the company.

X Q. 31. Looking at this document No. 3, I understand that the right-hand column covers entirely the lines which you were selling. Is that correct?

A. Yes, sir.

X Q. 32. And the left-hand column contains the items sold by other houses with which you were in competition. Is that correct?

A. Yes, sir. Except I notice in one or two items as to which there was no competing house, these seem to have been placed in the left-hand column with a blank in the right-hand column.

X Q. 33. Were there not many thousand items on your lists as to which there were competitive and similar items on the lists of other houses?

Mr. Bradford: This and the last two preceding questions objected to as not cross-examination and as immaterial and irrelevant.

A. No, I don't think so. Not many thousand.

X Q. 34. Were there as many as one thousand?

Mr. Bradford: Same objection.

A. No, sir; I don't think so.

614 X Q. 35. Were there five hundred?

Mr. Bradford: Same objection.

A. I don't think there were that many.

X Q. 36. I see that the document No. 3 contains about 150 items. Is this all the items which you were selling as to which competitive houses were selling similar items having the same medicinal effect?

Mr. Bradford: Same objection.

A. Practically so. Yes.

X Q. 37. Do you mean to say that except for the items on the Document No. 3 you were offering for sale many thousands of items as to which there was no competition?

Mr. Bradford: Same objection.

A. No, sir; there was competition, practically on the entire line as far as that is concerned.

X Q. 38. Then why did you just say that there were not 500 items in all your lines taken together as to which you had competition?

Mr. Bradford: Same objection.

A. I thought you had reference to these "replacer" preparations and substitutes, as listed on this replacer list.

X Q. 39. I now ask you whether it is not true that, taking all the items you are offering for sale, all or nearly all of them were in competition with items having the same medicinal effect when put on the market by other houses.

Mr. Bradford: Same objection.

A. Well, yes, all houses make practically the same line excepting what is termed "specialties" made by the different houses.

X Q. 40. Then except as to your specialties you were in competition with similar items along the whole line?

Mr. Bradford: Same objection.

615 A. Yes, sir.

X Q. 41. If in soliciting a druggist's business, the druggist had said to you that he had been using "Mecauro," Charles Rome Parmalee Co., and asked what item you had of similar medicinal effect, what would you have told him. Answer without looking at the blue list.

Mr. Bradford: Same objection.

A. I would call his attention to this particular preparation listed in the replacer list to take the place of the preparation named by him as being an exact reproduction of, or substitute for, the preparation named by the druggist.

X Q. 42. I am asking you to say now from memory and without looking at the document No. 3 what you would have offered such a druggist in response to his question.

Mr. Bradford: Same objection.

A. The fact of the matter is that I have paid no attention at all to this list in question since my leaving the Pfeiffer Chemical Co. and most of those preparations that I am not particularly familiar with have passed out of my mind.

X Q. 43. Do you mean to say that when you were in the employ of these people, you could have answered such a question offhand, without looking at the document No. 3?

Mr. Bradford: Same objection.

A. In most cases I could. Of course where I was unable to remember the preparations as substitutes of different preparations

named, I simply referred to the list, document No. 3, as that was what we were carrying the list for; as a salesman's reference.

X Q. 44. Then Document No. 3 was, as to the items covered by it, a sort of ready reference index to the complete catalogue of
616 your company, being such a one as is now marked "Complainant's Exhibit Searle & Hereth, 1906 Catalogue"?

Mr. Bradford: Same objection.

A. These lists were furnished to us as an addition to the catalogue which would enable us to quote prices on substitute preparations as listed in this replacer list.

X Q. 45. If a druggist had asked you to name a Searle & Hereth preparation which was similar in medicinal effect to Mercauro, Charles Rome Parmalee Company, please look at the Searle & Hereth 1906 catalogue and state what you would have named to him?

Mr. Bradford: Same objection.

A. Well, I would not have referred to the catalogue at all, because these substitutions for different preparations were not listed in the catalogue but were listed in the list known as the "replacer list" in question.

X Q. 46. But you have testified that as to practically all your line you were in competition with drugs of similar medicinal effect sold by one or more other houses. Is that not true?

Mr. Bradford: Same objection.

A. I was referring to what is termed legitimate competition and staple pharmaceutical preparations.

X Q. 47. Was Mercauro, Charles Rome Parmalee Co., a staple pharmaceutical preparation?

Mr. Bradford: Same objection.

A. This preparation was considered a staple specialty for which the Pfeiffer Chemical Co. offered a substitute as named in this list.

X Q. 48. Turn to the Pfeiffer Chemical Co. 1906 Catalogue and show where the Searle & Hereth competitive article for Mercauro, Parmalee, is found.

Mr. Bradford: Same objection.

617 A. I can't recall the name of the substitute offered for this article. It would be necessary for me to know the name of this substitute in order to find it in the catalogue. I have not paid any attention to this since my leaving the company.

X Q. 49. Could you have remembered the name of the Searle & Hereth article, when you were with the company?

Mr. Bradford: Same objection.

A. Yes, I probably could.

X Q. 50. You have just used the word "substitute." Do you use

that in the same sense in which you have just been using the word "replacer?"

A. Yes, sir.

X Q. 51. And I take it that you mean by both of those words an article which you were selling which was in competition with a similar article of another house? Is that correct?

A. No, not exactly.

X Q. 52. Then in what sense have you used those two words?

A. As a substitute and replacer for original preparations made by the different companies.

X Q. 53. Don't you mean by "substitute" and "replacer," articles which you were offering and which were in competition with similar articles of other houses?

A. Yes, I guess that's right.

X Q. 54. I take it then that if a druggist had stated to you that he had been dispensing a given preparation and asked if you had any preparation in your line of similar medicinal effect, you would look at your blue list "Document No. 3" to ascertain the name of your article. Is that correct?

A. That is correct.

X Q. 55. And if the name of your article that answered to his question was not on the blue list Document No. 3, you would
618 then consult the catalogue or catalogues of your various houses.

A. No, sir. Because all that were termed by us replacers or substitutes were printed on this list in question.

X Q. 56. You do not understand. I am asking you whether if a druggist said to you that he had been using a certain drug of a certain house other than yours, and asked if you could sell him anything that he could use in its place of similar medicinal effect and you could not answer the question from the blue print list Document No. 3, where would you get the information to answer him?

A. I would perhaps look in the catalogue for a similar preparation to the one inquired for by the druggist.

X Q. 57. Then the blue list Document No. 3 was a partial list of items of which with many others, many thousands of others, were found in the various trade catalogues of your houses? I refer only to the items on the blue list which were put out by your various houses.

A. The many items that were referred to listed in the different catalogues are what is termed staple pharmaceuticals which are listed by legitimate competition. The blue list as referred to as Document No. 6 contains the leading sellers and original specialties put out by the different houses and for which substitute preparations are offered by the Pfeiffer Chemical Co.

X Q. 58. Are all the items on the blue list marked with the name of your house found in the catalogues of that house?

A. Yes.

X Q. 59. If you offered a druggist a regular pharmaceutical found in your catalogue but not found on your blue list No. 3 to be used by

him in place of a like article which he had been using and
619 had bought from another house, would he not be replacing the article of the other house with your article?

A. Unless this preparation happened to be a standard preparation. Because if this preparation happened to be a standard or U. S. P. it would have been made by all pharmaceutical houses and would not be termed a "replacer."

X Q. 60. In such case would it not be in fact a "replacer" if he gave up his use of the article of the other house and took and sold yours?

Mr. Bradford: Objected to as merely calling for the opinion of the witness and entirely immaterial and irrelevant.

A. Not if this preparation was standard and made by a legitimate pharmaceutical house.

X Q. 61. In ordinary English language, if I use one article and give it up and use another, I would say that the latter was substituted for or was a replacer for the former. Is that not true?

Mr. Bradford: Same objection.

A. No, not exactly. I think my answer covers that.

X Q. 62. Referring to the blue list "Groves' Document No. 3" do you know whether all the articles marked with the name of your house on that list were put on the market by your company subsequently to their being put on the market as to the corresponding item by other houses?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.

X Q. 63. I will ask you to run your eye down the blue list "Grooves' Document No. 3" and see if you have any other answer to make to the question.

Mr. Bradford: Same objection.

A. Well, with this one possible exception as spoken of be-
620 fore, this preparation of Quin-Coco, Laxative. This list Groves' Document No. 3 was evidently issued by the Pfeiffer Co. before the purchase of the Wm. R. Warner Co. and contains several of the Wm. R. Warner Co. preparations in the left-hand column of this list and also substitute preparations which are listed in the right-hand column to substitute and replace these Warner preparations.

X Q. 64. Question repeated.

A. Well, I have no different answer to make. That covers it.

X Q. 65. Then you now state, referring to the blue list "Groves' Document No. 3" that every item on that list put out by your house was put out later than the corresponding item put out by the other house? Is that correct?

Mr. Bradford: Same objection.

A. With possibly a very few exceptions.

X Q. 66. Please indicate the exceptions.

Mr. Bradford: Same objection and also as incompetent, the witness not having qualified as to knowledge of time when all these preparations were put on the market.

A. Well, I am not in position to state the exceptions.

X Q. 67. Do you mean that you cannot now state them?

A. Yes, sir.

X Q. 68. If one of your druggists had been using a given standard preparation and he then bought a similar standard preparation of your house and used it, would he not be using that as a substitute or replacer?

A. No, sir.

X Q. 69. If after buying your standard preparation a prescription came in specifying the standard preparation of the other house and without informing the physician he used yours in place of the one in the prescription, what would you call that?

621 A. If the preparation in question was U. S. P. or standard as you put it, in the question, he would not be using a substitute.

X Q. 70. Assuming that your druggist had a prescription specifying a standard drug, Parke-Davis, and he filled it by using a like standard drug of Searle & Hereth. What would you call that, if he did not tell the physician?

A. If the Searle & Hereth preparation you speak of was standard, U. S. P., he would not be using a substitute preparation.

X Q. 71. Then in selling for your present house Standard U. S. P. preparations do you think it no harm to urge upon your druggist who has been using such standard preparation of another house, that he can give that up and use the preparation of your house on a prescription specifying specifically the standard drug of the other house?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Unless the preparation, or prescription rather, specified some particular make by the Doctor, he would not be substituting in using standard preparations made by my company. If the Doctor's prescription specified any particular make of this standard preparation, and he used any other make, he would in a way be substituting.

X Q. 72. Then you would not think it the part of an honest salesman to suggest to the druggist in such a case he should buy from and substitute on prescriptions specifying the make of another house, would you?

A. I would not advise any druggist where the prescription written by the Doctor specified any particular make of a pharmaceutical preparation, to use a preparation of any other make.

X Q. 73. Why wouldn't you advise it?

A. Well, because the druggist should respect his Doctor to
622 the extent of furnishing the particular preparations as specified in the prescription.

X Q. 74. And the doctors and the best druggists do not consider it honest not to follow the Doctor's prescription in such a case?

A. That is correct.

X Q. 75. And you don't consider it honest business, do you?

A. No.

X Q. 76. And you don't do it, do you?

A. Not when I clerked in a drug store, I certainly did not follow any such practice.

X Q. 77. And you do not consider it honest as a salesman, do you, to advise or suggest such practice?

A. A salesman is compelled to follow the instructions of the house he represents.

X Q. 78. Even if they instruct him to do a dishonest thing?

A. If he remains in the employ of the house, he is compelled to follow the instruction of the house as he is expected to show a certain amount of sales on these particular items as termed specialties, substitutes and replacers, which show a greater profit than what is termed staple pharmaceuticals.

X Q. 79. Then from 1903 to 1912 you systematically played the part of a dishonest salesman, did you?

A. I do not know whether you would term it that way, or not.

X Q. 80. How do you term it, in view of just what has been said?

A. It is simply following the instructions of the house. If the salesman was dishonest, the house was certainly more dishonest in instructing the sales man to do this.

X Q. 81. When did Garwin give you instructions? Was it when you started in 1903?

A. Well, it was a little later that they began putting out this list, probably 1905.

623 X Q. 82. And was that the time Merner talked with you?

A. Yes, and later than that.

X Q. 83. How much later?

A. Well, up to the time that I left the employ of the company, December, 1912.

X Q. 84. What did he say to you?

A. Well, his instructions to us were about the same as Mr. Garwin's: that these preparations were exact substitutes for the original preparations named by the other companies. He also instructed us that Quin-Coco could be used on Doctor's prescriptions where Coco-Quinine was specified and for us to show the druggist how much he could save by buying this substitute and replacer preparation from our company and that there was no use of a druggist paying the price for these original preparations when he could buy something that would answer all purposes and save him quite a little money.

X Q. 85. Anything else?

A. No.

X Q. 86. What did Mr. H. Pfeiffer say to you?

A. Well, his instructions were practically the same as were given

by Mr. Garwin and Mr. Merner, although Mr. H. Pfeiffer has been on the territory with me a great many times and possibly has said more than Mr. Merner in regard to pushing these different preparations, substitutes and replacers.

X Q. 87. Do you mean that Mr. H. Pfeiffer said more things to you about it or spoke to you more frequently?

A. Spoke to me about it more frequently.

X Q. 88. Did Mr. Garwin instruct you on these points after July, 1908?

A. Yes, sir.

X Q. 89. Did you have as salesman for Warner & Co. a book which has been sometimes called "Salesmen Confidential"?

624 Mr. Bradford: Objected to as not cross-examination, immaterial and irrelevant.

A. Yes, sir. I had this list after it was issued and used it until I returned it to the company when I left them. We were charged $5.00 for this list and when I left them I returned it to the company and got the $5.00 for it.

X Q. 90. Who wrote the circular letters of instructions which you spoke about?

A. Well, they were written by different people at different times, both from the St. Louis office and Philadelphia office of the Wm. R. Warner & Co.

X Q. 91. Up to how late a date did Mr. H. Pfeiffer travel with you?

A. Well, I would not be prepared to say exactly but he hadn't been with me for possibly five years before I left the company, December 31, 1912.

X Q. 92. Did you resign?

A. No, sir; I did not.

X Q. 93. Was there any trouble between you?

A. No; not any particular trouble excepting that I had asked for a raise in salary for several years and they virtually promised to give it to me each year and when I put it to them in the way that I was going to quit, if I didn't get a raise in salary, I was discharged December 13, 1912, because they did not see fit to raise my salary. The discharge was to take effect December 31, 1912, the letter was dictated on December 13th, 1912, by Mr. Garfield Merner.

X Q. 94. When did you make your first sale of Quin-Coco, Searle & Hereth?

A. I don't remember.

X Q. 95. When you were selling in the early days, did you run across Lilly salesman?

Mr. Bradford: Objected to as immaterial and irrelevant and not cross-examination.

A. Yes, sir.

625 X Q. 96. Did they know you were offering Quin-Coco?

Mr. Bradford: Same objection.

A. Yes, sir; offering it for sale, I suppose you mean?

X Q. 97. I understand you have come from Omaha, Nebraska, here for the sole purpose of testifying in this case. Is that true?

A. Yes, sir.

X Q. 98. Who pays your expenses?

A. They will be paid by the Lilly people, I suppose.

X Q. 99. Is it so understood between you?

A. It has never been understood between me and the Lilly people, no; but I naturally supposed they would. They never told me they would.

X Q. 100. And you are spending two days in Indianapolis?

A. Yes, sir.

X Q. 101. And are being entertained here by the Lilly Company?

A. Yes, sir.

X Q. 102. And stopping at the Claypool Hotel?

A. Yes, sir.

X Q. 103. Please turn to the Searle-Hereth 1906 Catalogue and take out from it a standard U. S. P. drug or preparation that has been in quite common use among druggists. Select one that was sold by several houses.

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Take for instance, Syrup of Sarsaparilla Compound U. S. P., on page 72.

X Q. 104. Is the same U. S. P. preparation sold by other houses?

Mr. Bradford: Same objection.

A. Supposed to be, yes, the standard is supposed to be exactly the same.

626 X Q. 105. Would you consider it honest to suggest to a druggist customer to buy that preparation made by your house and use it on prescriptions expressly specifying that preparation made by another house?

Mr. Bradford: Objected to as witness has already answered this question and for the further reason that it is absolutely immaterial and irrelevant to any issue in this cause.

A. I would not.

X Q. 106. What territory did you cover after you got the Warner list?

A. All of Nebraska and the Black Hills in South Dakota. As long as I was with Pfeiffer or Warner.

X Q. 107. When did you last see G. A. Pfeiffer?

A. I saw Mr. G. A. Pfeiffer since I left the company. I don't remember just when it was. I think it was about two years ago in Omaha.

X Q. 108. I mean when did you last see Mr. G. A. Pfeiffer before you left the employ of his companies?

A. I had not seen Mr. G. A. Pfeiffer after the purchase of the Wm. R. Warner Co. until I left the company.

X Q. 109. Had you seen Mr. H. Pfeiffer after the purchase of the Warner Co. and before you left their employ?

A. Yes, sir.

X Q. 110. How often?

A. Well, I would not be prepared to say exactly. Two or three times. At least that many times after the purchase of the Warner Co.

X Q. 111. Does the blue print list "Groves' Document No. 3" contain substantially the drugs and preparations which you most frequently sold out of your entire line?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Well, it is the line that we pushed the hardest and I suppose most frequently sold.

(27 X Q. 112. If a druggist had asked you whether you had anything to take the place of Saratoga Ointment, Harvey, could you have told him at once what you had in your line?

Mr. Bradford: Same objection.

A. I would refer to the list in question to find the substitute preparation.

X Q. 113. Is the same thing true of Succus Alterans, Lilly?

Mr. Bradford: Same objection.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 114. Did you come here willingly or reluctantly?

A. I came here really reluctantly. I would like very much to have gotten out of it. It is not pleasing to me at all personally to come to be mixed up in this affair. It was only after Eli Lilly & Co. wrote to my house and sent me a copy of the letter from my house consenting that I should come, that I finally consented to come.

Deposition closed.

C. J. THURMAN.

(Cut.)

Hotel Cerro Gordo,

Operated by

The Foster Hotel Company,

Sam S. Foster,

Manager.

Mason City, Iowa, 7/18, 1915.

Mr. E. W. Bradford,
Indianapolis, Ind.

DEAR SIR:

I received the deposition yesterday and have read it over
628 carefully and — to change my answer to X Q. 85 to read:

Mr. Merner has said other things to me along the same lines as my answer to the preceding X Q. 84.

Yours very truly,

C. J. THURMAN.

Original letter received from C. J. Thurman, July 21, 1915.

[SEAL.] A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

NOTE.—At the close of the deposition of witness C. J. Thurman, the same having been taken by the Notary in shorthand, and not having been transcribed, it was agreed that the deposition might be transcribed by the Notary and forwarded to the witness for his signature at the Hotel Cerro Gordo, at Mason City, Iowa, where he stated he would be on Saturday, the 17th inst.

The deposition was accordingly written out by me, and forwarded to the witness, and was received back from the witness on July 21, 1915, with a letter in which the witness stated that he desired to change his answer X Q. 85 to read: "Mr. Merner has said other things to me along the same lines as my answer to the preceding X Q. 84."

The original letter from the witness is attached hereto.

[SEAL.] A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

Dr. CHARLES A. NOIRET, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

629 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.

A. Charles A. Noiret; 39; New Orleans, traveling salesman for H. K. Mulford Co., Philadelphia; traveling South Mississippi, South Alabama, Southwest Florida. H. K. Mulford & Co. are manufacturers of pharmaceuticals and biologicals and I act as salesman for them for these products in this territory.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose preparation do you recognize this to be?

A. The Lilly Co.

Q. 4. How long have you known of this preparation in the trade?

A. I have been knowing of the Coco-Quinine for nine years.

Q. 5. Do you know of a preparation called Quin-Coco?

A. Yes, sir.

Q. 6. Whose preparation is this?

A. This is supposed to be put out by Searle-Hereth Co. formerly of Chicago but now owned by the Pfeiffer Chemical Co. of St. Louis.

Q. 7. Please state anything you know of these two preparations or in what way they have been called to your attention and by whom?

A. My attention was first called to the Quin-Coco by Mr. Howard Smith who represented the Pfeiffer Chemical Co. and W. R. Warner & Co. Mr. Howard Smith stated to me that Quin-Coco was the same identical thing as Coco-Quinine, as the chemist that formerly made Coco-Quinine for Lilly was now making for Pfeiffer Chemical Co.; and in my presence, to the retail drug trade he advised them to buy it, in preference to the original of Lilly & Co. as it was
630 cheaper and would answer the same purposes as the doctors could not detect the difference. Mr. Jones representing the Pfeiffer Warner Co.'s in Alabama told me the same thing.

Mr. Rawle objects to the answer because the alleged statements of Howard Smith and Jones to the witness were not in the ordinary course of business and, therefore, not binding in any way upon defendants, and because the witness does not state what was said to him but simply gives the general impression, because the witness does not state when any such transaction or conversation occurred.

Q. 8. Please state any specific instance naming the time and place, if you remember, when Mr. Jones made such a statement to you as you have given in your last answer?

Mr. Rawle: Same objection.

A. Mr. Jones stated the same to me at Meridian, Miss., in McCorkle's drug store in the presence of Mr. McCorkle about two years ago. I used to meet him on the road every week or so. We traveled the same territory. I have heard him make the same statement frequently in different drug stores at different times.

Mr. Rawles: Same objection.

Q. 9. Can you name any other drug stores?

Mr. Rawle: Same objection.

A. Yes, I can name others. I remember Johnson's drug store at Laurel, Miss., and Williams' pharmacy at Hattiesburg, Miss.

Q. 10. Can you name any specific time or place when Mr. Howard Smith made any such statements to druggists in your presence?

A. Why, I could not exactly give the dates as we were traveling all the time and we had to make the territory every 30 days and we met regularly every 30 days, making the same route. Williams' Pharmacy, Hattiesburg, Miss.; Johnson's Pharmacy, Laurel,
631 Miss.; McCorkle's Pharmacy, Meridian, Miss. Mr. Smith traveled the same territory that Mr. Jones did.

Q. 11. What have you heard Mr. Howard Smith tell the pharmacist as to how he could dispense Quin-Coco?

A. I have heard Mr. Howard Smith mention to the druggist that when he received a prescription for Coco-Quinine, that he could dispense Quin-Coco in its place and it could not be detected.

Q. 12. What have you heard Mr. Jones say to any druggist as to how he could dispense Quin-Coco?

A. Mr. Jones mentioned to the druggist that when he received a prescription for Coco-Quinine, he could use Quin-Coco and it could not be detected and it was cheaper to use Quin-Coco than it was to use Coco-Quinine.

Q. 13. These statements were made by both Mr. Smith and Mr. Jones to the druggists at the stores above mentioned?

A. Yes, sir. In my presence and also the presence of the druggist.

Direct-examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

X Q. 14. Were these statements made to you or the druggist?

A. They were made to the druggist in my presence.

X Q. 15. Who were you traveling for?

A. The H. K. Mulford Co. of Philadelphia.

X Q. 16. Mention the druggists in the various towns you have named.

A. Mr. McCorkle, McCorkle Drug Store at Meridian, Miss.; Mr. Johnson, of Johnson's Drug Store at Laurel, Miss., Mr. Williams, of Williams' Pharmacy at Hattiesburg, Miss.; also known as the Owls' Pharmacy.

X Q. 17. I assume that Howard Smith and Jones stated
632 in effect according to your recollection that the two products were so much alike that you could not detect the difference between them and that Quin-Coco was cheaper?

A. Yes, sir.

X Q. 18. Did you come here from New Orleans only for the purpose of testifying in this case?

A. Yes, sir. They asked me to come here and state what I knew about it and I told them I would gladly do it.

X Q. 19. Why do you say "gladly"?
A. Because I am friendly with all pharmaceutical houses?
X Q. 20. Did you get the consent of your employers?
A. No, sir.
X Q. 21. Did you come at Lilly & Co.'s expense?
A. Yes, sir.
X Q. 22. Had you been asked to testify in this case back in March or April in New Orleans?
A. No, sir.
X Q. 23. Were you there at the time?
A. No, sir; I was out on the road.
X Q. 24. How far from New Orleans?
A. Why, in March I must have been about 170 or 180 miles from New Orleans.

Mr. Bradford: At the time of taking depositions in the South, counsel for complainant had no knowledge of this witness or any information possessed by him on this subject. It was only within the last few days that such knowledge was obtained.

X Q. 25. How much of your time will it have taken before you attend to the business and get home?
A. It will take me just three days. I will lose three days.
X Q. 26. You have spent one day or two in Indianapolis?
A. One day and a night.

Cross-examination closed.

Deposition closed.

CHARLES A. NOIRET.

633 *Notice.*

Counsel for complainant notifies counsel for defendant that he will ask the Court for leave to amend the bill of complaint in order to conform with the facts as developed by the testimony, as follows:

That the manufacture of the product Quin-Coco and the adoption of the name "Quin-Coco" for such product was by the Pfeiffer Chemical Co. prior to its acquisition of the Searle & Hereth Co. and that the acts of the Searle & Hereth Co. complained of in relation to this product Quin-Coco were after it had been acquired by the said Pfeiffer Chemical Co. and that the product has been and is being manufactured by the Wm. R. Warner & Company, as well as being sold by it. Counsel for complainant will submit to counsel for defendant a formal amendment to said bill, to make it to conform to these facts, in due time. This notice is made of record in order that counsel for defendant may be fully advised of the proposed amendments prior to the beginning of the taking of his proofs.

Mr. Rawle makes no objection to such amendments.

Counsel for complainant notifies counsel for defendant that complainant now closes its prima facie proofs.

634 *Certificate.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

STATE OF INDIANA,
County of Marion, ss:

I, A. C. Rice, a Notary Public in and for the County of Marion, and State of Indiana, do hereby certify: That, pursuant to notice and agreement of counsel, I was attended at the office of Bradford & Doolittle, 1451-1455 Lemcke Annex, in the City of Indianapolis, and State of Indiana, by E. W. Bradford, Esq., on behalf of complainant and Francis Rawle, Esq., counsel for defendant, on the days and dates hereinbefore stated; that the aforenamed witnesses, A. J. Garner, C. H. Turner, John F. Whitley, C. J. Thurman and Dr. C. A. Noiret, who were of sound mind and lawful age, were by me duly sworn to testify the truth the whole truth and nothing but the truth, in the above entitled cause and that they thereupon testified as is above shown; that the depositions by the witnesses subscribed as above set forth were reduced to writing by myself and under my direction in the presence of the witnesses themselves and from their statements, and were read over by the said witnesses and subscribed by them, and that all was so done at the place above specified and at
635 the times set forth, and that said depositions were written and signed in the presence of myself and counsel for complainant, with the exception of the depositions of C. J. Thurman and Dr. C. A. Noiret, which by consent of counsel were sent to the respective witnesses for signature and were signed by them and in the case of both of these last two mentioned depositions, I first read my shorthand notes to the witnesses before they left, and they stated that such notes were correct.

I further certify that each of the above witnesses resides at a place more than one hundred miles from the place of the trial of this cause.

I further certify that the exhibits as cited, were offered in evidence and marked as specifically noted in the foregoing deposition of C. J. Thurman and that pursuant to a stipulation by counsel for the respective parties, I have delivered said exhibits to counsel for complainant to be retained and produced in accordance with the stipulation in that behalf contained.

I further certify that I am neither attorney nor counsel for any of the parties in said deposition or caption named, and am in no wise interested in the result of said cause.

Witness my hand and official seal at Indianapolis, in the State of Indiana, this 28th day of July, 1915.

[SEAL.]

A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

636 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Now comes The Eli Lilly and Company, complainant herein by its counsel, and moves this Honorable Court for leave to amend its bill of complaint and that the amendment be entered as follows:

Cancel Paragraph 9 and substitute the following in lieu thereof:

9. That during or about the summer of 1906 the said Searle & Hereth Co. was purchased by the said Pfeiffer Chemical Co. of St. Louis, Mo., or by the same parties owning the said Pfeiffer Chemical Co., and that the business of said Searle & Hereth Co. was taken over by the said Pfeiffer Chemical Co. and consolidated with or otherwise associated with the business of the said Pfeiffer Chemical Co., the manufacturing being transferred from the former laboratories of the said Searle & Hereth Co. of Chicago to the lab-
637 oratories of the said Pfeiffer Chemical Co. at 500 North Commercial Street, in the City of St. Louis, State of Missouri; that the said Pfeiffer Chemical Co. previously to this acquisition of the said Searle & Hereth Co., had carried on experiments in an effort to duplicate or imitate the said product of complainant known as Coco-Quinine and had selected "Quin-Coco" as a name for their imitation product for Coco-Quinine; that the said experiments were not at first successful but that after the acquisition of the said Searle & Hereth Co. said experiments were continued and in the Fall of 1907 they succeeded in producing a product substantially the same as Coco-Quinine in color, taste and constituent elements, although inferior in stability and in other particular details but, nevertheless, sufficiently close to an exact duplication as to be capable of being sold and used for applicant's product Coco-Quinine, without detection in many instances; that this product so produced in the laboratories of

the Pfeiffer Chemical Co. was given the name "Quin-Coco" and was put out and offered to the trade under the label of the Searle & Hereth Co., said Searle & Hereth Co., although having a separate corporate existence, being to all intents and purposes a part of the said Pfeiffer Chemical Co. and operated and controlled by the same officers and owners as said Pfeiffer Chemical Co.; that thereafter, to-wit, during the summer of 1908, as your orator has been informed, the said Pfeiffer Chemical Co. purchased and acquired ownership of the Wm. R. Warner & Co., the defendant herein, continuing the business of the said Wm. R. Warner & Co. in its original laboratories and under its original name in the City of Philadelphia and State of Pennsylvania; that the officers of the Pfeiffer Chemical Co. became the officers of the Wm. R. Warner & Co. and assumed control and management of its affairs, which control and management has remained in their hands up to the present time; that after acquiring control of the Wm. R. Warner & Co. the officers who were the same
638 officers as were in control of the Pfeiffer Chemical Co. and the Searle & Hereth Co. undertook the manufacture of a product in the laboratories of the Wm. R. Warner & Co. at Philadelphia, to be put out as a substitute for complainant's product, known as Coco-Quinine, that these efforts were not at first successful but that finally, after securing the formula from the associated St. Louis laboratories they succeeded at said Philadelphia laboratories in producing the product which here was also called "Quin-Coco" and was put out and offered to the trade under said name and under the label of the Searle & Hereth Co.; that renewed efforts were then made by defendant and by the Pfeiffer Chemical Company to push said product labeled Quin-Coco and bearing the label of the Searle & Hereth Company in the drug trade and medical profession as a substitute for your orator's product known as Coco-Quinine; that your orator is informed, and alleges the fact to be, that the said corporation the Searle & Hereth Company is no longer an active manufacturing concern but that its corporate existence is being kept alive although its business is practically merged into and combined with the business of the Pfeiffer Chemical Company of St. Louis, Missouri; that while the said product called "Quin-Coco" is put out under the Searle & Hereth label, that it is, as before alleged, actually manufactured in the laboratories of the said Pfeiffer Chemical Company in St. Louis, and the defendant's laboratories in Philadelphia, the Searle & Hereth label being used by the parties in control of said concern for purposes best known to them; that said Pfeiffer Chemical Company and the said defendant corporation, the Wm. R. Warner & Company, although separate corporations, are composed of the same stockholders and managed by the same officers and that the said defendant corporation in pushing the sale and distribution of said product called "Quin-Coco" is not only the manufacturer but
639 the distributor of its own product as well as the distributor of like product made in the St. Louis laboratories, all of which product is labeled with like labels bearing the name "Quin-Coco," and the name "Searle & Hereth" Company as the manufacturer; that the said defendant corporation, since the establishment of the

relations with the said Pfeiffer Chemical Company and the Searle & Hereth Company, as aforesaid, has by many and divers ways and schemes placed its said product on the market, representing through its agents and salesmen to the purchasing druggists and physicians that said product can be furnished in lieu of and for your orator's product Coco-Quinine when it is called for by customers, or by physicians' prescriptions; that following such instructions druggists have sold and are now selling said product called "Quin-Coco" as and for your orator's product "Coco-Quinine," and when your orator's said product is called for; that customers frequently receive said imitation product from druggists labeled with the druggist's own label but bearing the name "Coco-Quinine," the name of your orator's original product; that such methods have resulted in depriving and are now depriving your orator of large sales of its product and the consequent profit thereon, and have resulted and are resulting, further, in the deception and defrauding of the purchasers and users who in asking for Coco-Quinine, intended to purchase and expected to receive your orator's product, which they had been accustomed to use and which product had acquired an established reputation with them for its quality and medicinal characteristics; and that by said methods the said defendant corporation has, through its agents, salesmen and confederates, pushed the sale and distribution to the trade of the said product called "Quin-Coco," but largely retailed as Coco-Quinine.

640 This amendment is offered and the motion submitted pursuant to notice given defendant at the close of taking depositions in complainant's behalf on July 13th, 1915.

Respectfully submitted,

J. ADDISON ABRAMS,
Solicitor for Complainant.
E. W. BRADFORD,
Of Counsel for Complainant.

Before Dickinson, J.

Motion to amend bill of complaint allowed.
By the Court,
Attest:

GEORGE BRODBECK,
Deputy Clerk.
August 2, 1915.

Vol. II

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]32

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 4, 1923.

CERTIORARI AND RETURN FILED JULY 21, 1923.

(26,812)

(28,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

In Equity. No. 1355.

THE ELI LILLY AND COMPANY,
Plaintiff,

vs.

WM. R. WARNER & COMPANY,
Defendant.

Washington, D. C., June 23, 1916.

Francis Rawle, Esq.,
West End Trust Bldg.,
Philadelphia, Pa.

Dear Mr. Rawle:

Please take notice that on Wednesday, June 28, 1916, at 10 A. M., before Charles E. Riordon, Special Examiner, at the Hotel Astor in the City of New York, N. Y., I will begin the examination of witnesses in rebuttal on behalf of plaintiff in the above entitled cause.

The witnesses I expect to call are as follows:

Samuel H. Bell, J. H. Weber and Charles H. Ege, of Reading, Pa.; Maurice W. Watson, of Bristol, Pa.; C. S. Lebs, William Cline and Robert J. Groves, of Philadelphia, Pa.; E. R. Peabody, of Boston, Mass.; Henry B. Smith, of Newark, N. J.; Edgar B. Allen and Mrs. Allen, of Norfolk, Va.

It will probably be necessary to adjourn to Norfolk, Va., for the purpose of taking the depositions of the last two named witnesses, and it may be necessary to adjourn to Washington, D. C., to get the depositions of some of the other witnesses named. It is possible that some of the witnesses named may not be able to appear at this time, and if so, their depositions will be taken later.

I am getting together a list of other witnesses in other localities, which I will submit to you as promptly as possible.

Yours very truly,

E. W. Bradford,
For Plaintiff.

IN THE
DISTRICT COURT OF THE UNITED STATES,
Eastern District of Pennsylvania.

December Term, 1914. No. 1355.

IN EQUITY.

ELI LILLY COMPANY,

vs.

WILLIAM R. WARNER & COMPANY.

Ernest W. Bradford, Esq.
Dear Sir:

I wish to give you notice that I shall object to any testimony offered in rebuttal which should have been produced on your prima facie case and particularly to the testimony of any witnesses as to alleged improper suggestions to druggists and others by defend-

ant's salesmen; whether such testimony relates to transactions already referred to in your prima facie case or to alleged interviews between any of your witnesses and any of defendant's salesmen not referred to in your prima facie case.

FRANCIS RAWLE.
June 24, 1916.

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1914. No. 1355.

IN EQUITY.

THE ELI LILLY AND COMPANY, a Corporation,
Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation,
Defendant.

PLAINTIFF'S PROOFS IN REBUTTAL ON FINAL HEARING.

New York, N. Y., June 28th, 1916, 10 A. M.
Hotel Astor.

Testimony taken on behalf of the plaintiff in rebuttal in the above entitled cause, pursuant to notice hereto annexed, before Charles E. Riordon, Special Examiner, commencing Wednesday, June 28th, 1916, at 10 A. M., at Hotel Astor, New York, N. Y.

Present:

MR. E. W. BRADFORD, on behalf of plaintiff;
and
MR. FRANCIS RAWLE, on behalf of defendant.

CARL H. EGE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Carl H. Ege; age 31,; Reading, Pa.; retail druggist.

Q2. How long have you been in the retail drug business at Reading?

A. Seven years.

Q3. Do you know Mr. S. J. Hagaman?

A. Yes, sir.

Q4. What house does Mr. Hagaman represent?

A. Wm. R. Warner & Co., of Philadelphia.

Q5. Has Mr. Hagaman ever solicited from you an order for Wm. R. Warner & Co.'s products?

A. Yes, sir.

Q6. Are you familiar with Mr. Hagaman's "sales talk" and methods of soliciting orders?

A. One experience I had.

Q7. Mr. Hagaman when called as a witness for defendant in this case testified that it was contrary to the policy of his house to even make a suggestion that their items might be used by the druggists as replacers for items of other houses. I call your attention particularly to Qs. 24 and 25, pages 449, 450, defendant's record, and ask you to read these portions of his testimony and then state whether or not said testimony is consistent with the practices of Mr. Hagaman during your experience with him as a salesman?

By MR. RAWLE: The question is objected to as leading, because the only proper question to ask the witness is as to what took place or what was said between him and Hagaman on the one occasion with which he had experience; because the

question embodies in part the inference of counsel from Hagaman's testimony and is not confined to a statement in the question of the exact words of Hagaman's answer to those two questions, and as not proper for rebuttal.

To ask the witness whether Hagaman's testimony referred to in the question is "consistent with the practices of Mr. Hagaman during your experience with him as a salesman" is objected to as grossly irregular and improper. And notice is given of motion to strike out the question and any answer the witness may give.

A. Yes, on two occasions during this trip that he made to my place he called my attention to where I might save money in buying and offering for sale a preparation of bromo-soda over another well advertised article similar to it, and also their perfume called "Oriana" over a well-known perfume.

Q8. What have you to say then concerning the consistency of Mr. Hagaman's practices with his testimony. I call your attention that you begun your last answer with a "Yes." Is this what you meant?

By Mr. Rawle: The question is objected to as grossly leading and irregular. Also objected to because the opinion of the witness as to consistency is not evidence and because the only question proper to ask the witness is as to what Hagaman did or said in his presence.

A. No, what I meant to say was "No." That his testimony which I read is entirely contrary to the method in which he approached me at the time he called on me.

By Mr. Rawle: The answer is objected to for the same reason and notice to strike out both question and answer is given.

Q9. When did this call by Mr. Hagaman take place?

A. I do not know the date. To the best of my recollection it must be about four and a half years ago.

Q10. Have you purchased goods from him since?

A. Not from Mr. Hagaman; from their salesmen.

Q11. Have you any reason for not purchasing goods from Mr. Hagaman?

By Mr. Rawle: The question is objected to as irrelevant, immaterial, as not proper rebuttal, and because the only evidence proper to be given by the witness is as to what Mr. Hagaman said or did in his presence.

A. The only reason I have is that at the time he called on me he induced me to buy many more goods than I had felt inclined to buy at that time.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiving objections):

XQ12. Who arranged with you to come here to testify?

A. Mr. Robert Groves.

XQ13. Are you in active business now in Reading, Pa.?

A. Yes, sir.

XQ14. How long will you be away from your store on this business?

A. One day.

XQ15. Who is paying for your time and expenses?

A. I understand it is the Eli Lilly & Co.

XQ16. With whom did you make such arrangement?

A. With Mr. Groves.

XQ17. Did he promise you that Eli Lilly & Co. would pay you?

A. Well I understood him to say that; yes, sir.

XQ18. What did he say?

A. I just can't recall the words, but he said that the mileage and incidental expenses would be paid by Eli Lilly.

XQ19. When are you going home?

A. Late this afternoon.

XQ20. When did Groves make this arrangement with you?

A. On Monday evening last.

XQ21. Before Groves called on you had you talked with any one else connected with Eli Lilly & Co. about this case?

A. I never knew anything about the case before Mr. Groves approached me.

XQ22. Have you had any special business connection with Groves?

A. Never.

XQ23. Did you know him?

A. I have known him for seven years.

XQ24. In what connection had you known him for seven years?

A. First as salesman for Wm. R. Warner & Co., of Philadelphia, and then as a representative for Eli Lilly & Co.

XQ25. For how long has he been a representative of Eli Lilly & Co., the plaintiff?

By Mr. Bradford: Objected to as incompetent and irrelevant.

A. That I can not answer.

XQ26. How long have you known Groves as acting as salesman for Eli Lilly & Co.?

A. I think he has represented Eli Lilly at least two years, to the best of my knowledge.

XQ27. In the territory of which Reading is a part?

A. Yes, sir.

By Mr. Bradford: No objection is made to the obviously impertinent, irrelevant and incom-

petent questions on cross-examination. The information called for being entirely welcome to the defendant but in order to save time and possibly expedite depositions that are to follow, counsel for plaintiff acknowledges that the several witnesses to be produced here are brought here at plaintiff's expense, it being selected as possibly the most convenient and central point to examine several witnesses who will be called, and he believes the expense will be less than if counsel with the Examiner attended the witnesses at their several places of residence. If any question by counsel for defendant implies or seeks to imply that any witness is being paid for his testimony the question and implication are resented and absolutely denied.

CARL H. EGE.

JOHN H. WEBER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. John H. Weber, age 29, Reading, Pa.; retail druggist.

Q2. How long have you been in the retail drug business at Reading?

A. I have been a proprietor six years and six years previous as a clerk.

Q3. Do you know S. J. Hagaman?

A. Yes, sir.

Q4. When did you meet him and under what circumstances?

A. I believe in 1911 as a salesman for Wm. R. Warner & Co.

Q5. Did Mr. Hagaman ever solicit your order for the products of Wm. R. Warner & Co.?

A. Yes, sir.

Q6. Please give as near as you can Mr. Hagaman's "sales talk" in soliciting your order?

By Mr. Rawle: The question is objected to as not proper rebuttal and because the only proper question to ask the witness is as to what Hagaman said at a particular interview.

A. There was one definite visit in May, 1911 that I recall several items mentioned in which he suggested several preparations that could be bought cheaper and sold in place of proprietary preparations on the market.

Q7. Will you mention one or two of the items referred to?

By Mr. Rawle: Same objection.

A. Fluid Viburnum Compound in place of Hayden's Viburnum Compound; Pitcher's Castoria in place of Fletcher's Castoria; Triloids in place of Diamond Brand Antiseptic Tablets. They are the only definite items I remember.

Q8. Mr. S. J. Hagaman has been called as a witness on behalf of defendant in this case. I ask you to read from Mr. Hagaman's deposition Qs. 10 and 11 on page 132 and Qs. 24 and 25, on pages 449 and 450 of defendant's record, together with Mr. Hagaman's answers, and state whether or not Mr. Hagaman's practices and methods in his efforts to sell you goods are consistent with the testimony he has there given?

By Mr. Rawle: The question is objected to as leading because the only proper question to ask the witness is as to what took place or was said between him and Hagaman on any particular occasion; because the witness's function is to testify to facts only and not to give his opinion as to whether or not Hagaman's practice was consist-

ent with Hagaman's testimony. Notice is given of motion to strike out the question and answer given thereto.)

A. I cannot say definitely if the substituting preparations was insinuated to be sold when a call was made for a definitely named article, but I think Mr. Hagaman's statements endeavored me to attempt the sale of items in place of known proprietary preparations through stating they were the same.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ9. Please point out on the printed record you have just had in your hand what questions and answers of Hagaman you read before answering the question?

A. I read on page 132 Q11; page 449, Q24, and page 450 I read Q25.

XQ10. Turn to page 449 of Hagaman and state whose testimony is printed on the last twelve or fifteen lines of that page, immediately following the asterisks?

A. R. J. Groves.

XQ11. Are there any proprietary medicines in your shop as to which you carry in stock the particular proprietary medicine of more than a single manufacturing house; that is, do you carry two or more of a kind of what is substantially the same proprietary medicine?

By Mr. Bradford: Objected to as not proper cross-examination as incompetent, irrelevant and immaterial.

A. In pharmaceutical preparations of known formulas we naturally have duplications in manufacturers. In proprietary preparations of unknown formulas duplications are not carried.

XQ12. Please define proprietary preparations?

By Mr. Bradford: Same objection.

A. Proprietary preparation is a secret formula of a single manufacturer in the broadest sense of the term.

Pharmaceutical is a preparation of a known formula usually United States Pharmacopoeia or National Formulary and can be put up by any manufacturer.

XQ13. Then are there not many proprietary medicines according to that definition which are sold by different drug houses and are substantially the same in therapeutic effect whether they are sold under the same name or not?

By Mr. Bradford: Same objection.

A. I believe manufacturing drug houses usually do not imitate a secret proprietary remedy.

XQ14. Do you call Fluid Viburnum Compound or Hayden's Viburnum Compound proprietary medicines?

By Mr. Bradford: Same objection.

A. I would only call Hayden's Viburnum Compound a proprietry medicine.

XQ15. Have you carried them both in stock?

By Mr. Bradford: Same objection.

A. Yes, sir.

XQ16. Would you call Fletcher's Castoria or Pitcher's Castoria, proprietary medicine?

By Mr. Bradford: Same objection.

A. I believe I would, each under its own name.

XQ17. Have you carried them both in stock?

By Mr. Bradford: Same objection.

A. Yes, sir.

XQ18. Name any other proprietary medicines with which you stock products of more than one house?

By Mr. Bradford: Objected to for the reasons before given and for the further reason that

this line of cross-examination is a gross abuse of the privilege of cross-examination outside of the courtroom and unnecessary use of plaintiff's time in an effort to introduce evidence that if competent at all should have been produced by defendant in its own time, and unnecessary increase of plaintiff's expenses in taking its proofs, and as wholly out of place.

A. Compound Syrup of Figs and Elixir of Sena with California Syrup of Figs. I do not recall at this moment any other true proprietaries. There are certainly a very few.

XQ19. Who arranged with you to come here to testify?

A. Mr. Bradford.

XQ20. Who first spoke to you about it?

A. Mr. Groves.

XQ21. Who is he?

A. Mr. Groves is a salesman for Eli Lilly & Co.

XQ22. How long have you known him as such?

By Mr. Bradford: Objected to as immaterial.

A. At least several years or ever since the commencement of that position, I have no means of knowing, I knew him before.

XQ23. When did he first speak to you about coming here?

A. Possibly a month ago, possibly a little longer, but not much.

XQ24. And he arranged for you to see Mr. Bradford?

By Mr. Bradford: Objected to as absolutely immaterial and irrelevant. Mr. Bradford states for the information of counsel that he went to Reading to see Mr. Weber and Mr. Bell another witness who will be presently called, possibly two weeks ago, on information from Mr. Groves that these gentlemen would probably be willing to testify for us in this case.

A. Yes, sir.

XQ25. In answer to Q7 you mentioned Triloids. Don't you remember that before the May interview in 1911 you had Triloids, Wm. R. Warner & Co., in stock?

A. I do not recall having them in stock previous to that time.

XQ26. I hand you an order sheet of Wm. R. Warner & Co., with the selling date of November 2, 1910, and ask you if you remember giving that order to Wm. R. Warner & Co., and whether it does not include Triloids?

A. It does include Triloids. I do not remember the order.

XQ27. Have you any doubt that that is the order which you gave Wm. R. Warner & Co. at that time, or which your then drug store gave?

A. I believe the order is accurate and I may have been mistaken on the previous questions concerning the time of the original purchase of Triloids on account of not being carried regularly in stock.

XQ28. You rather think now that prior to May, 1911, interview with Hagaman you had at some time Triloids in stock? Is that correct?

A. I believe so after having my mind refreshed with a copy of a previous order.

XQ29. On November 2, 1910, were you connected with Rentchler's pharmacy in Reading, and if so as employee or proprietor?

A. I had been manager of the Rentchler pharmacy and became full proprietor possibly about that time, about November.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ30. I note that the copy of the bill shown you by counsel for defendant bears a stamp "New

Customer." Was this your first order given to this house?

A. I can't state definitely because I do not remember the bill, but it very likely was the first order.

RDQ31. Do you recall definitely the statements by Mr. Hagaman respecting Triloids as before testified to by you, irrespective of the date of this bill or any other bill?

By Mr. Rawle: Objected to as not proper re-direct-examination.

A. I do not recall definite statements about Triloids.

RDQ32. You stated in answer to Q7 that Mr. Hagaman, among other things, named Triloids in place of Diamond Brand Antiseptic Tablets. My question is, is your recollection clear as to this fact without reference to the date of his visit?

By Mr. Rawle: Previous objections repeated. Also as leading.

A. About all I can recall is that on informing Mr. Hagaman that Diamond Antiseptics were carried in stock and that he then sold me Triloids. I don't recall any of the argument.

Re-cross-examination.

By Mr. Rawle:

RXQ33. Do you know the difference between the formulæ for Triloids and Diamond Antiseptics?

By Mr. Bradford: Objected to as immaterial, irrelevant and not cross-examination.

A. I believe all manufacturers make bichloride of mercury tablets to contain a definite amount to make a certain percentage solution with different amounts of water, such as one quart and two quarts.

RXQ34. Don't you know that they have a differ-

ent base; that is, that the Triloid has a muriate of ammonia base and the Diamond has a citric acid base?

By Mr. Bradford: Same objection.

A. I do know that they contain those substances added to make the salt more soluble, but are not the base of the tablets.

RXQ35. Don't they differ in the respect I have mentioned?

By Mr. Bradford: Same objection.

A. They do.

RXQ36. And the Triloids are in the form of triangles and the Diamond in the shape of diamonds?

By Mr. Bradford: Same objection.

A. Yes, sir.

RXQ37. And Triloids are put up in a triangular bottle and Diamond in a fan-shaped bottle in horizontal section?

By Mr. Bradford: Same objection.

A. Yes, sir.

RXQ38. And in selling Triloids and Diamond you sell them in the original bottles, don't you?

By Mr. Bradford: Same objection.

A. Yes, sir.

John H. Weber.

After Recess.

Charles S. Lebo, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford (at 2.40 P. M.):

Q1. Please state your name, age, residence and occupation?

A. Charles S. Lebo, age 35; Philadelphia, Pa.; retail druggist.

Q2. How long have you been located in Philadelphia and where were you employed prior to your Philadelphia employment?

A. About four years and a half in Philadelphia and prior to that time about four years with Mr. Samuel H. Bell, of Reading, Pa.

Q3. What was your position with Mr. Bell?

A. I was head clerk for Mr. Bell.

Q4. Do you know Mr. S. J. Hagaman, and if so, where did you meet him and under what circumstances?

A. I knew Mr. Hagaman when he called on Mr. Bell for Wm. R. Warner & Co.

Q5. Did Mr. Hagaman ever solicit orders for Wm. R. Warner & Company's products, either of you direct or of Mr. Bell in your presence?

A. He did not solicit orders direct but he did from Mr. Bell in my presence.

Q6. Do you recall Mr. Hagaman's "sales talk" in his efforts to sell Mr. Bell the Warner goods and if so, please state the substance as near as you can of such talks?

By Mr. Rawle: Objected to as not proper for rebuttal and because the witness has not yet stated when and where the interview took place and because the witness is asked to state the substance and not to state what was said.

A. I can't recall many instances, nor just what was said, but he seemed to lay great stress on the fact that the Warner goods could be sold in preference to higher price articles of the same kind and could be used in substitution you might say.

Q7. How many times did Mr. Hagaman talk with Mr. Bell in regard to the purchase of goods in your presence and when were these talks, as near as you can remember?

A. Well, they were during the four years previous to 1912, almost every time he came into the store during that time.

Q8. Do you recall any special items discussed by Mr. Hagaman and represented by him to Mr. Bell as stated in your last answer?

A. I recall two, one was Pills of Aloin, Belladonna, Strychnine and Ipecac, which could be sold in preference to Lapactic Pills, at a greater margin of profit for the druggist. Another was Triloids which could be sold in preference to Diamond Antiseptics.

Q9. What kind of a store in respect to size is conducted by Mr. Bell in Reading?

A. It is a very large store and carries a very large stock.

Q10. How does it rank and compare with the other drug stores of Reading?

A. I always considered it the largest patent medicine store in Reading.

Q11. How does Mr. Bell rank in the community of Reading?

By Mr. Rawle: Objected to as immaterial and not proper for rebuttal.

A. In a business way he is considered very aggressive and up to date and reliable.

Direct examination closed at 3 P. M.

Cross-examination.

By Mr. Rawle (without waiver of objections, at 3 P. M.):

XQ12. Please state what Mr. Hagaman said at any of these interviews from four to eight years ago?

A. Well, I can't remember his exact words, but the impression he left with Mr. Bell and also with me, as a clerk, was that we could substitute these two items for the others.

By Mr. Rawle: All but the first clause is objected to as not responsive, and because it gives Mr. Bell's impressions and those of the witness.

By Mr. Bradford: The impressions made upon Mr. Bell and the witness by Mr. Hagaman's talk are submitted to be material.

XQ13. H~d you been selling lapactic pills at that time?

A. Yes, we were selling lapactic pills.

XQ14. And Hagaman asked you to sell his pills instead of lapactic pills, did he not?

A. He suggested that we switch the customers from lapactic pills to the other pills.

XQ15. By persuading the customer?

A. Yes, by getting the customer to take the other pills.

XQ16. And the same way with Triloids?

A. Yes.

XQ17. Did you ever stock his Aloin pills and his Triloids?

A. Yes, Mr. Bell stocked both of them.

XQ18. And he also stocked at the same time lapactic and Diamond Tablets?

A. Yes, sir.

XQ19. And didn't he stock a great many preparations where he had the products of two or more houses for preparations that were substantially the same?

By Mr. Bradford: Objected to as not cross-examination and as immaterial and irrelevant.

A. He did, yes.

XQ20. Give me an approximate idea of how many; were there a dozen?

By Mr. Bradford: Same objection.

A. No, there were only a few; of the pills there was the Warner package and the lapactic pill package, of the same size and shape.

XQ21. Did you carry both Pitcher's and Fletcher's castoria at the same time?

By Mr. Bradford: Same objection.

A. Yes, we carried both.

XQ23. Mention some other preparations of which you carried the makes of some other houses?

By Mr. Bradford: Same objection.

A. Well I can't mention any specific preparations. However, where there was a preparation put up by two different houses the packages were not usually the same size and shape.

XQ24. And there were a good many preparations put up by two different houses with which you stocked?

By Mr. Bradford: Same objection.

A. Yes.

XQ25. You say Mr. Bell is a business man of high position in Reading? Did you understand that Mr. Hagaman was making any dishonest offer or suggestion to him?

A. I don't think he really meant anything dishonest.

XQ26. What do you mean by the word "substitution" which you used when you said "used in substitution you might say"?

A. The pills themselves were the same size and could not be told one from the other if they were out of their original container and if put up in a plain box they could be easily sold when lapactic pills were called for.

XQ27. Do you swear that Hagaman said that to Mr. Bell?

A. No, I do not. I was talking about impressions and not what he said.

XQ28. Was Mr. Bell's drug store in the practice of putting up a different kind of pill than the one called for?

A. Samuel H. Bell, age 48, Reading, Pa.; retail druggist.

Q2. How long have you been in the retail drug business in Reading?

A. I began business December 13, 1902, and have been in it ever since up to the present time.

Q3. Comparatively speaking, do you carry a large or a small stock of goods in your store?

A. I have quite an extensive stock, my last inventory was $21,000.

Q4. Do you know Mr. S. J. Hagaman.

A. I do.

Q5. Please state the circumstances under which you have known him?

A. I have known Mr. Hagaman and to my recollection I can go back to about 1909, or in that neighborhood. He came in my store and represented himself as being the representative of Wm. R. Warner & Co., of Philadelphia, Pa. The purpose of his call was to sell me his goods.

Q10. In soliciting your order for the Wm. R. Warner & Co. products what representations did Mr. Hagaman make, respecting their items, and particularly as to the methods you might employ in disposing of them?

By Mr. Rawle: Objected to as not proper for rebuttal; also because the only proper question is to ask the witness as to when the witness saw Hagaman and what he said.

Notice to strike out the question and answer and all preceding like questions and answers is here given.

A. Mr. Hagaman, in the first place, never came by himself; always in company with one of their salesmen, and in trying to place an order Mr. Hagaman would place great stress on naming this, that or the other article which would be a good substitute for one of the standards. For instance, their A. B. S. & I. pill, gc round, would be a good pill to replace the la-

pactic pill of Sharp & Dohme. He then would state in what way to proceed in order to knock out the lapactic pill. Likewise their Elixir Pepsin and Caffein Comp. to replace Sharp & Dohme's panpeptic elixir, which is sold in bulk. I could name you a dozen or more of articles which would bear along that same line of substitution.

By Mr. Rawle: The answer is further objected to as not stating anything that was said.

Q11. Mr. Hagaman was called as a witness on behalf of defendant in this case. I show you and ask you to read Mr. Hagaman's answer to Q24, pages 449-450, defendant's record, and state whether or not Mr. Hagaman's methods and practices in soliciting your order for goods were consistent with the testimony which he there gives?

By Mr. Rawle: Objected as not proper for rebuttal because the witness is not asked to say what took place, because the witness is asked to state his opinion as to whether what was said was consistent with the quoted testimony of Hagaman, which is matter for the court and not for the witness. And because this evidence is merely cumulative of like evidence given on plaintiff's prima facie case and motion to strike out both the question and answer is made.

By Mr. Bradford: It is submitted that the evidence called for by this question is evidence tending to explain plaintiff's case as already made to sustain the credibility of plaintiff's witnesses and destroy the force of the evidence submitted by defendant and is clearly proper rebuttal.

A. My answer is that Mr. Hagaman's manner of placing or rather soliciting an order was decidedly inconsistent to his evidence.

By Mr. Rawle: Objected as such an answer to the question is inadmissible.

Direct-examination closed at 4 P. M.

Cross-examination.

By Mr. Rawle (at 4 P. M. without waiver of objections):

XQ12. Please direct your attention to any one interview with Hagaman and state what Hagaman said in trying to sell you goods?

A. Well, whenever Mr. Hagaman tried to sell me goods that would be one of his strong arguments. I would add to that in order that he might not overlook the familiar ones he would carry those in his pocket and readily make reference to them, how I could substitute the same for the standard. Knowing that I had the confidence of my trade it appeared to me that he placed extra stress on substitution, due to the fact that he was familiar of me being a good salesman back of the counter, thereby taking advantage of same, in that particular manner.

By Mr. Rawle: The answer is objected to as irresponsive and as stating inferences and not facts and motion will be made to strike it out.

XQ13. Please fix your mind on any one interview with Hagaman as to which you can give the approximate date and as to which you can state what Hagaman said to you and then state what he said.

A. As to approximate dating, my bills will prove that, which I fail to have with me at this time, but can furnish same whenever required. As to his expressions I have covered that.

XQ14. I now ask you to say what words Hagaman used at any interview?

A. In trying to place an order he would demonstrate. For instance (witness here takes from his pocket two packages of pills—one package Wm. R. Warner & Co., and one package Sharp & Dohme, and pours four pills from each bottle on the table) comparison would be his great talk in making the sale. You can just as readily sell that pill, (referring to the War-

ner pill) as the S. & D. pill, which will net you more profit.

XQ15. And that is what he said to you?

A. Yes, sir.

XQ16. Anything else?

A. Along the general lines of salesmanship, yes.

XQ17. Did you stock both of these pills?

A. I did.

XQ18. And carry them in stock for a considerable time or constantly? I mean what was your practice as to stocking both of these pills?

A. That is my original stock package, that I stocked ever since I opened store (referring to the Sharp & Dohme package). Now referring to the Warner package I stocked that at the solicitation of Mr. Hagaman. I have had them in stock ever since. As to substituting that is a thing that I do not tolerate in my business.

XQ19. You consider that substitution is dishonest business for a druggist?

A. Making that a standard practice, I do, yes, sir.

XQ20. Please define substitution?

A. Wilful substitution is deception to the customer.

XQ21. Is it passing off a given preparation of one house when a like preparation of another house is called for by a patient or a doctor on a prescription and without telling the customer over the counter or the doctor that you have done so or are doing so?

A. As I have before stated, substitution is deception to the doctor or customer. It is something that I positively do not allow. Therefore I have no occasion to tell the doctor or customer that such an act has been done.

XQ22. You say that the practice is one which you do not allow and that it is deception. Please now tell us what the act is that you do not allow and which you consider to be deception?

A. For instance, a doctor writes a prescription for panpeptic elixir (S. & D.) and I give him Warner's

Elixir Pepsin & Caffein Comp. I term that deceptive drug dealing, or dispensing. And that is what I mean I positively do not allow.

XQ23. Is that what Hagaman suggested to you that you should do, in order to persuade you to buy his product, aloin pills?

A. It is not what Mr. Hagaman said I should do, but it is what Mr. Hagaman said I could and would do.

XQ24. Did you tell him that you never did that or allowed it in your drug store?

A. I did. Mr. Hagaman is well versed with the methods of my store and more than once I have been disgusted and refused him an order for that reason alone. That being my very last refusal on his last trip, attending his persistency along those lines.

By Mr. Rawle: The answer is objected to as irresponsive and volunteered and as not stating facts. Notice to strike out is given.

XQ25. How many different houses make and sell pills similar in a therapeutic sense to Sharp & Dohme's lapactic pills?

By Mr. Bradford: Objected to as not cross-examination, irrelevant, immaterial and incompetent.

A. I don't know of any other house in a similar form. Some of those ingredients contained in these pills are put up by other houses in tablet form—excepting Sharp & Dohme and Wm. R. Warner & Co.

XQ26. Do you draw a distinction between the form of the pills of different houses?

By Mr. Bradford: This question and the preceding one are objected to as in no sense cross-examination and as irrelevant, incompetent and immaterial.

A. There is no other house that represents a pill similar to the one of Sharp & Dohme.

XQ27. What product does Eli Lilly & Co. put out

that is similar to this lapactic pill, S. & D., or substantially so, therapeutically?

By Mr. Bradford: Objection repeated.

A. I have never been approached on that by any of Eli Lilly's representatives. I however notice that on page 30 of their price list which you hand me they have a pill of a same formula however coated white and pink and not black to take the place in salesmanship of the S. & D. pill.

XQ28. Please look at the Lilly catalogue and tell me if these pills there referred to are not therein marked as being gelatin coated and as being either oval or round?

By Mr. Bradford: Objection before noted is repeated and the further objection is made to the continued abuse by counsel for defendant of his privilege of cross-examination outside of the court room by attempting to lug into the record evidence that if admissible at all is only admissible as evidence in chief for defendant. Further objection is made to thus wilfully consuming plaintiff's time and increasing plaintiff's expenses by this character of proceeding, in no sense cross-examination.

By Mr. Rawle: Defendant's counsel states in a word that he is pursuing this method of cross-examination for the simple reason that in his opinion it is proper for cross-examination.

A. According to the price list, yes.

XQ29. And it is the same formula as the lapactic S. & D.?

By Mr. Bradford: Same objection.

A. Yes, sir.

XQ30. What other houses have a similar pill?

By Mr. Bradford: Same objection.

A. I am not booking myself along that line at all.

A. Henry B. Smith; 44; 350 Montrose Avenue, South Orange, N. J., President of C. B. Smith & Co., wholesale druggists, formerly of 863 Broad Street, Newark, N. J., now at 57-59 Green Street, Newark, N. J.

Q2. At the taking of testimony by defendant in this case an exhibit was offered in evidence consisting of a bottle of "Syrup Chova Comp." under the label of your house. Please state whether or not this preparation has any considerable sale and where its sales and use are confined?

A. The sales are very slight in and around the territory of Newark, or in the vicinity of Newark.

Q3. Do you know about what quantity of this preparation is sold per annum by your house?

A. I can't answer that, but small would be a very correct answer. The quantity is very slight.

Q4. Can you state in gallons approximately?

A. I should judge approximately five gallons.

Q5. Is it sold outside of N. J.?

A. The only case I can recall to mind is the order we received from Wm. R. Warner & Co.

Q6. You are familiar with Lilly's preparation known as Coco-Quinine?

A. We are selling it.

Q7. Do you regard Syrup Chova Comp. as a similar preparation or one competing with Coco-Quinine?

A. I do not.

No cross-examination.

HENRY B. SMITH.

Adjourned until tomorrow, Thursday, June 29th, 1916, at 9.30 a. m. at same place.

New York, N. Y., June 29th, 1916—9.30 a. m.
Hotel Astor.

Met pursuant to adjournment.

Parties present as before.

EARL R. PEABODY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD: (at 9.35 a. m.)

Q1. Please state your name, age, residence and occupation?

A. Earl R. Peabody; age 28; 17 Clermont Park, Boston, Mass.; salesman for the French Lick Springs Hotel Company.

Q2. Were you ever employed by Wm. R. Warner & Co., and if so, when, and in what capacity?

A. I have been employed by the Wm. R. Warner & Co., as a salesman in Massachusetts, from February, 1911, to January, 1912.

Q3. By whom were you employed on behalf of the Wm. R. Warner & Co.?

A. By Mr. S. J. Hagaman.

Q4. Were you instructed in the policy of the house by Mr. Hagaman?

By MR. RAWLE: Objected to as not proper for rebuttal, and because all such matters constitute part of the plaintiff's *prima facie* case.

A. What do you mean by that?

Q5. Mr. Sylvester J. Hagaman was called as a witness for defendant in this case, and in his deposition stated his methods of teaching the salesmen and the instructions given. My last question had for its purpose to inquire whether or not you were one of the salesmen so instructed and taught by Mr. Hagaman?

A. What were those instructions? I was one of the salesmen that were instructed by him when I entered the employ of Wm. R. Warner & Co.

Q6. I call your attention to Mr. Hagaman's answers to Qs. 7 to 13, inclusive, on pages 132 and 133, of Defendant's Record, and ask you whether or not Mr. Hagaman's methods of instruction and his instructions

to you were in accordance with his statements in this part of his testimony?

By Mr. Rawle: Same objections and further because the question is leading and because the only proper question is as to what Hagaman said to the witness.

A. Mr. Hagaman did not go through this salesman's Confidential and Manual with me as he states here that he does with others. He merely gave me to understand that this list contained lower prices than were in the regular catalogues.

Q7. Did he call your attention in any manner to the paragraphs headed "What a salesman should know" on page 86 and to the "Salesman's Creed" on page 87? I show you a copy of the "Salesman's Confidential and Manual" and call your attention to these pages, which are particularly referred to by Mr. Hagaman in his answer to Q9, page 132.

By Mr. Rawle: Same objections.

A. No.

Q8. Did any one representing the house ever call your attention to these pages?

By Mr. Rawle: Same objections.

A. No, sir.

Q9. How did Mr. Hagaman teach you to sell goods? I mean, in what manner and what were his teachings or instructions?

By Mr. Rawle: Same objections (except as to being leading).

A. On the Pfeiffer line it was a question of price compared with other lines, that they would pay more profit. In the pharmaceutical end of it that is the Warner and Searle & Hereth preparations he gave me no specific instructions any more than to watch him while he was making sales and use the arguments and methods that he used.

Q10. Did Mr. Hagaman travel with you in visiting the trade, and if so, how frequently?

By Mr. Rawle: Same objections.

A. Yes, two times, once when I started with the house and again later in the year.

Q11. I show you a list which has been introduced in evidence as "Plaintiff's Exhibit, Thurman Copy of Document No. 3", and ask you if this list was used by Mr. Hagaman in his instructions and if so, what use he made of it?

By Mr. Rawle: Same objections.

A. Yes, it was used by Mr. Hagaman and as replacers for advertised articles, that is the way I understood it, that these items of Warner's and Searle & Hereth opposite the advertised preparations were exact replacers for them.

Q12. Was or was not this a part of your regular equipment as a salesman?

By Mr. Rawle: Same objections.

A. I considered it a regular part of the equipment.

Q13. I also call your attention to Mr. Hagaman's answer to Q24, beginning on page 449 of Defendant's Record, the answer being on page 450, and ask you to state whether or not his instructions to you and his methods of salesmanship were consistent with the testimony there given?

By Mr. Rawle: Same objections and because the only proper question to ask the witness is as to what Hagaman said to him.

A. It is consistent with his testimony. As I understood the question it was, was it consistent with Groves.

By Mr. Rawle: Mr. Rawle wishes to note that between the first clause and second clause some remark was made by examining counsel, whereupon the witness added the last clause, beginning "As I understood".

By Mr. Bradford: Mr. Bradford desires to add that some remark was also made by defendant's counsel.

Q14. My question did not inquire concerning Mr. Groves' testimony but concerning the answer given by Mr. Hagaman to Q24, and I call your attention to the fact that the Groves testimony which you have referred to is a part of the question submitted to Hagaman and no part of Hagaman's answer to the question. Please read Mr. Hagaman's answer on page 450, and state whether or not his instructions to you, his teachings and his methods were consistent with the testimony given in this answer by Hagaman?

By Mr. Rawle: Same objections.

A. No. Mr. Hagaman's testimony in answer to that question is not consistent with instructions that he gave me.

Q15. Have you in mind any specific instances of practices by Hagaman in soliciting orders that are not consistent with the statement made by him in this answer? If so, please recite them.

By Mr. Rawle: Objected to as not proper rebuttal, the matter being obviously part of plaintiff's *prima facie* case and fully exploited by plaintiff therein.

A. I have seen Mr. Hagaman offer the S. & H. pill, Aloin, Bella Donna, Strychnine and Ipecac as a substitute or replacer for lapactic pills. He stated that they were the same composition, shape and size. Also the same with Alophen Pills and their preparation similar to that, opposite the name that appears on this list. I can give you more if you want them.

Q16. In soliciting orders for these goods were his methods a part of his instructions to you and intended for you to follow in selling the same goods?

By Mr. Rawle: Same objections and because the only proper question is as to what Hagaman said or did.

A. I understood them as such.

Q17. Did any other representative of the house of Wm. R. Warner & Co. ever travel with you as instructor or assistant, and if so, whom?

A. Yes, Mr. Charles E. McNulty.

Q18. How many times was Mr. McNulty with you?

A. Once.

Q19. I call your attention to Mr. McNulty's testimony as a witness in behalf of defendant in this case, particularly to his answers to Q9 to Q15, inclusive, on pages 95 and 96, respectively, of Defendant's Record, and ask you to read these questions and answers, and state what you have to say respecting the accuracy of his statements there made?

By Mr. Rawle: Same objections.

A. His answers to these questions are not consistent with the instructions he gave me.

Q20. What were the instructions he gave you?

By Mr. Rawle: Same objections.

A. When Mr. McNulty called me to the Essex Hotel in Boston, his first instructions to me were to send me to a Riker-Hegeman Drug Store, to purchase two bottles of Fletcher's Castoria. I did so and returned the two bottles to him. He immediately took them and poured their contents into the Dr. Hobson's Castoria bottle and stated that, "I guess they can't tell any difference now between the Dr. Hobson's and the Fletcher's". This bottle of Dr. Hobson's containing the Fletcher's Castoria he used in making sales during the time he was with me. In selling other preparations in the Hobson line I have repeatedly heard him mention competitor's names.

Q21. Describe his methods of using the bottle of castoria referred to in your last answer?

By Mr. Rawle: Objected to as not proper for rebuttal.

A. He would ask the prospective buyer to compare

the contents of the Dr. Hobson's castoria, with one of the original Fletcher's and ask him if he could detect any difference in taste or color in the two preparations and that the Dr. Hobson's contained more than the original Fletcher's, and that the margin of profit was greater.

Q22. Please explain what became of the bottle of castoria you have mentioned in your last answer?

By Mr. Rawle: Same objections.

A. It was taken from me by Mr. S. J. Hagaman.

Q23. Under what circumstances and when and why?

By Mr. Rawle: Same objections.

A. The exact date I can not remember, but it was during the last time that he worked with me. His reason for taking same he did not state. I would like to add to the answer to Q21 that the castoria mentioned was the one put out under the Pfeiffer Chemical Company label.

Q24. What was the trade name under which it was sold? The name used by them in place of the name "Fletcher" on the Fletcher castoria?

By Mr. Rawle: Objected to for the same reason and because it is well know that castoria is an open product, free to all to make and sell.

A. The exact name I can't state, but it was sold by Mr. McNulty as Pitcher's Formula Castoria. It has been five years since I handled that line.

Q25. I show you "Complainant's Exhibit, Thurman Pfeiffer Chemical Company Catalogue", and call your attention to page 153, and ask you if the package there illustrated is the package of castoria you refer to or similar to it?

By Mr. Rawle: Same objections.

A. Package No. 57 in this catalogue is the one referred to.

Q26. Do you recall any other specific items which in submitting to the prospective purchaser were compared by Mr. McNulty with items of other houses?

By Mr. Rawle: Objected to as not proper for rebuttal and as leading, and as irrelevant.

A. Yes, Hobson's Eczema Ointment compared with Cuticura Ointment.

Q27. Do you recall any other items which you observed Mr. Hagaman compare with items of other houses when soliciting orders, especially in the pharmaceutical line, liquids or elixirs?

By Mr. Rawle: Same objections and because the only proper question is as to what Hagaman said or did.

A. Elixir of Iron, Quinine and Strychnine with Wyatt's elixir of same thing.

Q28. How would Mr. Hagaman make his comparisons?

By Mr. Rawle: Same objections.

A. He would ask for graduates, pour a quantity of each into a graduate to be compared, and ask the buyer to compare them carefully.

Q29. How was this comparison usually made?

By Mr. Rawle: Same objections.

A. By the eye, color and taste.

Q30. Did he follow the same methods in respect to other items?

By Mr. Rawle: Same objections.

A. Not in all cases.

Q31. What was the chief requisite of salesmanship impressed upon your mind by Mr. Hagaman, if any?

By Mr. Rawle: Same objections.

A. There was no chief requisite that Mr. Hagaman impressed upon my mind any more than to make all the sales that I could.

Q32. Was this likewise impressed upon your mind by Mr. McNulty?

By Mr. Rawle: Same objections and as leading.

A. It was.

Direct-examination closed at 10.50 a. m.

Cross-examination.

By Mr. Rawle: (At 10.50—without waiver of objections)

XQ33. Did you have in your possession as part of the tools of your trade a copy of Wm. R. Warner & Company's "Salesman's Confidential and Manual"?

A. Yes, sir.

XQ34. Did you carry it with you always?

A. Yes, sir.

XQ35. Did it contain lists of articles, prices, terms, &c.?

By Mr. Bradford: Objected to as not calling for the best evidence, the book showing for itself what it is, and being already in evidence in the case.

A. Yes.

XQ36. And it was a necessary part of your equipment as a Warner salesman, was it not?

A. I presume it was, otherwise I would not have had it.

XQ37. Did you read the printed matter on your Confidential on the last five or six pages thereof?

A. I might have read part of it.

XQ38. Did you read a page on which is printed "What a Salesman Should Know" and the page on which is printed the "Salesman's Creed"?

A. I can't say whether I read it all or not.

XQ39. Inasmuch as this manual is called "Salesman's Confidential," didn't you suppose that it contained information which you ought to study?

A. I assumed that they all contained information, but I had no specific instructions to read all of them throughout.

XQ40. You had this manual in your possession for eleven months, did you not?

A. I had it during the term I was employed by the Wm. R. Warner Company.

XQ41. Have you any doubt that you read the two pages I have just specified?

By Mr. Bradford: Objected to as immaterial.

A. You mean did I or did I not read them. I don't understand the question.

XQ42. State whether or not you did, in those eleven months, read the two pages I have just specified?

A. I do not remember.

XQ43. Do you remember at any time receiving a card from the house about as big as your hand, having the "Salesman's Creed" printed at the top. I hand you "Defendant's Exhibit, Salesman's Creed 1910"?

A. Yes, sir.

XQ44. Did you read that?

A. Yes, sir.

XQ45. Do you remember about when you received it, whether at the beginning, in the middle or at the end of your employment in 1911?

A. I do not remember.

XQ46. What is your best recollection in regard to when you received that card from the house?

A. I could not state but it was during the time I was employed by them.

XQ47. After you left the employ of defendant in January 1912 what did you do next?

A. I was employed by the Nelson-Baker Company, Detroit, Michigan. I remained with them until June 1912. I have no records of the times and people with whom I was employed from then up to now.

XQ48. Can't you remember without a record?

A. Not all of them.

XQ49. Can you name any of them?

A. Yes. I can't tell the next employer that I worked for, but between then and June 1914 I worked for a retailer in Boston, Putnam, I don't know the initials, and I worked for the Willis H. Lowe Company, wholesale manufacturers of perfumes.

XQ50. How long did you stay with Baker?

A. Until June 1st, 1912.

XQ51. Where are you employed now?

A. With the French Lick Springs Hotel Company.

XQ52. How long have you been there?

A. Since June 1st, 1914.

XQ53. In what capacity?

A. Salesman for Pluto water.

XQ54. Do you travel in selling Pluto water?

A. Yes, sir.

XQ55. Then as a wholesale drug salesman you have had no employment since you left defendant except with Nelson-Baker & Company, which terminated in June 1912. Is that correct?

A. It is not correct. I stated previously that I worked for Willis H. Lowe, in the capacity of a traveling salesman, selling perfumes.

XQ56. Have you made any attempt in the last two or three years to get back into the selling of wholesale drugs? And especially with Wm. R. Warner & Co.?

By Mr. Bradford: Objected to as immaterial, incompetent and irrelevant and not cross-examination.

A. Not in the last two years, but about three years ago when Mr. Hagaman was looking for a man in Massachusetts and I was employed in the retail business I asked him what kind of an offer he would make me.

XQ57. Did you get the job?

A. I did not.

XQ58. Look at this Blue List. Is it not a list of items that you were most likely to sell, and given to you for convenience in selling?

A. Not necessarily, no. All of their items in their catalogues are subject to sale.

XQ59. Were there not as many as four or five thousand items in their catalogue?

A. I should think so.

XQ60. And the Blue List was rather a selected list from the catalogue, was it not?

A. A selected list I should say from two catalogues.

XQ61. Look at the left hand column in the Blue List. What class of articles do you find there?

A. Advertised articles in the majority of cases, or the principal specialities which the various pharmaceutical houses which manufacture them have placed special effort to create a demand for.

XQ62. Read down the left hand column on all four pages of the Blue List and give the names of any articles you find there which are either Wm. R. Warner & Company, or Searle & Hereth. Please note that Wm. R. Warner & Co., is there indicated by W. & Co. and Searle & Hereth by S. & H.

By Mr. Bradford: The question is objected to on the ground that the list being a part of the record and showing for itself it is the best evidence and as unnecessary repetition and as immaterial and irrelevant.

A. The items marked with a single cross on this list which you have handed me, on the left hand column, are either Wm. R. Warner & Company's or Searle & Hereth's goods. They are as follows:

Alka-Men-Thym. W. & Co.
Anti-Cold Tabs. Huyck's, Part 3. S. & H.
Anticongestus. W. & Co.
Anticongestus Comp. B. Q. part 2, W. & Co.
Anti Malarial Pills, Dr. Bonner's, Part 1, Warners.
Anti Malarial Tablets, Dr. Bonner's, Part 2. S. & H.
Antiseptic Solution, W. & Co.
Bromo Potash, W. & Co.
Bromo Soda, W. & Co.

Calolactose Tabs. White, part 3, S. & H.
Calolactose Tabs. Pink, part 3 S. & H.
Calolactose Powder, part 3. S. & H.
Castor Oil, Aromatized, White or Red, S. & H. part 2.
Castor Oil, Aromatic, White or Red, S. & H. part 3.
Cod Liver Oil Wine of Ext. of, with Malt and Hypophosphites, part 3, S. & H.
Cod Liver Oil Wine Ext. with Hypophosphites and Wild Cherry, part 2, Warner.
Digestive Powd. Comp. S. & H., part 3.
Eczemacide S. & H., part 3.
Elixir Salicylic Comp. W. & Co.
Elixir Tussis, part 3, S. & H.
Eonine Violets W. & Co., part 2.
Formin Comp. R. A., W. & Co.
Formin Comp. R. B., W. & Co.
Formin Laxative Comp. W. & Co.
Fragrant Violets, W. & Co., part 2.
Gauze, Iodoformal, W. & Co., part 2.
Glycerole-Hero Pinus Comp. W. & Co., part 2.
Gonichon, W. & Co., part 2.
Guajatonic, part 3, S. & H.
Hemonervine, S. & H., part 3, 298f.
Hepar Tabs. 302s, part 3, S. & H.
Hep-So-Lax, W. & Co., Salts Eff. part 2.
Hydralto, S. & H., part 3.
Ingluvin, Powder and Tab. W. & Co.
Iodoformal, W. & Co., part 2.
Lin-ne-mulsion, part 3, S. & H.
Lithia Water Tablets, 3 grs. W. & Co.
Lithia Water Tablets, 5 grs. W. & Co.
Antiseptic Eczema Lotion, W. & Co., part 2.
Methyl Compound, W. & Co., part 2.
Methylglobes, part 3, S. & H.
Ointment, Iodoformal, W. & Co., part 2.
Ointment, Reso-Iodo, W. & Co., part 2.
Pancreopepsine Comp. Compressed Tablets, part 2, W. & Co.

Quinaton, W. & Co., part 2.
Quin Coco, Lax. Part 3, S. & H.
Rheumaglobes, part 3, S. & H.
Santol, W. & Co., part 2.
Suppositories, Iodoformal W. & Co., part 2.
Syrup Infantile Laxative, W. & Co., part 2.
Syrup Phytolacca Comp. W. & Co., part 2.
Syrup Tolu and Heroin Comp. W. & Co., part 2.
Telectolin, part 3, S. & H.
Teko Ointment, part 3, S. & H.
Tono Sumbul Cordial, W. & Co., part 2.
Triloids, Antiseptic Tablets, W. & Co., part 2.
Tritica, part 3, S. & H.
Violets, part 3, S. & H.

XQ63. Look at the items on the left hand column of the list, "Derma Zema", "Lithia Formin Tablets" and "Santalglobes". Are these either Wm. R. Warner & Co. or S. & H. goods?

A. I don't remember.

XQ64. Don't you remember that "Derma Zema" was S. & H. goods?

A. I do not now. I might have at the time.

XQ65. Didn't you just say that "Derma Zema" was S. & H.?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. I did not state whether it was S. & H. or W. and Co.

XQ66. Is it one or the other of them?

By Mr. Bradford: Same objection.

A. I presume it is.

XQ66. On page 3 of this list I find Lithia Formin Tablets and also Lithia Water Tablets marked W. & Co. and Lithia Water Tablets, 5 Grains, marked W. & Co. Were these Lithia Formin Tablets, W. & Co. goods.

By Mr. Bradford: Same objection.

A. I don't remember.

XQ67. On page 4 I find "Santol W. & Co.", I also find Santalglobes not marked. Do you remember whether Santalglobes was a Warner & Co. product.

By Mr. Bradford: Same objection.

A. I do not.

Recess at 12.10 until 2 p. m.

After Recess.

XQ68. You said that Hagaman first traveled with you, then McNulty did, and after that Hagaman did a second time. How many days were there between McNulty and the second time of Hagaman?

A. I don't remember the exact number of days.

XQ69. Give it approximately and state where McNulty joined you that second time?

A. I should say it was about three months between McNulty's visit and Mr. Hagaman's second. I met Mr. McNulty in the Essex Hotel, Boston, Mass.

XQ70. Is it not true that in the blue list the items which you have just read into the record from the left hand column do not have opposite them on the right column any article of a house other than Warner & Co., and Searle & Hereth?

A. It is.

XQ71. Do you remember how many competing drug houses whose goods you met in competition sold an article just like lapactic pills, which you say is the same as S. & H. pill A. B. S. & I.?

By Mr. Bradford: Objected to as immaterial, irrelevant and incompetent, and not cross-examination.

A. I do not remember how many.

XQ72. Were any of such competing drug houses putting out a similar product?

By Mr. Bradford: Same objection.

A. There might have been but I never saw it.

XQ73. Don't you know that lapactic and the A. S. B. & I. (S. & H.) are both open formula with the formula printed on the label?

By Mr. Bradford: Same objection.

A. No, I did not know that they were open formula.

XQ74. I hand you a package of lapactic pills, S. & D., and a package of A. S. B. & I., W. R. W. & Co. Please state whether those are the articles you have referred to in connection with Hagaman?

A. The lapactic pills are the article, but the ones that the Warner & Company pills that I referred to were in bulk and not in the original bottle.

XQ75. Did you have on your list a preparation of iron, quinine and strychnine?

By Mr. Bradford: Objected to as not cross-examination, as immaterial and irrelevant.

A. Please state what list you mean. I had several lists.

XQ76. Were you selling a preparation of that kind for Wm. B. Warner & Co.?

By Mr. Bradford: Same objection.

A. Yes, I attempted to sell this preparation, but with instructions that it could be used when another manufacturer's brand is specified.

By Mr. Rawle: The answer, except the first word, is objected to as unresponsive and volunteered and as showing a bias on the part of the witness.

By Mr. Bradford: The latter part of the objection is objected to as uncalled for and unjustified.

XQ77. What other competing houses whose prod-

ucts you ran against had an I. Q. & S. preparation, or something like it?

By Mr. Bradford: Objected to as not cross-examination, immaterial and irrelevant.

A. I think every pharmaceutical house makes an elixir of iron, quinine and strychnine.

XQ78. Don't most or many of the pharmaceutical houses make an A. B. S. & I. preparation?

By Mr. Bradford: Same objection.

A. Possibly but as I stated previously I never saw it.

XQ79. Isn't the I. Q. & S. an open formula?

By Mr. Bradford: Same objection.

A. I believe that it is.

XQ80. What is the cuticura preparation which you spoke of in connection with the Hobson eczema ointment?

A. As far as I know there is no similarity between the two. But what I referred to is the fact that it could be sold against cuticura ointment.

XQ81. And the A. S. B. & I. could be sold against lapactic. Is that right?

A. The question involved in this question is entirely different than in the other. I was stating that I had instructions to convince the druggist that he could use Warner & Co., A. S. B. & I. pills on prescriptions where lapactic S. & D. were specified.

XQ82. Who got you to come here?

A. I came through Mr. Thomas Taggart, Sr., whom I believe is a personal friend of Mr. Lilly's, at Mr. Lilly's request.

XQ83. Is he your employer and is he a Senator of the United States from Indiana?

A. Yes, sir.

By Mr. Bradford: For the information of defendant and the Court, I desire to state that I had an interview with Mr. Peabody in Boston a few

weeks ago for the purpose of ascertaining whether or not he would testify in this case. He refused, but finally said that if we obtained the permission of his employer he would be willing. This information I gave to Mr. Lynn, General Manager of Eli Lilly & Co. He wrote to Mr. Taggart, the President of the French Lick Springs Hotel Company. Mr. Taggart transmitted the letter to the General Manager of the company, with instructions if he saw no reason to object to write Mr. Peabody that he had their permission. This was done. Mr. Peabody absolutely declined to testify until this was done, stating as his reason that Wm. R. Warner & Co., always treated him all right and he did not care to be mixed up in this case.

Cross-examination closed at 2.45 p. m.

Re-direct-examination.

By Mr. Bradford:

RDQ84. Referring again to the Blue List and to the list of the Warner and S. & H. items which have been copied therefrom into the record, and to XQ70, I ask you to state whether or not there are any items listed in the right hand column opposite these Warner and Searle & Hereth items? Or whether the right hand column opposite said items is blank?

A. The right hand column is blank.

RDQ85. What is the significance of these blank lines in the right hand column opposite the Warner and S. & H. items, if you know?

A. It signifies that it is not necessary to have any similar preparation or replacer as we call it, because they manufacture these items themselves. Mr. Hagaman informed me that on the older lists that I knew there used to be preparations opposite the W. & Co. items.

By Mr. Rawle: The answer is objected to as hearsay and as irrelevant and as not proper for rebuttal.

E. R. Peabody.

By Mr. Rawle: Mr. Rawle states that he objects to the depositions of all the witnesses taken at this session, yesterday and today, upon the ground that they are not and none of them are proper for rebuttal and that they merely go into matters which are part of the plaintiff's *prima facie* case and were very fully gone into on the plaintiff's *prima facie* case.

For these reasons he now places on the record a notice given to counsel for plaintiff on June 25th, 1916, in the following words:

"I wish to give you notice that I shall object to any testimony offered in rebuttal which should have been produced on your *prima facie* case and particularly to the testimony of any witnesses as to alleged improper suggestions to druggists and others by defendant's salesmen; whether such testimony relates to transactions already referred to in your *prima facie* case or to alleged interviews between any of your witnesses and any of defendant's salesmen not referred to in your *prima facie* case."

I further give notice here to plaintiff's counsel that at the proper time I shall move the court to strike all of such depositions from the record, with costs.

By Mr. Bradford: I regret that I can not agree with learned counsel for defendant respecting what is proper rebuttal evidence in this case. I submit to the court that the objection by counsel is without ground in law or reason and further that the evidence offered for plaintiff as rebuttal yesterday and today would have been entirely improper and out of place in plaintiff's *prima facie* case. Further that the fact that the evidence thus offered in rebuttal and directly tends to rebut the evidence of the defense, also tends incidentally to confirm or sustain plaintiff's original case, does

not render it less evidence strictly in rebuttal. This is placed of record not for the sake of argument but to frankly acquaint counsel for defense with the grounds for my difference with his opinion and to show good faith in the further taking of the rebuttal for plaintiff. Immediately on receipt of notice from counsel for defendant of his objection, which notice he has quoted in the record, he was advised by a special delivery letter mailed within an hour after the receipt of said notice, that his notice was received and would be made a part of the record immediately following the notice given him of these depositions.

The examination of other witnesses named in the notice has been rendered impossible by circumstances over which plaintiff has no control and they will be called later as may be agreed upon.

Adjourned to meet at Fairfax Hotel, Norfolk, Virginia, at 10 o'clock to-morrow, Friday, June 30th, 1916.

Norfolk, Virginia,
June 30th, 1916.
Fairfax Hotel.

Met pursuant to adjournment.

Parties present as before.

HARRIET M. ALLEN, a witness of lawful age, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to her by counsel:

By MR. BRADFORD: (at 10.50 a. m.)

Q1. Please state your name, residence and occupation?

A. Harriet M. Allen; 1005 Church Street, Norfolk, Va.; pharmacist, in retail drug trade.

Q2. Are you a registered pharmacist?

A. I am. I have been a registered pharmacist for twenty-five years. They amended the by-laws to admit me.

Q3. Are you the Mrs. Allen, the wife of Edgar B. Allen, who was a witness for plaintiff in this case and who has been referred to in the depositions of witnesses Moon and Hagaman called for defendant?

A. I am.

Q4. Are you acquainted with Mr. Victor M. Moon?

By Mr. Rawle: Mr. Rawle states that Edgar B. Allen was examined on behalf of plaintiff in the *prima facie* (Rec. p. 531) and that this was the proper time for the examination of the present witness if desired. The examination of Allen was held in the drug store of the witness. He therefore objects to the examination of this witness as not being proper for rebuttal and gives notice of a motion to strike the deposition from the record.

By Mr. Bradford: It is sufficient in reply to observe that the witness could not have been called to rebut the testimony of defendant's witnesses Moon and Hagaman prior to the depositions given by them, in defendant's behalf.

By Mr. Rawle: Mr. Rawle unwilling adds that the testimony of Allen was admissible as part of plaintiff's *prima facie* case, and that he testified to what took place between him and defendant's salesmen Moon and Hagaman. Moon and Hagaman were then called by defendant to state what took place at the interview and no further evidence is admissible, in rebuttal. Both sides have been heard.

A. Yes, sir.

Counsel for plaintiff stipulates that the objection may stand as to all questions asked this witness and all answers.

Q5. Are you acquainted with Mr. Sylvester J. Hagaman?

A. Not to say acquainted. I have never met the gentleman but once. I would not recognize him now if he were to come into the store.

Q6. Do you remember of any interview ever held with Mr. Hagaman in your store?

A. Mr. Moon and Mr. Hagaman came together and I gave an order.

Q7. Do you remember the date of this visit by Mr. Hagaman and Mr. Moon together, or approximately the date?

A. Only by referring to the invoice of the order given that day, which is, I think, May 1915, last year.

Q8. During that interview which of these gentlemen did the talking in seeking your order for goods?

A. Well, I recognized Mr. Moon as the salesman and laughed at him and asked him if he was being checked up, and he said "No", that Mr. Hagaman was with him to get acquainted with the trade in this territory.

Q9. Which of the two solicited your order?

A. Well, in fact, both, Mr. Hagaman took the order, but Mr. Moon wrote it down and also had his order book of previous orders, but he also referred to his note book of previous orders and prompted Mr. Hagaman.

Q10. In Mr. Hagaman's deposition as a witness for defendant in this case, in answer to XQ56, page 456, he stated that he called on you May 12, 1915, and in answer to XQ58, he stated that he did all the talking and in answer to XQ60 that Mr. Moon did not take any part in this conversation. Is this according to your recollection of the interview?

A. No, it is not, because Mr. Moon had as much to do with the taking of the order as Mr. Hagaman did, in the conversation that took place. When any question came up of any product that I wanted, Mr. Moon

being the regular salesman, I referred to Mr. Moon, asked him questions and he answered all the questions I asked.

Q11. Mr. Moon testifying as a witness for defendant in this case in answer to Q29, page 416, which asked him "What do you know about Edgar B. Allen", stated that he first ran across him approximately fourteen years ago, he was clerking for Mrs. Sterling at that time, a widow who owned a drug store on Church St., in Norfolk. Mr. Moon was testifying on December 9, 1915. What have you to say in reference to this statement by Mr. Moon?

A. Mrs. Sterling was not a widow until 1907. Dr. Sterling died in January 1907. That would only be nine years ago, or eight years prior to the time when Mr. Moon was testifying.

By Mr. Rawle: The question and answer are objected to as irrelevant and immaterial.

Q12. Mr. Moon further testified in the same answer, "I quit calling on him for several years under the old management on account of reasons, I did not care to call on him on his account, under the present management I have sold him quite a few orders more recently." What have you to say to this testimony?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I have been absolute owner of Sterling Pharmacy for sixteen years. There has been no change in the management whatever in that time. What Mr. Moon's reasons might have been for not calling, I do not know. He never called on Mr. Allen, because Mr. Allen never did any buying. He called on me one time several years ago, but I can not remember the date, but he was partially under the influence of liquor and I gave him a very cold turn down. He was only then as a specialty man, not selling Warner's regular line, and since then the first order I have any record of was

in 1912, December, I think. And I have bought a little of Warner's goods each year since 1912, through Mr. Moon. When he came in 1912 it was just making a specialty of the Bucklin line and that was what I bought of him, but I only had one bill in that year, and I think it was in December.

Q13. This deal in December 1912 is then the first deal of which you have any record of purchase from Mr. Moon?

A. It is.

Q14. Does this conform to your memory as to about when you began dealing with Mr. Moon?

By Mr. Rawle: Same objection.

A. I won't say it was the first order that I have ever given Mr. Moon, but it was the first that was ever shipped direct from Wm. R. Warner. If there were any previous to it they were through the jobber.

Q15. How long ago would you say from memory it is since the first call was made by Mr. Moon at your store?

By Mr. Rawle: Same objection.

A. I could not answer that question because he was not personally known to me more than any other drummer that just happened to drop in. I knew for a long time before I ever purchased from Wm. R. Warner & Co., that he represented them, but I never purchased from him.

Q16. Was Mr. Allen present at the interview between you and Mr. Moon and Mr. Hagaman in May 1915?

By Mr. Rawle: Same objection.

A. He was.

Q17. Do you remember any interviews with Mr. Moon at which a preparation known as Quin-Coco was offered to you by him, and if so, please state what you recall respecting such interview?

A. Yes, I remember this conversation, but it would

be impossible for me to give dates as to when the conversation took place. Mr. Moon asked me if we used a chocolate syrup and I told him we only used Lilly's. He asked me why not try Warner's, that they made a preparation called Quin-Coco and that there was none better on the market. I told him my physicians specified Lilly and he then told me that his preparation was equal to Lilly's or any other on the market and that the chemist that formerly made Coco-Quinine for Lilly was now making Quin-Coco for Wm. R. Warner & Co. There was considerable conversation over the matter and I said "Now, look here, Mr. Moon, I handle Warner's Elixir Salicylic Acid Comp., and the physicians specify for it." I said, "Now, do you think I ought to dispense Mulford's on a prescription when they call for Warner's? I have both in the house." He said, "Oh, no, no, no." That is just the way he answered me. And I said then that stands good for Lilly's Coco-Quinine, that is the way I answered him. He also asked me if I did not have a counter demand for the chocolate quinine and I told him I did not.

Q18. During this conversation was the name Coco-Quinine freely used by Mr. Moon?

A. Yes, sir; in referring to Lilly's, yes.

Q19. Did he say anything in reference to how you could dispense Quin-Coco?

By Mr. Rawle: Objected to as leading and because the only proper question is as to what was said.

A. No, not to me, because I told him positively that I never substituted. He and Mr. Allen had considerable talk about it, but I dropped the matter and went on to the other line.

Q20. How many interviews did you have with Mr. Moon at which the subject of Quin-Coco and Coco-Quinine was discussed, as near as you can recall?

A. With every order except the last two, the last two visits he has never mentioned the subject.

Q21. What did he say in reference to the two preparations, Coco-Quinine and Quin-Coco, when telling you about the chemist who made the preparation first for Lilly and then for Warner?

A. That the two preparations were practically identical, and Warner's had the benefit of a lower price.

Q22. In Mr. Moon's deposition in answer to XQ51, page 422, he stated that he did not say either to Mr. Allen or in his presence anything from which he could infer that he intended to have him understand that Quin-Coco could be used in the place of Coco-Quinine. What have you to say as to this statement of Mr. Moon?

A. Well, I think I have answered that previously by saying that he told me that the two preparations were identical and trying to prove it to me by saying the same chemist who had formerly made Coco-Quinine now made Quin-Coco for Warner.

Direct-examination closed at 11.35.

Cross-examination.

By Mr. Rawle (at 11.35, without waiver of objections):

XQ23. Has Mr. Allen ever bought any goods for your store since he worked for you?

A. There is one specialty line that Mr. Allen always buys, the general line I buy all.

XQ24. What specialty line?

A. A line of rubber goods that a woman has no business handling.

XQ25. Then I take it that if a drug salesman calls at your store to offer his goods, if you are out Mr. Allen does not talk to him. Is that correct?

A. Mr. Allen may talk to him, but he does not buy from him. He may make a date with the salesman to return when he knows I will be there. Understand, when I say that Mr. Allen does no buying, that I am referring to out of town salesmen, the local jobbers are

authorized to receive any order from Mr. Allen the same as from me. Out of town bills I buy exclusively.

XQ26. You said that in 1912, December, you kept in stock Wm. R. Warner and Company Elixir of Salicylic Acid Comp. Am I correct?

By Mr. Bradford: Objected to as not a correct statement of the witness' testimony.

A. Yes, sir; the same as any other proprietary preparation the physicians specify for, but that order was my first order direct from Wm. R. Warner. It had always been purchased through a jobber.

XQ27. You also testified that when Mr. Moon called on you in December 1912, "It was just as making a specialty of the Bucklin line and that was what I bought of him." Are you perfectly sure that you bought nothing else from him at that time except Bucklin products?

A. When Mr. Moon came in he informed me that he had a special deal in the Bucklin line with special terms, and I bought. After I had purchased the Bucklin line he asked me if there was not some of Wm. R. Warner's preparations that I was in need of, and I bought the Elixir Salicylic Comp. as the only thing I needed outside of the Bucklin line. The reason I am positive, I referred to the invoice last night, to find when my first purchase direct was made.

XQ28. You now say that at the December 1912 call you bought Elixir Salicylic Comp., W. R. W. & Co. Before that you say that you bought only the Bucklin line at that interview, which is correct?

A. I think I said formerly the Bucklin line and the Salicylic Comp. both. If I did not then I should have done so, because that was correct.

XQ29. When Dr. Sterling was living what part did he take in the drug store business, which you say you have owned for sixteen years?

By Mr. Bradford: Objected to as immaterial and irrelevant and not cross-examination.

A. You not being familiar with the circumstances I don't blame you for asking me that question, but I will explain. When I married Dr. Sterling I was a young girl of 20 and he was 65. As a natural consequence I had to be the bread winner in the later years of his life. He sat in a chimney corner and smoked his pipe.

XQ30. And you ran the business altogether?

A. I ran the business before I owned it.

By Mr. Bradford: All of these questions are objected to as irrelevant, immaterial and not cross-examination.

XQ31. How many years have you owned the business?

A. Sixteen years this month. Dr. Sterling turned it over to me on a bill of sale sixteen years ago this month in exchange for a piece of property, that was in my own right.

Cross-examination closed at 11.55

Re-direct-examination.

By Mr. Bradford:

RDQ32. Was Mr. Allen usually present at your interviews with Mr. Moon?

A. I think he was present at every interview excepting the one I have spoken of in December 1912. At that time he was at our branch store, in Ocean View.

RDQ33. And he was in a position to hear the conversation that took place?

A. I seldom ever make a purchase without consulting Mr. Allen. He sells seventy-five per cent. of the goods and I want his opinion as to whether they are salable.

RDQ34. I ask you to read Qs. 24 to 27, pages 415-416, in Mr. Moon's deposition, and his answers, and state whether or not Mr. Moon's methods and practices in soliciting orders for goods as observed by you are

consistent with the ethical standard Mr. Moon endorses in his answers to these questions?

By Mr. Rawle: The same general objections first placed of record are here repeated. Further objected to because the form of the question is inadmissible, the only proper question to ask the witness is as to what was said by Mr. Moon in her presence.

A. No, they are not, because he did try to sell Quin-Coco to take the place of Coco-Quinine. But this is the only preparation Mr. Moon ever offered to me to take the place of any other on the market.

By Mr. Rawle: The answer is objected to because the witness does not state facts or what was said.

Harriet M. Allen.

Edgar B. Allen, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford: (at 1.05 p. m.)

Q1. Are you the same Edgar B. Allen who previously testified as a witness on behalf of plaintiff herein?

A. I am.

Q2. I ask you to read Qs. 24 to 27, pages 415-416, in Mr. Moon's deposition, and his answers, and state whether or not Mr. Moon's methods and practices in soliciting orders for goods as observed by you are consistent with the ethical standard Mr. Moon endorses in his answers to these questions?

By Mr. Rawle: The question is objected to as not proper for rebuttal. The witness has already been examined on the plaintiff's *prima facie* case and the witness Moon was examined as to his ver-

sion of the conversation that had taken place between the present witness and Moon. Both have been heard as to their version of the interview.

The question is also objected to as inadmissible in form and because it does not call for facts but for the opinion of the witness. Notice of a motion to strike out is given.

A. Mr. Moon's practices are entirely opposite from his testimony.

Q3. I also call your attention to Mr. Moon's answer to Q29 on page 416, and ask what you have to say in reference thereto? Mr. Moon was testifying on Dec. 9, 1915.

By Mr. Rawle: Same objections and notice.

A. Mr. Moon is entirely wrong in stating that he met me fourteen years ago. My first meeting with Mr. Moon was in, as far as I recollect, August 1913. He states here that he ran across me clerking for Mrs. Sterling, a widow at that time. Dr. D. G. Sterling, the husband of the then Mrs. Sterling, did not die until 1907. I married Mrs. Sterling in June 1910, and have no recollection of Mr. Moon calling on us until after I returned from the Ocean View store in 1913. The first business the Sterling Pharmacy did with Mr. Moon was in 1912.

Q4. A certain interview or call has been referred to in your deposition and in the deposition of Mr. Moon and in the deposition of Mr. Hagaman, at which Mr. Hagaman accompanied Mr. Moon, the visit having been in May 1915. Do you recall that interview, and, if so, please state which of the two gentlemen did the talking in soliciting the order on that occasion?

By Mr. Rawle: Same objections and as irrelevant and immaterial.

A. I recall that interview. Mr. Moon came into the store and introduced Mr. Hagaman as their assistant sales manager. Mr. Moon then went on asking us

if there was anything we needed. And knowing the line of goods that we had been in the habit of purchasing from him he called over the list of preparations and made suggestions as to what we might need. Mr. Hagaman also went over the list and catalogue and as items were ordered Mr. Moon wrote them down. During the buying my wife went into the storage room to look up stock, Mr. Hagaman offered Quin-Coco as a chocolate syrup of quinine which could be used for all purposes as Coco-Quinine.

Q5. Mr. Hagaman when testifying as a witness for defendant stated in reference to this interview that Mr. Moon had nothing to say. What have you to say as to this?

By Mr. Rawle: Same objections.

A. It would have been unreasonable for Mr. Moon to have nothing to say, as he knew our needs in his line and knew what goods we had been in the habit of purchasing from him. Mr. Hagaman knowing nothing of the character or amount of goods that we purchased from Wm. R. Warner & Co., was in no position to offer suggestions as to what we were to buy. The selling was done by Mr. Moon.

Q6. Mr. Moon, in his testimony, has also denied that he ever told you or suggested to you that Quin-Coco was the same thing as Coco-Quinine, or could be used for Coco-Quinine. Have you since your last testimony recalled any other incidents bearing upon this subject?

By Mr. Rawle: Same objections, the witness being asked to state on rebuttal something which he forgot to state when testifying on his *prima facie* case.

A. On one occasion on offering Quin-Coco he stated that the chemist who manufactured Quin-Coco was one who had been in the employ of Eli Lilly & Co., and that he had perfected Quin-Coco to such an extent that it

was a smoother and more easily dispensed preparation than Coco-Quinine.

Direct-examination closed at 1.20.

No cross-examination.

Deposition closed.

E. B. ALLEN.

Newport News, Va.,
June 30th, 1916.

Met pursuant to adjournment.

Parties present as before.

H. W. DUNN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. H. W. Dunn; age, 50; Newport News, Va.; retail druggist; manager of the Chestnut St. Pharmacy.

Q2. Are you acquainted with Mr. Victor M. Moon, a traveling salesman for Wm. R. Warner & Co.?

A. Yes, sir.

Q3. I call your attention to XQs. 54 and 55 on page 422 of Defendant's Record, being a part of Mr. Moon's testimony as a witness for defendant in this case, and ask you to read the answers and state whether or not you recall the incident there related by Mr. Moon?

A. No, sir. I can't recall that at all and I have searched every chamber in my brain, to see if I could. I have no recollection whatever of it.

Q54. Have you talked with Mr. Moon about this incident since he testified?

A. Yes, sir.

Q5. And did he endeavor to refresh your memory and recall the incident to your mind?

A. Mr. Moon called since Mr. Wetzel mentioned this subject to me. I spoke to him about it and we had a conversation and discussion of his statement. I told him that I could not recall any such incident, and I have been unable to since.

By Mr. Rawle: Objected to as not proper for rebuttal and as irrelevant and immaterial. This objection stands to the entire deposition by consent of counsel.

No cross-examination.

H. W. Dunn.

IN THE
DISTRICT COURT OF THE UNITED STATES,
For the Eastern District of Pennsylvania.

IN EQUITY.

No. 1355.

THE ELI LILLY AND COMPANY,
Plaintiff,

vs.

WM. R. WARNER & COMPANY,
Defendant.

Washington, D. C., July 3, 1916.

Francis Rawle, Esq.,
West End Trust Bldg.,
Philadelphia, Pa.

Dear Sir:

As a partial list of witnesses to be examined on our trip South, I submit the following:

F. M. King and L. B. Hardy, of Atlanta, Ga.; J. E. Greene, of Spartanburg, S. C.; Mr. R. Willis, of Den-

mark, S. C.; J. E. Justice and J. T. Fletcher, of Clarksville, Tenn.; C. T. Tanner and W. C. Batts, of Springfield, Tenn.; Dr. D. J. Kuhn and G. A. Blodau, of Nashville, Tenn.; Edward V. Sheely, F. W. Ward, Edward Collins and G. A. Lavison, all of Memphis, Tenn.

There are several other witnesses who have been named to me as "parties"; for example, Mr. Vinson advises me that a "party in Dawson" (Georgia) will testify for us, but does not give me his name. I am trying to get these names by wire, in order that I may furnish them to you at the earliest possible moment.

Neither have I been advised of the names of the witnesses who will appear for us at New Orleans, except that Mr. Heno, the prescription clerk in his store, and a doctor at Napoleonville, are among the witnesses.

Mr. J. R. Stuckey, of Samson, Ala.; Laurence Daniels and Charles Burkett, of Mobile, Ala.

I may recall the witnesses who before appeared for plaintiff, especially witnesses John B. Reid and John M. Mosely.

This covers the list as complete as I can give it today.

It is now my purpose to leave here Thursday in time to examine the Atlanta witnesses Friday and then proceed to either Montgomery or Nashville and examine the witnesses that can be brought in to either of these cities, then proceed to the other, and then to Memphis.

By the time we meet in Atlanta, I shall hope to be able to hand you the names of the additional witnesses, as well as the names of our witnesses in Texas, St. Louis and Indianapolis. There will also be some witnesses from Michigan. These depositions we will probably take in Detroit.

As I understand the arrangements, the witnesses will all come to one or the other of the large cities named, so that we will not be under the necessity of going to small towns, as on our other trip. I realize

that, at this season of the year, it is not going to be a very pleasant trip, and we shall do everything we can to make the trip as convenient and comfortable as possible.

Unless I am definitely advised that the witnesses will be ready, the start on the trip may be delayed for a day or two, because I wish to clean up everything as we go along and not be obliged to go back or to arrange for witnesses to come long distances. It has been a very difficult matter to make the arrangements, as I think you fully appreciate, but I am doing everything possible to secure definite information on which we can act.

Yours very truly,

EWB/McB E. W. Bradford.

Atlanta, Georgia,
Piedmont Hotel,
August 7th, 1916—10 a. m.

Met pursuant to notice and agreement of counsel.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

Michael R. Willis, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. Michael R. Willis; age, 28; Denmark, S. C.; retail druggist, and at the present time I am also City Clerk and Treasurer of the City of Denmark.

Q2. How long have you been in the retail drug business at Denmark?

A. Since 1910.

Q3. Do you know Mr. L. B. Hardy, a former representative of Wm. R. Warner & Co.?

A. Yes, sir.

Q4. Did you ever buy goods of him while he was representing Wm. R. Warner & Co.?

A. Yes, sir.

Q5. Did you ever buy of him a preparation called Quin-Coco?

A. Yes, sir.

Q6. What representations were made to you by Mr. Hardy in soliciting your order for this preparation as an inducement for you to purchase it?

By Mr. Rawle: Counsel for defendant objects to the question as not proper for rebuttal and as inadmissible, the matter inquired of being part of the plaintiff's *prima facie* case, and the subject having been there examined into at great length. He repeats the objections and notices hitherto made since the beginning of the rebuttal testimony to this line of evidence and gives notice that a motion to strike all such testimony from the record with costs.

A. He said it was the same thing as Coco-Quinine, the only difference being the price; that is was a good substitute; that nobody could tell the difference. That is practically the argument he put forth.

Q7. Did he demonstrate in any way that the two preparations were sufficiently alike that no one could tell the difference?

By Mr. Rawle: Same objections and notice and further as leading.

A. Yes, he showed me his sample; had me pour some Coco-Quinine in a clear bottle and asked me if I

could tell the difference, by looks or taste. I don't think I tasted it but I couldn't tell any difference.

By Mr. Rawle: The answer is further objected to as irrelevant.

Q8. Have you purchased goods of other representatives of Wm. R. Warner & Co.? If so, how many?

By Mr. Rawle: Same objections.

A. Yes, sir; I bought from Atkinson and I don't remember the last man who came through there; he only made one trip and I have forgotten his name.

Q9. Did Mr. Hardy represent to you any other of the Warner items to be good substitutes for items of other houses?

By Mr. Rawle: Objected to as not proper for rebuttal, as irrelevant and leading.

A. Yes, sir.

Q10. Can you recall some of them, and if so, please name them?

By Mr. Rawle: Objected to as not proper for rebuttal and as irrelevant.

A. Aloin, belle donna, strychnine and ipecac pills, as a substitute for lapactics. Mr. Hardy didn't show me any other, at least I didn't buy them if he did.

Q11. What was the policy of the other Warner representatives who have called on you in soliciting orders for the same items?

By Mr. Rawle: Objected to as not proper for rebuttal; because the only admissible evidence is as to what was said and a question as to "policy" is inadmissible.

A. The same as Mr. Hardy's.

Q12. What is Mr. Hardy's reputation as a man entitled to be believed, if you know?

By Mr. Rawle: Objected to as not proper for rebuttal and as inadmissible.

A. He impressed me as being a reputable man.

Direct-examination closed.

Cross-examination. (at 10.45)

By Mr. Rawle (without waiver of objections):

XQ13. Mr. Willis, you will pardon me if I ask you whether you consider yourself an honest druggist?

A. So far as I can I try to be fair and square.

XQ14. Did Hardy make you any dishonest proposition as to Quin-Coco or Aloin?

By Mr. Bradford: Objected to as calling for matter of opinion and not competent or relevant.

A. It did not prove so if he did.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ14. What do you mean by "It did not prove so"?

By Mr. Rawle: Same objections.

A. I mean that I could not tell the difference in the preparations.

By Mr. Rawle: A motion is made to strike this deposition from the record.

Deposition closed.

Michael R. Willis.

Francis M. King, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford: (at 11.10 a. m.)

Q1. Please state your name, age, residence and occupation?

A. Francis M. King; age 32; 43 West Peach Tree St., Atlanta, Ga.; salesman for Eli Lilly & Co.

Q2. How long have you been in the drug business and where?

A. Since 1905, in Macon, Eastman, Columbus, Rome, Daltonville and Atlanta, all in Georgia.

Q3. Are you a graduate pharmacist and if so, when did you graduate?

A. I am. From Mercer University, in 1907.

Q4. Won't you please give the names of the stores in which you have worked, and your position in each store from the beginning down to the time you began working for Eli Lilly & Co.?

A. Clerk in Person's Pharmacy, Macon, Ga., from 1905 to 1907; I then went to Pellew's Pharmacy, Macon, Ga., as clerk from 1907 to 1909; I was then made manager of the Vineville drug store of Macon, Ga., owned by Pellew's, from 1909 to 1910. I filled in at Eastman Drug Company for a month as manager. I was then manager of the Fox Drug Company, of Columbus, for four months. I then opened Wright & Graham store at Rome, Ga., and was there for two years as manager. I then bought a store in Dalton, Georgia, and operated it myself for two years. I was then sick for a year and did not work. Last August I took charge of Palmer's drug store in Atlanta, until January 29th, 1916, when I went with Eli Lilly & Co., as traveling salesman, covering North Georgia territory, except Atlanta, including a section of North Alabama, which position I now hold.

Q5. Do you know Stonewall J. Nottingham, who was a witness for defendant in this case, and if so, how long have you known him?

A. I do, and have known him for about seven years.

Q6. What have been your relations with Mr. Nottingham?

A. I have bought goods from him and have known him in a business way only, covering this period of seven years.

Q7. Stonewall J. Nottingham, as a witness on behalf of defendant herein, testified as follows:

"Q15. If a retail druggist on a prescription or a call over the counter, specifying a given preparation made by a certain house, should dispense a similar preparation of a different house, state whether or not you consider that as honest on the part of the druggist?

A. I think it is dishonest; I know it is dishonest.

Q16. Will you state whether or not you thereby express the ethical standard of honesty in a drug business?

A. It is dishonest, where a specification is given, not to supply what is specified.

Q17. Is that the ethical standard of the retail drug business?

A. That is the way I understand it.

Q18. If a salesman should suggest that sort of thing to a retail druggist in offering him goods, will you state whether or not you consider that would be honest on the part of the salesman?

A. It would be dishonest to suggest replacing one article for another; where one is specified it should always be given.

Q19. Will you state whether or not that has been your standard?

A. That is my standard."

I ask your attention to these questions and answers of Nottingham and whether or not the standard of ethics there defined by him is the same as practiced by him in his soliciting orders from you and if not in what particulars his practice was inconsistent with this statement?

By Mr. Rawle: Objected to as not proper for rebuttal, as leading, as calling for generalizations and inferences, and an opinion, instead of asking

for facts, and as inadmissible and incompetent. Notice of a motion to strike out is given.

A. It is not in accordance with his policy in soliciting business from me. On one occasion I remember his suggesting that I buy a pill from him as a substitute for Park Davis & Company's Alophen and an elixir to replace Battle & Co.'s Papine, both of which items I bought at Mr. Nottingham's suggestion.

Q8. Please state the conversation that took place between you and Nottingham at the time, and any incidents leading up to the deal?

By Mr. Rawle: Objected to as not proper for rebuttal and as inadmissible.

A. When Mr. Nottingham suggested my buying a pill to replace Alophen pills, I laughed because I did not think he had one as I was not very familiar with soft mass pills at that time, and was under the impression that Park, Davis & Co. were the only people who made one. He offered to take some Alophen pills and some of his replacer, put them in separate containers, mix them behind my back, and bet a cigar I could not tell the difference. I lost the cigar, I could not tell the difference. The elixir I bought on his say so.

Q9. Was any one present at this interview with Nottingham?

A. My clerk, F. C. Black.

Q10. Where did this incident take place?

A. In the front part of the store of the King Drug Company, Dalton, Georgia.

Q11. Did Mr. Nottingham ever solicit your order for a preparation called Quin-Coco? If so, what representations did he make respecting this item?

By Mr. Rawle: Same objections.

A. He offered Quin-Coco as a substitute for Coco-Quinine on several occasions, once in particular insisting that I try it, but I never did.

Q12. What did he say to you with respect to the two preparations, Coco-Quinine and Quin-Coco?

By Mr. Rawle: Same objections.

A. That they were the same thing; that Quin-Coco could be used for Coco-Quinine; and that I would make more money.

Q13. Mr. Nottingham as a witness for defendant testified in answer to Q31, page 399, of defendant's record, that he has never suggested to any one replacing Coco-Quinine with Quin-Coco. Your last answer would seem to indicate that Mr. Nottingham erred in this statement. What have you to say as to this?

By Mr. Rawle: Objected to as not proper for rebuttal; as leading, and as improper and inadmissible.

A. He did offer Quin-Coco to me as a substitute for Coco-Quinine.

Q14. In answer to Q40, page 401, he stated that the majority of chocolate quinine preparations in his territory is sold over the counter "on calls for syrup of quinine, chocolate quinine, sweet quinine". From your experience as a retail druggist in the several localities where you have served in drug stores, what is your view as to the correctness of this statement?

By Mr. Rawle: Objected to as not proper for rebuttal.

A. I don't recall ever having a call for "chocolate quinine" as such, but always as Coco-Quinine.

Q15. How about "Syrup of Quinine"?

Same objection.

A. If I were working in a retail drug store and had a call for "Syrup of Quinine" I would give them tasteless syrup of quinine which is not a similar preparation to Coco-Quinine at all.

Q16. How about "sweet quinine"?

Same objection.

A. That holds good of sweet quinine too.

Q17. Will you please explain the difference between Coco-Quinine and the preparation you have referred to as "tasteless syrup of quinine"?

Same objection.

A. Tasteless syrup of quinine is a suspension of the cinchona alkaloid in simple syrup like Fibrilene, while Coco-Quinine—I don't know what Coco-Quinine is—it is a special preparation of a syrup of quinine in which is incorporated chocolate.

Q18. While in the retail drug business did you ever have a call for "chocolate quinine" either over the counter or on prescription?

By Mr. Rawle: Same objection.

A. To the best of my recollection I have not.

Q19. Does this cover your entire period of service from 1905 down to February 1916?

Same objection.

A. It does.

Q20. In answer to Q58, page 404, defendant's record, witness Nottingham defined his method of practice in taking up with the retail druggist a proposition to sell him Quin-Coco as follows:

> "A. I ask him how is their stock of Quin-Coco, and if they ever handled it before, or chocolate quinine—I would say, 'How is the chocolate quinine'? They have a regular demand for it right over the counter, for chocolate quinine. I gave the labels there of several of them. That is the way they get rid of it. A good many doctors prescribe it, preferring it to any other make."

What have you to say as to this?

By Mr. Rawle: Objected to as not proper for rebuttal.

A. I recall once on Nottingham's asking for busi-

ness of his picking up my stock bottle of Coco-Quinine and asking "How about sending you a gallon of this at a price." I turned him down so flat that he didn't worry me about Quin-Coco any more.

By Mr. Rawle: The answer is objected to as not stating what was said, being merely an inference.

Q21. At any time did Nottingham ever introduce the subject with you by asking you "How is your stock of Quin-Coco"?

Same objection.

A. No, sir.

Q22. Did he ever introduce the subject with the question, "How is the chocolate quinine"?

By Mr. Rawle: Objected to as not proper for rebuttal, as leading and as inadmissible.

A. He did not.

Q23. Did Nottingham ever offer you Quin-Coco put up in two ounce bottles and four ounce bottles to be sold under the original label?

By Mr. Rawle: Objected to as not proper for rebuttal and as leading and irrelevant.

A. He did not.

Q24. Was the item Coco-Quinine handled and sold on prescription and on call over the counter in the several retail stores where you worked during the period from 1905 to 1916?

A. It was.

Q25. Was it in fairly good demand at these several stores?

By Mr. Rawle: Objected to as not proper for rebuttal and as irrelevant.

A. It was a ready seller, both on call and on prescriptions.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 12 m., without waiver of objections):

XQ26. I understand that Coco-Quinine is bought by druggists in bulk and that when sold over the counter it is transferred to the druggist's own bottle with the druggist's own label. Is that correct?

A. Usually, although I have sold original pints.

XQ27. But not frequently?

A. No big demand for original pints, but enough to warrant all the stores carrying them in stock as well in bulk packages.

XQ28. Have you ever stocked Quin-Coco?

A. No, sir.

XQ29. Do you know whose product it is?

A. My recollection is that it has a Searle & Hereth label on it.

XQ30. Do you know whether it is known in the trade as their product?

A. Quin-Coco is known to the trade generally as Warner's substitute for Coco-Quinine.

XQ31. Are you speaking now as a Lilly salesman, which you are, or from your experience as a retail druggist?

A. I am speaking from a knowledge acquired both in the retail drug business and as a salesman.

XQ32. When you offer for sale to a retail druggist a Lilly product which is similar in therapeutic effect to some product of another drug house, do you consider you are offering it as a substitute for that other product?

By Mr. Bradford: Objected to as not cross-examination, immaterial, incompetent and irrelevant.

A. If another pharmaceutical house copyrighted specialty, yes. If a general line pharmaceutical, no.

XQ33. Name some Lilly products which are similar to products of other houses?

By Mr. Bradford: Objected to as not cross-examination, as a gross violation of the right of cross-examination outside of the court room, an endeavor to make witness his own, and as incompetent, immaterial and irrelevant.

A. Tablets of calomel and soda, fluid extract of cascara, elixir of iron, quinine and strychnine, all of which I am under the impression are manufactured and sold by all pharmaceutical houses.

XQ34. Please name other preparations?

By Mr. Bradford: Objection repeated.

A. Fluid extract of ergot, fluid extract of prickly ash, Blaud's Pills, compound cathartic pills, tablets of calomel, of ipecac, and soda, elixir of aletris compound, elixir of lactated pepsin, elixir of buchu, juniper and potassium acitate.

XQ35. I understand that as to all these mentioned Lilly products a similar product is marketed by one or more or many other drug houses. Is that correct?

By Mr. Bradford: Objection repeated.

A. To the best of my knowledge, yes.

XQ36. How many more such Lilly products could you name as to which a similar product is marketed by one or more other houses in competition with Lilly's products?

By Mr. Bradford: Objection repeated.

A. It would be a question of memory to a large extent.

XQ37. Give your estimate of how many such products there are?

By Mr. Bradford: Objection repeated.

A. Never having counted competitive items in the Lilly catalogue, I am unable to give even a rough estimate.

XQ38. Have you any doubt that there are as many as a hundred such?

By Mr. Bradford: Objection repeated.

A. Absolutely none.

XQ39. Have you any doubt that there are as many as five hundred such?

By Mr. Bradford: Objection repeated.

A. I know that there are as many as a hundred but I have no idea how many more.

XQ40. I understand that any druggist carrying such a Lilly product as to which there is a similar product made by another house, could without fear of detection supply the Lilly product when a make of another house is called for on prescription or over the counter. Is this substantially correct?

By Mr. Bradford: Objection repeated, and further a protest is placed of record against this manifestly unfair procedure, in no sense cross-examination, and notice given that it will be called to the Court's attention, not only for the purpose of determining the competency of the question propounded but also for the purpose of taxing defendant with costs.

A. Of the items I have enumerated, yes, except in shapes and styles of pills and tablets.

XQ41. Then, whether or not the druggist thus uses the Lilly product is a matter for the honesty of the druggist, is it not?

By Mr. Bradford: Objection and protest repeated.

A. Unless some particular house's product is specified, inasmuch as these products, or rather the formula for these products, in the majority of instances, is designated either by the pharmacopœia, National Formulary, or some other official reference book, it is not a question, on these items, of honesty or substitution.

XQ42. But I think you have said that in respect of the Lilly products you have been referring to, a retail druggist could dishonestly use one of the Lilly

products when a similar product of another house was called for on prescription or over the counter. Is that correct?

By Mr. Bradford: Objection and protest repeated.

A. If a general line product is called for over the counter or prescribed with some particular manufacturer's make called for, it would be dishonest to give him some other manufacturer's make, without the customer's knowledge.

XQ43. And that would be a question for the honesty of the druggist, wouldn't it?

By Mr. Bradford: Objection and protest repeated.

A. I should think so.

XQ44. When you sell a retail druggist one of these Lilly products which he could, if he were dishonestly minded, pass off for a similar product of another house, do you consider that you were dishonest in selling the druggist that product?

By Mr. Bradford: Objection and protest repeated.

A. If I sell him a product under our formula and name on the merits of our product and our price, without any reference to anything else, I do not consider it dishonest.

XQ45. If a retail druggist should say to you that he had been stocking Park, Davis & Company's elixir of iron, quinine and strychnine, and should ask you if Lilly had any like or similar preparation, what would you say?

By Mr. Bradford: Objection and protest repeated.

A. That Eli Lilly & Co. manufactured both U. S. P. and other iron, quinine and strychnine formulas, and would endeavor to sell him our product.

XQ46. Do you really think you would be so elaborate as that? Wouldn't you probably just mention the Lilly product and offer it to him?

By Mr. Bradford: Objection and protest repeated.

A. Inasmuch as both Park, Davis and Lilly manufacture several formulas for this product, it would take some investigation as to the formula they desire to find out the price, so this elaborateness would seem somewhat necessary.

XQ48. Are all the Lilly products that you have mentioned made on formulas of either the U. S. P. or the N. F., and if not, which are not?

By Mr. Bradford: Objection and protest repeated.

A. To the best of my knowledge the majority of these formulas are manufactured by the processes or formulas given in some standard work on pharmacy.

XQ49. Can't a dishonest druggist pass off a preparation of a given house made under a U. S. P. or N. F. formula for a similar preparation of another house just as well as if neither preparation were made under the U. S. P. or N. F. formula, and if he did so would it not be just as dishonest in the druggist?

By Mr. Bradford: Objection and protest repeated, and further objection to the question is made as calling for opinion.

A. I am unable to answer that question.

XQ50. Why can't you?

By Mr. Bradford: Objection and protest repeated.

A. Because technique in the manufacture of various products of all houses will cause a variation in color, taste and appearance, that would sometimes make such a transaction impossible without detection.

Recess until 2.30.

Afterr recess.

XQ51. Can not a disshonest druggist dishonestly pass off a preparation off a given house made under a U. S. P. or N. F. formula, for a similar preparation of another house, just as wwell as if neither preparation were made under a U. S.. P. or N. F. formula, and if he did so, would it not, in your opinion, be just as dishonest in the druggist?? In answering the question assume that the respectivve preparations are substantially similar in color, tastte and appearance?

By Mr. Bradfordd: Objection and protest repeated.

A. If in the call for tlhe particular preparation the prospective customer hadd specified some particular manufacturer's make, the substitution of another manufacturer's make would, inn my opinion, be dishonest.

XQ52. And that couldd take place dishonestly just as easily with U. S. P. orr N. F. preparations as with preparations that are nott U. S. P. or N. F., could it not?

By Mr. Bradfordd: Objection and protest repeated.

A. In my opinion the disregard of the specification would be where the dishonesty would come in.

XQ53. You have refeerred to an offer from Nottingham of a Warner prooduct similar to Parke-Davis alophen and of an elixir similar to Battle's papene. Are either of those preparrations U. S. P or N. F.?

Same objection aind protest.

A. They are not so fair as I know. I have not seen the latest issues of the U. SS. P. and N. F.

XQ54. Does Lilly mairket preparations similar to alophen P. D and Papenne, Battle, and if so what is the name of the product?

By Mr. Bradfordd: Objected to as not cross-examination, incompeetent, immaterial and irrelevant.

A. Yes; Phenolththalien Compound and elixir of morphine hydrochloride. There are two of those Phenolththalien Compounds. I don't recall which is similar to Parke-Davis' preparations.

XQ54. If you were offering a retail druggist those Lilly products and you demonstrated to him that they were pharmaceutically similar to the respective Parke-Davis and Battle preparations, would you think that you were making him a dishonest proposal that he should in selling your Lilly products dishonestly pass them off for the Parke-Davis and Battle products respectively when they were specifically called for?

By Mr. Bradford: Objection repeated and a protest against this line of questioning is made on the ground that it is not only not cross-examination, but a most flagrant violation of the rules of evidence, and a grossly unfair advantage of the privilege of cross-examining the witness outside of the court room.

By Mr. Rawle: If I did not deem my questions and each of them perfectly proper in cross-examination I would not ask them.

By Mr. Bradford: The Court's attention is asked to the fact that there is not the slightest basis in the direct-examination for any question asked this witness on cross-examination. The examination is manifestly taking unfair advantage of the situation referred to to put upon the record matters which counsel believes may be of advantage to his side of the case, and which he had ample opportunity to show and to prove in his own time and by his own witnesses and which under no rule of evidence has he a shadow of right to attempt to prove by plaintiff's witnesses.

A. If I suggested that he substitute the Lilly product in question for the original in question, I would consider that I had made my prospective customer a dishonest proposition.

XQ55. What year was it that Nottingham offered you preparations similar to alophen and papene?

A. The year 1913, to the best of my recollection.

XQ56. I am sure I am right in assuming that you carried yourself honestly all those years as a retail druggist, and in assuming that as a Southern man you would be quick to resent any reflection on your honesty. Please state whether you said anything to Nottingham by way of resenting anything he said to you in offering you this product similar to alophen and papene, and if so, state the words which you used?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant, not calling for any information having the slightest value in determining any question at issue in this case, and also as including unnecessary and frivolous insinuations.

A. I am sorry to say that I bought the two products at Mr. Nottingham's suggestion as a substitute for the two items in question and used them as such, not only on one occasion, but to my certain recollection twice. And I consider that I violated the ethics of my profession in allowing Mr. Nottingham to persuade me to do this.

XQ57. As you admit that you were a dishonest druggist on these occasions in selling those goods, may it not be possible that some of the temptation to buy them from Nottingham came from you yourself?

By Mr. Bradford: Objection repeated.

A. Not knowing that Mr. Nottingham was with a house that offered substitutes for any product the suggestion to use them as substitutes came from him, my not knowing that such items were manufactured at that time by anyone but the originators of these two products.

By Mr. Rawle: The answer is objected to for bias on the part of the witness who is employed by the plaintiff.

By Mr. Bradford: It is noted that if a like objection had been recorded to defendant's testimony and would properly lie against defendant's testimony, but little would remain to support defendant's contentions.

XQ58. When was it that Nottingham picked up your stock bottle of Coco-Quinine, as you have testified (Q20)?

A. During the solicitation of business at the same time the other items were purchased. It was in 1913.

XQ59. Was that the first time he ever solicited your trade in any drug store?

A. That was the first time that he had ever called on me after I was in a position to do the buying, Mr. Nottingham not having called on me in Rome, so far as I can remember.

XQ60. Has Nottingham since solicited your trade?

A. Mr. Nottingham called on me last Fall, while I was manager of Palmer's drug store, Atlanta, Ga., and solicited business from me.

XQ61. Did you buy anything?

A. I bought to the best of my recollection a small deal of Sloane's Liniment at this time.

XQ62. Prior to 1913, when Nottingham called on you, had you known that there was a Quin-Coco preparation on the market?

A. My first recollection of Quin-Coco was an endeavor on Mr. Nottingham's part to sell my employer Mr. L. E. Pellew, of Macon, Ga., some of this product. I can't just definitely give you the time on this. It was along during 1909 and '10, during my employ by Mr. Pellew.

XQ63. Between 1909 and '10 and 1913, do you think you were familiar with the fact that there was a product on the market called Quin-Coco?

A. I don't suppose I had a lapse of memory during that time

XQ64. Then if you were familiar with that fact, did you know that it was a Searle & Hereth product?

A. No, sir; I did not.

XQ65. When did you first know that?

A. I believe that the first knowledge I had of its being marketed under the Searle & Hereth label, was on Mr. Nottingham's visit to me in Dalton, Georgia, in 1913. I recall having seen in Mr. Nottingham's label portfolio a number of Searle & Hereth labels, and to the best of my recollection that was the first time I had ever seen a Quin-Coco, Searle & Hereth, label?

XQ66. Then at the time he picked up your stock bottle of Coco-Quinine did you know that there was a Quin-Coco product on the market under a Searle & Hereth label?

A. I can't say, not knowing whether this happened before or after I had looked at Mr. Nottingham's portfolio.

XQ67. When he picked up your stock bottle of Coco-Quinine and made the remark you have stated, did you understand him to offer to sell you specifically some Coco-Quinine, or a product similar to it?

A. I understood that he was offering me a substitute for Coco-Quinine.

XQ68. That is something that you could dishonestly pass off for Coco-Quinine if you wished to do so? Is that correct?

A. That is my idea of the meaning of the word "substitute".

XQ69. Are there not a great number of preparations in stock in any well stocked drug store of which there are similar products of two or more houses, and as to which the druggist, if dishonest, could pass off one for the other dishonestly?

By Mr. Bradford: Objected to as not cross-examination, incompetent, immaterial and irrelevant.

A. There are a number of similar preparations made by various pharmaceutical houses that possibly could be passed off one for the other.

XQ70. Would there be as many as one hundred of such in a big drug store?

By Mr. Bradford: Objection repeated.

A. I am unable to say.

XQ71. Is not your familiarity with drugs as a Lilly salesman sufficient to enable you to give an approximate answer to my question?

By Mr. Bradford: Same objection.

A. It is not.

XQ72. As a Lilly salesman do not a very large number of your items which you are offering to druggists come into direct competition with similar preparations of other houses?

By Mr. Bradford: Objection repeated.

A. Practically all the general line items are competitive items.

XQ73. In your answer to XQs. 33 and 34 (page 75) you named Lilly products which are similar to corresponding products of other houses. Are these "general line" products?

By Mr. Bradford: Objection repeated.

A. They are.

XQ74. You say that practically all the general line items are competitive. What other class or items are likewise competitive with the products of one or more other houses?

By Mr. Bradford: Objection repeated.

A. Empty capsules.

XQ75. Are Lilly's line of fluid extracts more or less competitive with similar products of other houses?

By Mr. Bradford: Objection repeated.

A. They are.

XQ76. Are Lilly's line of pills, competitive with similar products of other houses?

By Mr. Bradford: Objection repeated.

A. They are, except trade name pills such as Asbic and Aphrodisiaca.

XQ77. Are Lilly's line of soft mass pills and hypo tablets competitive with like products of other houses?

Objected repeated.

A. They are.

XQ78. How about Lilly's tablet line and the following lines, dispensing tablets, lozenges, elixirs, syrups, wines and cordials, tinctures, solid extracts, powdered extracts, and elastic filled capsules? Are all those classes competitive with corresponding products of other houses?

Objection repeated.

A. They are. These are all competitive products, for which Eli Lilly & Co., have endeavored to create Lilly's specifications on general line products by detail work and distribution of both samples and literature to physicians.

By Mr. Rawle: All the answer but the first two words is objected to as volunteered.

XQ79. Are Lilly's line of "specialities" competitive with similar products of one or more other houses? I hand you the Lilly catalogue, 1913-14?

By Mr. Bradford: Objection repeated.

A. In some instances they are competitive items, but in all instances there is some particular characteristic of the Lilly product which makes it more desirable than the others, and in a number of instances Lilly has adopted a special so-called trade name for same.

XQ80. You say the Lilly specialities are competitive in "some instances"? Are they not competitive in the majority of instances?

By Mr. Bradford: Objection repeated.

A. Not under their special names.

XQ81. Please explain your answer?

By Mr. Bradford: Same objection.

A. I mean that the competitive houses either do not or can not market similar preparations under Lilly's special name.

XQ82. But are they competitive irrespective of the Lilly special name or of any other special name? That is are they competitive because they are similar pharmaceutically?

By Mr. Bradford: Objection repeated.

A. Some are and some are not.

XQ83. But I have asked you in XQ80, whether the majority of Lilly "speciality" items are competitive with similar products pharmaceutically of other houses irrespective of mere difference of trade names. Please answer.

By Mr. Bradford: Objection repeated.

A. They are competitive inasmuch as the similar product can be used as substitutes for the Lilly product.

XQ84. In your experience have you had knowledge of any chocolate quinine product on the market other than Coco-Quinine, Lilly, and Quin-Coco, S. & H.?

By Mr. Bradford: Same objection.

A. I have.

XQ85. Have they been offered to you for sale?

By Mr. Bradford: Same objection.

A. They have not.

XQ86. When was it first brought to your attention that you were expected to testify in this case?

A. Friday, June 9th, 1916, when I met Mr. Bradford in Indianapolis, in Mr. Lynn's office, at the laboratories of Eli Lilly & Co.

XQ87. Before you became a Lilly salesman were you asked if you had any information about the matters you have been testifying about today?

A. No.

XQ88. What is your home town?

A. I was born in Houston County, Georgia, near Perry. I am now a resident of Atlanta.

XQ89. Before you entered Lilly's employ had you ever talked with any Lilly employee about this law case, or about the competition between Lilly Company and the Warner Company on the sale of their respective products?

A. Not until after I had been employed by Eli Lilly & Co.

XQ90. Since June 9th, or since your employment by Lilly, have you endeavored to find witnesses who would testify or who might testify in this case, or talked to any druggist about it?

By Mr. Bradford: Objected to as wholly immaterial, incompetent and irrelevant.

A. I have talked to a few personal friends in regard to the suit, but not in an endeavor to get them to testify in the case.

XQ91. Did you do this by direction of the company or of your own volition?

Same objection.

A. Of my own volition.

Cross-examination closed at 4.18 p. m.

By Mr. Bradford: As justifying my protest against the practice of defendant in disregarding the rules of evidence and seeking to make the witness his own and make a record in his own behalf in the time and at the expense of plaintiff, it is made of record that the direct-examination of this witness occupied forty-five minutes, and that the examination by counsel for defendant has occupied two hours and forty-five minutes, not more than twenty minutes of

which has been devoted to questions which can properly be classed as cross-questions or relating to facts brought out in the direct-examination.

Without waiving any objections to questions propounded by counsel for defendant, counsel for plaintiff proceeds with re-direct-examination.

Re-direct-examination.

By Mr. Bradford:

RDQ92. Please state the occasion of your being in Indianapolis on June 9th, 1916, and whether or not your meeting with me at that time was prearranged or accidental?

A. I was in Indianapolis at that time attending a salesman's convention held by Eli Lilly & Co, and the meeting with Mr. Bradford was accidental as I did not know he was there or to be there.

RDQ93. If you recall the conversation that took place between us at that time, please state it as fully as you can?

By Mr. Rawle: Objected to as irrelevant.

A. I was summoned from the convention hall by Mr. Caperton in order to meet Mr. Lynn, whom at that time I had never met, and was introduced to Mr. Bradford as the Lilly attorney, and who was present in Mr. Lynn's office, and knowing of the suit, informed both Mr. Lynn and Mr. Bradford that these facts were known to me, and I was then informed that I would be called as a witness in this case.

RDQ94. In the sale of Lilly products including general line items as well as specialties, is there or is there not a specific demand by the medical profession for the Lilly make?

By Mr. Rawle: Objected to as not rebuttal of cross-examination, or relevant or admissible.

A. There is a specification demand for Lilly general line products as well as specialities.

RDQ95. Explain how this demand is created by Eli Lilly & Co.?

A. By detail work which consists of sampling and distribution of literature on these products to the physicians, and also the liberal use of a mailing list of physicians whose names are supplied by the salesmen.

RDQ96. Have you ever as a Lilly salesman represented to a retail druggist that he could use any product in your line as a substitute for an item made by another house?

By Mr. Rawle: Objected to as not proper for rebuttal of cross-examination and as irrelevant.

A. I have not.

RDQ97. While in the retail drug business did you ever know of a Lilly salesman making such a representation to you or to any of your employees?

By Mr. Rawle: Same objection.

A. I have not.

Re-direct-examination closed—4.45 p. m.

F. M. King.

By Mr. Rawle: I here repeat my objections to this entire deposition as not proper for rebuttal, and repeat my notice of motion to strike the deposition from the record with costs.

By Mr. Bradford: To satisfy the curiosity made evident by a question propounded by counsel for defendant to the last witness near the close of his examination, it is admitted of record that plaintiff's salesmen have been requested to inform either counsel for plaintiff or plaintiff's general manager, Mr. Charles J. Lynn, of facts which they might run on to in their travels which would tend to disprove statements made by some of defend-

ant's witnesses. The last witness being a new man probably has had less opportunity for responding to this request than some of the older men.

By Mr. Rawle: Mr. Rawle asks plaintiff's counsel whether he is willing to say in his frankness as now manifested whether or not the Lilly sales force has as a general thing been directed to look about for witnesses in this case and report the names and circumstances of those discovered by them?

By Mr. Bradford: Mr. Bradford answers that in the discovery of evidence in this case, both prima facie and rebuttal, plaintiff has depended very largely upon its sales force to report facts believed to be material. It is regretted that by far the larger number of witnesses discovered, competent to testify, have declined so to do on the ground that they did not wish to be mixed up in litigation between two houses in neither of which they had any special interest and to neither of which they desired to show any partiality. The witnesses produced, however, and those to be produced, have in most instances been suggested by members of the Lilly sales force.

Mr. Rawle objects to the statement on the record beginning with "It is regretted" as being entirely improper.

Adjourned until 10 o'clock to-morrow, August 8th, 1916, at same place.

Atlanta, Georgia, August 8th, 1916—10 A. M.

Met pursuant to adjournment.

Parties present as before.

JESSE E. GREENE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Jesse E. Greene; age 35; Spartanburg, S. C.; retail druggist.

Q2. How long have you been in the retail drug business?

A. I have been in the retail drug business since 1899.

Q3. Do you buy goods from a house known as Wm. R. Warner & Co.?

A. I have bought from them.

Q4. Do you know a man who formerly worked for Wm. R. Warner & Co. as a salesman by the name of L. B. Hardy?

A. Yes, sir.

Q5. How long have you known Mr. Hardy?

A. For several years. I don't know the exact length of time; I should say six or eight years.

Q6. Do you recall any calls made on you by Mr. Hardy for the purpose of soliciting your order for the products of Wm. R. Warner & Co.?

By MR. RAWLE: Objected to as not proper for rebuttal.

A. Yes, sir; on several occasions.

Q7. Do you remember of any call by Mr. Hardy when certain items in the Warner line were offered to you as substitutes or replacers for items manufactured by other houses?

By MR. RAWLE: Objected to as not proper rebuttal, and as leading.

A. Not by Mr. Hardy.

Q8. Explain more fully, giving the facts covering any incident, such as suggested in my former question, either by Mr. Hardy or any other representative of Wm. R. Warner & Co.?

By Mr. Rawle: Same objections, also because the only question that possibly could be proper is as to what was said; incidents are not evidence.

A. On one occasion Mr. Hardy called with another gentleman, whom he introduced as Mr. McNulty. He introduced Mr. McNulty as sales manager or assistant sales manager and I went through the line with Mr. McNulty, who did the talking.

In the course of that interview he showed me two items and suggested that they could be used as substitutes for other preparations.

By Mr. Rawle: The answer is further objected to as not stating what was said, but merely the inference of the witness.

Q9. What were the items referred to in your last answer?

A. One was a pill containing aloin, belladonna, strychnine and ipecac, the same formula as lapactic pills manufactured by Sharp & Dohme, and the other was a chocolate syrup of quinine which he said was the same thing as Lilly's Coco-Quinine.

Q10. What did Mr. McNulty say respecting the two pills, that is, his pill, A. B. S. & I. and the lapactic pills, Sharp & Dohme?

By Mr. Rawle: Same objections, and as irrelevant.

A. He poured a few of the pills from his sample bottle into his hand and showed them to me, and called my attention to the fact that they were the same in appearance as the lapactic pills and that the formula was exactly the same.

He also named the price of lapactic pills and the

price of his pills, which were cheaper, and called my attention to the saving it would be to use his pills.

Q11. Did he tell you how you could dispense his pills, and if he did, what did he say?

By Mr. Rawle: Same objections.

A. He did not tell me how I could dispense his pills any more than I have already said.

Q12. Did he compare them with the lapactic pills?

By Mr. Rawle: Same objection and as leading.

A. This conversation took place in the front of the store, and we kept our lapactic pills in the rear in the prescription counter, and he had no opportunity to make an actual comparison, but he showed me his pills and said that it was the same in size, shape, color, and in general appearance and formula as the lapactic pills.

Q13. Had you any demand at your store for A. B. S. & I. pill Warner?

By Mr. Rawle: Objected to as not proper rebuttal and as irrelevant.

A. No, sir.

Q14. Have you ever had any demand at your store for A. B. S. & I. pill Warner?

Same objections.

A. No, sir.

Q15. Have you any demand at your store or have you ever had any demand at your store for Quin-Coco?

By Mr. Rawle: Objected to as not proper for rebuttal and as leading.

A. No, sir.

Q16. Have you ever seen a prescription written for Quin-Coco?

Same objections.

A. I don't recall ever having seen a prescription for Quin-Coco.

Q17. How do your customers and your physicians call for Coco-Quinine? By what name, I mean?

A. By the name of Coco-Quinine.

Q18. Do they ask for chocolate quinine frequently?

Same objections.

A. No, sir.

Q19. When did this incident occur, as near as you can recall? I refer to the time when Mr. McNulty called in company with Mr. Hardy and offered you their A. B. S. & I. pill and other items?

A. It occurred four or five years ago; I can't remember the exact date. In the Spring or Summer of 1912, I think it was.

Direct-examination closed at 10.30.

Cross-examination.

By Mr. Rawle (at 10.30, without waiver of objections):

XQ20. Did McNulty say to you that his Quin-Coco was similar to Lilly's Coco-Quinine or just like it?

A. Yes, sir.

XQ21. Meaning, I suppose, therapeutically the same preparations?

A. Yes, sir.

XQ22. And that I understand is the substance of what he said?

A. That and his reference to the saving of money by using it instead of Coco-Quinine.

XQ23. When was it first suggested to you that you should testify in this case, or when were you first told that there was a litigation between the Warner Company and the Lilly Company?

A. In the early part of this year, during the latter part of January or the first part of February.

XQ24. Who suggested the subject to you first?

A. I was told about the litigation by Mr. Hardy.

XQ25. How did you happen to meet Mr. Hardy; did he call on you?

A. He was in Spartanburg, my home town.

XQ26. Did he suggest to you or ask you to testify in this case?

A. At that time he did not. He asked me if I would if there was ever any occasion to do so.

XQ27. Who did you see next connected with the Lilly house on this subject?

A. I have not seen anybody else until I saw Mr. Bradford this morning.

XQ28. Then you came here pursuant to a letter, perhaps?

A. Yes.

XQ29. From whom?

A. From Mr. W. R. Bell.

XQ30. Who is he?

A. I didn't know him. His letter was written on Eli Lilly & Company's stationery and I presume that he is employed by them in some capacity?

XQ31. Where is it dated?

A. Atlanta, Georgia.

XQ32. When Hardy called on you last January or February did he discuss with you what had been said at the interview between him and McNulty and you as to which you have testified?

A. Yes, sir. He discussed it in a general way. The burden of Mr. Hardy's conversation was in regard to himself, his position in the matter. He said that he had made an affidavit that had been contradicted by another affidavit of one of Warner's men, and he was very much concerned about his veracity being questioned and at stake, and it was that feature of it that he talked about more than anything else.

XQ33. Did he state to you then his recollection of what McNulty had said at that interview?

A. Mr. Hardy did not lead me along in that. He only agreed with me when he found that I remembered

these things, and told me that after I had made these statements that I was right, that he remembered them the same way.

XQ34. How long did he talk to you at that call?

A. I suppose fifteen or twenty minutes.

XQ35. Did you buy any of those two Warner products from McNulty?

A. No, sir.

XQ36. Have you ever stocked either of those products of Warner?

A. No, sir.

XQ37. How many bills of goods have you bought from Warner?

By Mr. Bradford: Objected to as not cross-examination; as immaterial, incompetent and irrelevant.

A. Not very many direct, I don't know exactly how many. I have not bought any of their merchandise except through a jobber in a long time.

XQ38. Since the McNulty interview, how often, approximately, have Warner salesmen solicited your trade?

A. Approximately three or four times a year. I mean by that, on their combined line, not on their pharmaceuticals alone.

XQ39. At the McNulty interview did McNulty offer you substantially the entire line of the Warner company and their various lines?

A. Yes, sir.

XQ40. Didn't it consist of a great many thousand items?

By Mr. Bradford: Objected to as calling merely for opinion.

A. It was an unusually extensive line; I don't know how many items.

XQ41. How long did the interview last?

A. I should say a half or three-quarters of an hour.

XQ42. Do you know of any other drug house that

markets a preparation therapeutically similar to Sharp & Dohme's lapactic pills?

By Mr. Bradford: Objected to as not cross-examination; as incompetent, immaterial and irrelevant.

A. Yes, sir; I know of more than one, unless they have recently discontinued.

XQ43. I mean, did you at the time of the McNulty interview know of such?

Same objection.

A. Yes, sir.

XQ44. Please name the drug houses and the respective names of their products?

Same objection.

A. The only one that I am absolutely positive about now is Park, Davis & Co. The reason my memory is clear on that is because I worked for them at one time.

XQ45. Which makes of that kind of pill do you carry?

Same objection.

A. The one made by Sharp & Dohme.

XQ46. Does Lilly market a pill of that kind, therapeutically?

Same objection.

A. I don't know positively, but I think that several of the larger manufacturing pharmaceutical chemists do.

XQ47. Have you ever stocked that kind of pill made by any other house than Sharp & Dohme?

Same objection.

A. I don't recall having done so.

XQ48. If you had a call for Quin-Coco, whose preparation would you understand it to be?

A. Now I would understand it to be Warner's.

Until I heard the name discussed here I did not know what they called their chocolate syrup of quinine.

XQ49. When your customers over the counter call for some kind of a sweet chocolate preparation, by what various names have they called for it, including the colored population?

A. In the community where I live the colored population and very few of the laity are familiar with any chocolate preparation of quinine. It is mostly dispensed on physicians' prescriptions.

XQ50. If you have had calls over the counter by what names have they been?

A. We have occasional calls for Coco-Quinine.

XQ51. Any other name?

A. No, sir.

XQ52. Do you sell Coco-Quinine in the original package, or do you sell it in your own bottles with your own labels?

A. Usually in our own bottles, with our own labels. All prescriptions are put up in that way. We sell it all in that way because we only carry it in large size packages, five pints or gallons.

XQ53. How large is the population of Spartanburg and how many drug stores are there in the place?

A. Spartanburg is approximately 20,000 population with eight or nine drug stores.

XQ54. How far from Atlanta is it?

A. I don't know, it is about five hours on the train.

XQ55. How long have you been here on this business?

A. I came here this morning about 8.45 Atlanta time.

XQ56. When are you going home?

A. I intend to go home tonight.

XQ57. Have you seen Hardy today?

A. Yes, sir; in the lobby of the hotel.

XQ58. What other Lilly man have you seen?

A. Mr. Bradford.

Cross-examination closed at 11.20.

Re-direct-examination.

By Mr. Bradford:

RDQ59. Have you been the buyer for your store continuously during the last four or five years or since your first interview with McNulty about which you have testified?

A. I have been with the exception of a period from January 15, 1916, to June 20th, 1916.

RDQ60. Was there any circumstance at the McNulty interview which impressed it upon your memory and enables you to recall the facts as related regardless of any suggestion by Mr. Hardy or any one else, and if so, please state?

By Mr. Rawle: Objected to as not proper rebuttal or re-direct.

A. Yes, sir; there was an incident that causes me to remember his visit. As stated before, he called on us with Mr. Hardy; Mr. McNulty did all the talking. I endeavored to get out of going through the entire line on account of it being so extensive and taking so long, but Mr. McNulty was very persistent and insisted on showing me through the entire line. He first showed me samples of various pharmaceuticals including the pills and the chocolate quinine syrup that we have been talking about. After finishing that line we looked through his catalogue of non-secrets. I told him before going into the non-secret line that we could not use anything in it as we were local agents for the Rexall goods which pretty thoroughly covered the non-secret field. But he insisted and after turning several pages of the catalogue, probably half through it, my attention was called to a package of Rat and Roach Paste; I have forgotten their name for it, but the style of the package was similar to that of the Stearns Electric Rat and Roach Paste. I gave Mr. McNulty an order for a small quantity of this paste. I don't remember the amount. Then he turned through the rest

of the catalogue and he called my attention to different items that were in it, but I did not see anything else that I wanted and after we had finished this book I told Mr. McNulty to either send this small package I had given him an order for by mail or put it in with a package coming to some other local druggist.

When Mr. McNulty found that that was all I was willing to buy he seemed to get mad and said to me in a tone that suggested anger or impatience that he did not call that an order, and asked me if I did. I told him I didn't care what he called it. He made some remark indicating that he would not send the order in. I told him not to send it in and if he did I would not accept it if he shipped it. In the meantime I had gotten a little mad and seeing my hat near me on the counter I got it and left the store, leaving Mr. McNulty and Mr. Hardy in there packing up their goods. I have never seen Mr. McNulty since.

Re-direct-examination closed.

By Mr. Rawle: Notice of motion to strike out this deposition is given for reasons above set forth.

Deposition closed.

Jesse E. Greene.

Adjourned until tomorrow at Hermitage Hotel, Nashville, Tenn., at 10.30 A. M., August 9th, 1916.

By Mr. Rawle: Mr. Rawle calls attention to the fact that the evidence today has consumed only an hour and twenty minutes of the day, and while appreciating the difficulties of plaintiff's counsel, he hopes that the witnesses can be produced more numerously and the proceedings speeded, as this is a very expensive trip.

By Mr. Bradford: Mr. Bradford regrets that two of the witnesses whom he had expected to examine

here have been unable to attend, one because of absence from home on his vacation, another because his clerk is away on a vacation, and he calls the attention of defendant's counsel to the fact that his original arrangements for taking these depositions contemplated a start of about a month ago and that postponement was wholly for the accommodation of counsel for defendant, which postponement has resulted in materially disarranging our plans and making it impossible in all cases to get the witnesses as we had originally expected. He is assured, however, that proceedings will be speeded as much as possible even though it be necessary in some cases, as in this, to probably lose the benefit of the depositions by some witnesses in contemplation.

Nashville, Tenn.,
Hermitage Hotel,
August 9th, 1916, 10.30 A. M.

Met pursuant to adjournment.

Parties present as before.

DAVID J. KUHN, a witness called by and on behalf of plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. David J. Kuhn, age 48, 1900 State Street, Nashville, Tenn., proprietor of Kuhn's Pharmacy, 1123 Cedar Street. I have been in the retail drug business in Nashville for twenty years. I am now president of the State Pharmaceutical Association of the State of Tennessee and am also President of the Nashville Drug Club.

Q2. Are you accustomed to buy goods of Wm. R. Warner & Co., defendant in this case and if so, how long have you dealt with that house?

A. Yes, sir. I have dealt with them for quite a number of years. I couldn't say definitely just how long, but by referring to my invoices I could give it definitely.

Q3. Have you dealt with them as long as since 1908?

A. Yes, sir.

Q4. Please give the names of salesmen who solicited your order for goods on behalf of Wm. R. Warner & Co.?

A. Mr. Kelton, I think it is Alva Lee Kelton. There is another one who is not now in this territory but in the Memphis territory I think. He was with them for quite a while, a very short name.

Q5. A Mr. Duvall?

A. Yes, sir; that is the name.

Q6. Has any other representative of the Warner house ever solicited your orders for goods?

A. The man succeeding Mr. Duvall whose name I do not recall.

Q7. Have any of the proprietors or managers or assistant sales-manager ever called on you in company with these salesmen?

A. Mr. Pfeiffer called on me in company with Mr. Kelton.

Q8. Which Mr. Pfeiffer?

A. I don't know the initials, that gentleman right over there. (The witness points to Mr. Henry Pfeiffer, who is here present.)

Q9. Did Mr. Henry Pfeiffer, the gentleman present, to whom you have referred, ever solicit your orders for goods, and if so, state the circumstances and what Mr. Pfeiffer said to you?

By Mr. Rawle: The question is objected to as not proper for rebuttal.

A. The only thing I remember was in the sale of a perfume which they manufactured under the title of "Florita" perfume, he saying that it was the same article as Allen's "Janice" perfume.

By Mr. Rawle: The answer is further objected to as irrelevant.

Q10. What did Mr. Pfeiffer say to you in respect to this Florita perfume and how it could be used?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant.

A. That it was an article costing less than the Janice perfume; that very few people could tell the difference between the two. Upon a test made by myself I found it to be so.

Q11. How long have you known Mr. Kelton?

A. I have known Mr. Kelton about sixteen or eighteen years.

Q12. Do you know of his reputation for truth and veracity and if so, what is it?

By Mr. Rawle: Objected to as improper for rebuttal, as irrelevant and as inadmissible, and because no foundation has been laid for the question.

A. I have never heard anything derogatory against him in my life, so far as his truthfulness is concerned. About the only thing that I ever heard was of his being mixed up in some case with a woman in Memphis, which by the way was only hearsay with me.

Q13. My question only referred to Mr. Kelton's reputation for truthfulness? Is he a man that in view of your long acquaintance with him whose word you believe is entitled to be believed?

By Mr. Rawle: Objected to as inadmissible, as incompetent, irrelevant and immaterial.

A. I certainly do.

Direct-examination closed at 11 A. M.

Cross-examination.

By Mr. Rawle: (at 11 A. M. without waiver of objections):

By Mr. Rawle: Above objections are here repeated and notice given of a motion to strike the deposition from the record.

XQ14. Who first mentioned this lawsuit to you and spoke to you about it or about testifying in it?

A. I don't remember.

XQ15. Who arranged with you to come here today?

A. Mr. Bradford called me up.

XQ16. Mention anybody connected with Lilly who has talked with you about this case?

A. No one.

XQ17. No Lilly salesman?

A. Not a single one.

XQ18. Kelton?

A. I don't remember, I would not say that for sure.

By Mr. Bradford: For the information of counsel for defendant counsel for plaintiff states that he had an interview with Mr. Kuhn a few months ago and asked him in reference to this incident which had been told to him by Mr. Kelton. On learning that Mr. Kuhn remembered the incident he asked him to testify for us if at some later date we asked him to do so. He has had no further communication with Mr. Kuhn until he called him on the 'phone at his store about forty minutes ago.

XQ19. In view of this statement by Mr. Bradford do you remember that first interview with Mr. Bradford?

A. I do.

XQ20. Who was with him?

A. I think Mr. Kelton was here, I am not sure, it might have been Mr. Madden. I am not sure.

XQ21. Who is Madden?

A. Mr. Madden is the representative of the Eli Lilly Company.

XQ22. Do you mean that either Madden or Kelton was at the interview?

A. I think one of the two, I would not say for sure who it was.

XQ23. I understand you to testify that one of the two was present at the interview, but that you do not remember which one. Will you think right hard for a moment and see if you can not find somewhere in your memory which one of the two it was?

A. No, I don't. It has been several months ago and would not want to make a statement that I could not absolutely verify.

XQ24. Where did the interview with Mr. Bradford take place?

A. At the Hermitage Hotel.

XQ25. Who asked you to call on Mr. Bradford?

A. I don't remember. I was 'phoned at the store and asked if I would come to the Hermitage Hotel, that a gentleman by the name of Mr. Bradford would like to meet me.

XQ26. And you then called at his room in the hotel?

A. I did.

XQ27. Can't you now remember whether it was Kelton or Madden?

A. I do not.

Deposition closed.

DAVID J. KUHN.

MR. RAWLE asks Mr. Bradford if he will explain on the record his own recollection of this interview.

By MR. BRADFORD (responding): For the information of counsel for defendant, but without admitting that it can have any possible pertinency in the record, and further, without admitting that counsel for defend-

ant has any right to the information, or that it is any of his business, but purely as a matter of courtesy to him, and in response to his request, counsel for plaintiff makes the following statement:

After referring to a memorandum to ascertain the date that he was in Nashville on either February 15th or 16th, 1916, that he had an interview with Mr. Alva Lee Kelton, a witness who has testified for plaintiff in this case; that he showed Mr. Kelton some of the testimony that had been given by witnesses for defendant referring to testimony, or statements in the testimony, by witness Kelton when testifying for plaintiff; that in discussing questions which arose at that interview Kelton informed plaintiff's counsel of the incident which took place in Mr. Kuhn's store, about which Mr. Kuhn has just testified; that he then asked Kelton if it would not be possible for him to have a talk with Mr. Kuhn; that, as counsel recalls, it was Mr. Kelton who 'phoned Mr. Kuhn and asked him if we could see him at his store or if he was coming uptown if he would not stop at the Hermitage Hotel and meet counsel for an interview; Mr. Kuhn, so Mr. Kelton reported, replied that he was coming up town to go to bank and it would be more convenient for him to stop at the hotel than to wait for them at his store; that Mr. Kuhn called in response to the request and the interview before referred to took place. Counsel is under the impression that when Mr. Kuhn arrived Kelton introduced him and after a few words excused himself to keep an engagement at his office, for which he was then overdue, and that most of his interview with Mr. Kuhn was in Kelton's absence, but as to this his memory is not clear and he cannot state positively. This was in the forenoon and Mr. Kelton returned later and spent a considerable part of the afternoon with counsel.

Mr. Rawle having omitted to ask the last witness Kuhn when the interview with Mr. Henry Pfeiffer took place is permitted to state on the record that Mr.

Pfeiffer states to him that it was in 1906 or before and that he has not been in Nashville since 1906.

By Mr. Bradford: After the close of the deposition witness having given plaintiff's counsel some additional information which is believed to be pertinent and rebuttal evidence, counsel for plaintiff asks some additional direct questions as follows, making the same a part of the direct-examination, subject, of course, to further cross-examination:

By Mr. Bradford:

Q28. Did Mr. Duvall, as representing Wm. R. Warner & Co., ever offer you a preparation called "Quin-Coco," and if so, what were his statements to you when soliciting your order for this item?

By Mr. Rawle: Objected to as not proper rebuttal.

A. Yes, sir; he did, stating at the time that Quin-Coco was the same preparation as Coco-Quinine, Lilly, and also he presented me a sheet about the size of this blotter, about four by eight inches, in which he had Quin-Coco listed and directly opposite Quin-Coco, Lilly's Coco-Quinine. In fact this list was presented to me each and every time that I made a purchase from Wm. R. Warner & Co.

Q29. Was it a list similar to the list I hand you? (Showing witness a copy of Plaintiff's Exhibit, Document No. 3.)

A. Yes, sir; folded as that is.

Q30. Did Mr. Kelton ever offer you the same preparation and if so on what statements?

By Mr. Rawle: Objected to as not proper for rebuttal.

A. Mr. Kelton was the first man who ever offered me Quin-Coco for Lilly's Coco-Quinine, saying that it was the best substitute of the kind ever produced.

Q31. Was Mr. Henry Pfeiffer present when Mr. Kelton made this statement?

A. That I will not state for sure. I never met Mr. Pfeiffer but once at my store in company with Mr. Kelton.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiving objections):

XQ32. Did Kelton say to you in effect that Quin-Coco was the same preparation as Coco-Quinine?

A. Yes, sir.

XQ33. And cheaper?

A. Yes, sir.

XQ34. Is that the substance of what he said to you?

A. To the best of my recollection.

XQ35. Kelton did not make you any dishonest proposition as to buying his Quin-Coco did he?

A. I don't understand the question. What do you mean by the term "dishonest"?

XQ36. I mean did Kelton make you any proposition in regard to his Quin-Coco that would not be ethical according to the ethical standards of the drug business? Did he suggest to you that you should do anything that was not ethical?

A. He suggested that inasmuch as Quin-Coco was so much cheaper than Lilly's Coco-Quinine and containing the same per cent. of quinine to the teaspoonful as Lilly's, he thought I would certainly be saving money in handling Quin-Coco instead of Lilly's Coco-Quinine. If he had not made this suggestion I am sure I would not have invested all these years buying Quin-Coco from his firm.

Deposition closed.

David J. Kuhn.

By Mr. Rawle: Notice is given of motion to strike out this deposition.

Adjourned to meet tomorrow, August 10th, 1916, at 9.30 A. M., at same place.

Nashville, Tenn.,
August 10th, 1916—9.30 A. M.

Met pursuant to adjournment.

Parties present as before.

GUS A. BLODAU, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Are you the same Gus A. Blodau who has heretofore testified in this cause on behalf of plaintiff?

A. I am.

Q2. E. B. Duvall, a witness who testified in this case on behalf of the defendant, was asked certain questions respecting statements made by you in your testimony for plaintiff. Among other things in answer to Q27, page 297, Defendant's Record, Mr. Duvall stated in answer to a question as to what was his talk with you on Quin-Coco:

> "When I talked to Mr. Blodau on Quin-Coco it was on the quality of the preparation and I also brought in the price of the product. I told Mr. Blodau the quantity of quinine that our preparation contained, the smoothness of it, that he would be able to pour it into very small neck bottles, it would give absolute satisfaction where any quinine was necessary. My talk also to him was the question of customers that wanted preparations for malaria and bad colds and things of that nature where Quin-Coco could be sold."

In Mr. Duvall's interview with you did he say anything to you about the smoothness of the preparation Quin-Coco or that you would be able to pour it into very small neck bottles?

By MR. RAWLE: Objected to as not proper

for rebuttal, as leading, and as irrelevant, the neck of the bottle not being related to any issue in this case.

A. He did not refer to the Quin-Coco in regard to its being a fluid easily poured into a bottle; that is, as an individual characteristic of that particular thing.

Q3. Did Mr. Duvall at that interview give you any talk on the question of customers that wanted preparations for malaria and bad colds and things of that nature?

By Mr. Rawle: Same objections.

A. No, he did not speak to me in regard to anything of that character.

Q4. Mr. Duvall also states in answer to XQ93, page 307, Defendant's Record, that he is certain that you did not intend in your testimony to lay any stress on the statement made by you that you understood him to intend that you should use Quin-Coco in preference to Coco-Quinine. What have you to say as to this?

By Mr. Rawle: Objected to as not rebuttal.

A. If that was not his intention I really can not understand his idea in showing me the Quin-Coco as I had had no calls for Quin-Coco or chocolate quinine, that the only name by which the chocolate quinine preparation has been called for in my store to the best of my knowledge is Coco-Quinine and as it (chocolate quinine) or Quin-Coco as it is called, would not interest me owing to the fact of having no sale for it under those names.

Q5. Your testimony as previously given then was given intentionally and is in accordance with your clear understanding of Duvall's statements at the interview in question?

By Mr. Rawle: Objected to as not rebuttal and as an incompetent and inadmissible question to ask the witness.

A. I have no reason whatever to state anything but a true answer to all questions that have been asked me at any time before this or now in this case.

Q6. Mr. Duvall also stated in answer to XQ85 that he never mentioned a competitor's product until the subject was first mentioned by his customer? What have you to say as to this?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant and inadmissible.

A. If I am not mistaken his method of introducing this Quin-Coco preparation was by asking me whether I used Coco-Quinine, taking the sample out and holding it up right before me, saying it is a preparation at a much less price, being virtually identical with Coco-Quinine. Otherwise I could not have known that he had had a chocolate quinine preparation among his samples.

Q7. Who mentioned Coco-Quinine first, you or Mr. Duvall?

By Mr. Rawle: Same objection.

A. Mr. Duvall mentioned the fact first as I stated in my last answer. It stands to reason that I would not have any occasion to mention Coco-Quinine unless he approached me with the article that he had.

Q8. It has been stated by some of defendant's witnesses that this preparation is called for by customers more frequently by such names as "Chocolate Quinine," "Sweet Quinine," "Syrup of Quinine," etc. What is your experience as to this?

By Mr. Rawle: Objected to as not rebuttal.

A. I have had no calls for "Sweet Quinine" of that chocolate quinine preparation. "Syrup of Quinine" if called for would be a clear mixture of quinine with orange syrup or lemon syrup, as the flavor may be, and can have no similarity to this preparation. In regard to calls on my precriptions I have yet my first

time to see a prescription for Quin-Coco since I have been in business. My prescriptions run from six to eight thousand a year.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 10.10 A. M., without waiver of objections):

XQ9. You have been a fairly steady customer of Wm. R. Warner & Co., have you not, for the last three or four years?

A. Yes, I have bought considerable amount of goods from them.

XQ10. And their salesman has called on you probably four times a year?

A. He has, about that time.

XQ11. That would be about twelve calls. To which of the twelve calls by Duvall have you been referring?

By Mr. Bradford: Objected to as not a definite or intelligible question, nothing having been said about twelve calls or the period of time in which Duvall served as salesman in Mr. Blodau's territory.

A. I really could not positively state which call. Mr. Duvall I have always thought a good deal of and was always glad to see him in the store and whenever possible I always gave him an order and he did not refer to the substitution proposition, as I termed it, after he discovered my standing on substitution. It was not the last time or two that he was there.

XQ12. Might he not have said to you, holding up his bottle of Quin-Coco, "Do you want any of that," and might you not have replied "No," that you kept only Coco-Quinine.

A. In a large line of pharmaceutical samples a druggist, as a rule, does not jump at the nature of

the contents of a bottle unless he is told what it contains, or he sees the label on the bottle.

XQ13. You have not yet answered my question asking you at which of the interviews with Duvall, the conversation took place which you have testified to. Please do so?

By Mr. Bradford: Objected to as improper.

A. As I have answered only such things that are clear to my mind it is almost an impossibility for me to remember exactly what trip that he displayed this Quin-Coco to me with the recommendation for me purchasing same, as from your own question to me in the form of a statement you say and I admit it that he has called on me for a few years, making four trips a year. This naturally renders it almost an impossibility to remember exactly the trip, but I can state, it was in the early part of his visits to me.

XQ14. When did his visits begin?

By Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. I would judge that I can positively say, that he has called on me for about four years, with the exception of the last four trips. I believe that they have had two different salesmen that have called at my store since he has quit calling on me.

XQ15. Did he at all or most of these various calls offer you the entire Warner line and go through it with you?

A. Every time that he has been to see me I have tried to give him an order as the house has always treated me very nicely and he is an agreeable gentleman. It was unnecessary for him to minutely pick out every sample that he had as I was and am very familiar with the majority of the goods handled by the Wm. R. Warner Co. His line of samples embraces not only Wm. R. Warner's products, but at least six or eight other concerns that the Pfeiffer Chemical Company has absorbed. And it is no trouble to find shorts

whereby you can favor their representative with an order.

XQ16. But was it not his practice at these interviews to mention a considerable number of articles of the Warner and other lines and solicit an order for them?

A. It stands to reason that any representative who is calling on you to sell you goods would naturally show you some samples that he had for that purpose carried around with him.

XQ17. At the interview when he took out his sample bottle of Quin-Coco and held it up right before you, was that the first time you had ever heard of Quin-Coco, marketed by Warner & Co.?

A. The first time that I ever heard of Wm. R. Warner & Company or their representatives having in their sample case Quin-Coco was when Mr. Duvall had occasion to show it to me. I did not know that they put up a preparation of anything like it.

XQ18. How long did that interview last?

A. As a general thing his time spent at my store varies from half an hour to an hour and a half, owing to the fact that we are continually interrupted by some of my attention being diverted to the trade, but on this particular occasion I can not give you the exact amount of time that he spent in my store.

XQ19. I think you said that you and Duvall were good friends?

A. By "good friends" in an instance of this kind I mean a mutual good feeling between the salesman and myself, and not good friends as one would imply by a continued association.

XQ20. But in dealing there was mutual respect between you?

A. In dealing with Mr. Duvall I respect him as much as any salesman that comes in my house and also consider the house of Pfeiffer Chemical Company one of the cleanest and best I have ever had dealings with.

XQ21. When you first testified here about a year ago, what Lilly man had previously talked to you about this case?

A. Mr. G. W. Madden.

XQ22. Since you testified what Lilly man has talked to you about the case and when and how often?

A. This same man spoke to me and I told him I was sorry that I had anything whatever to do with it, and my explanation was exactly the reason that I thought a great deal of Duvall and I did not care to get Mr. Duvall in any trouble.

XQ23. Have you ever talked to Alva Lee Kelton about this case?

A. No direct conversation pertaining to this case in regard to what was said has ever taken place between Mr. Kelton and I. He did ask me if I had testified and how long they kept me up there. In regards to what was said by either side I know of nothing of that character in the conversation.

XQ24. Have you seen Madden here today?

A. I have.

XQ25. Is he here in this hotel?

By Mr. Bradford: Objected to as absolutely immaterial, incompetent and irrelevant. Counsel is advised, however, that Mr. Madden is in the next room and if he wants to see him we will call him in and introduce him.

A. If he is I can not see him. He might be here and he might be gone.

Deposition closed at 10.55.

Gus A. Blodau.

By Mr. Rawle: Notice is given of motion to strike the last deposition from the record for reasons given.

Adjourned to meet tomorrow, Friday, August 11th, 1916, at 11 A. M., at the Hotel Peabody, Memphis, Tenn.

Memphis, Tenn.,
Peabody Hotel,
August 11th, 1916, 11 A. M.

Met pursuant to adjournment.

Parties present as before.

By agreement of counsel adjourned to meet at same place tomorrow, Saturday, August 12th, 1916, at 10 A. M.

August 12th, 1916, 10 A. M.

Met pursuant to adjournment.
Parties present as before.

ELZIE H. WHITE, a witness called by and on behalf of plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Elzie H. White, age 26, McNary, La., pharmacist, in retail drug business. I am manager of the drug department of the Cady Lumber Company, known as the McNary Pharmacy.

Q2. How long have you been in the retail drug business and where?

A. I have been in the drug business since 1908, but not continuously. I stated at Dotson, La., in 1908, as a clerk in the Dotson Drug Store. I worked there until 1909. I then went to school until the spring of 1910. I then went to Winfield, La., and worked in a drug store for Whitley & Thomas as a general clerk and assistant in filling prescriptions. I worked there

until October, 1911. I then left to go to school again. I attended school for two years then, working during vacation. After I finished school I worked for Shreveport Drug Company, at Shreveport, La., until February, 1914. I then went back to Winfield and worked until June, 1914, with the same store but which was then known as the Winfield Drug Company. When I left there I went to the place where I am now working and have been there ever since.

Q3. Do you know a gentleman by the name of James W. Wilkins and if so where have you known him and what are his duties?

A. Yes, sir; I know him. I have known him since about 1910. He is a drug salesman for Wm. R. Warner & Co.

Q4. Were you ever present at an interview between Mr. Wilkins and Mr. John F. Whitley at which Wilkins solicited an order for the Warner goods?

A. Yes, sir; three or four times.

Q5. Were you ever present at such an interview when Mr. Wilkins, among other items, offered Mr. Whitley a preparation known as Quin-Coco, and if you were what did Mr. Wilkins say to Mr. Whitley about this preparation?

By Mr. Rawle: Objected to as not rebuttal, John F. Whitley referred to by the witness having been already examined on behalf of the plaintiff in the prima facie case (p. 599).

A. I was, and Mr. Wilkins showed this preparation to us, explaining the merits of it, stating that he could sell this preparation to us to be used as Coco-Quinine at a less expense and a saving on the original Coco-Quinine.

Q6. Do you recall Mr. Wilkins' exact language and if you do state it as well as you can?

By Mr. Rawle: Same objections.

A. The way I remember it he showed us the prep-

aration stating that it contained two grains of quinine sulphate to the teaspoonful and that he was selling only to the trade in general for the Coco-Quinine preparation and that he could sell it to us in gallon lots at about the same cost as we had been paying for the five pints of Lilly's Coco-Quinine.

Q7. Do you know a man by the name of Henry J. Gonzales?

A. I do.

Q8. How long have you known him and what is his business?

A. I have known him for about six years, I suppose. When I first knew him he was salesman for Park-Davis & Co. I have since known him as salesman for the Wm. R. Warner & Co.

Q9. Has Mr. Gonzales ever solicited your order for Quin-Coco since he has been representing Wm. R. Warner & Co., and if so what did Mr. Gonzales say to you about this item?

By Mr. Rawle: Same objections.

A. Yes, sir; he has solicited my business for it. He just asked if I could use his Quin-Coco, that it was a saving in price over Lilly's Coco-Quinine, stating that I had used it before, to his knowledge, and he knew I could use it at the place where I was now for Coco-Quinine. He also at this time stated that he could sell me his preparation, Quin-Coco, in gallon lots, to take the place of Coco-Quinine, as Lilly had taken their Coco-Quinine off the market in gallon lots, due to the price of quinine sulphate at that time, which was a high price.

Q10. Did you buy the item of Mr. Gonzales?

A. Yes, sir; I bought it from him. I bought a gallon of it.

Q11. Did you sell it?

Same objections.

A. Yes, sir.

Q12. How did you label it when you sold it?

Same objections.

A. I used the regular label, regular printed label of Coco-Quinine.

Q13. When did the interview between Mr. Wilkins and Mr. Whitley concerning which you have testified, take place, as near as you can remember?

A. In the latter part of 1910.

Q14. Did Mr. Whitley buy the preparation Quin-Coco?

A. Mr. Whitley's partner did, Mr. Thomas.

Q15. How was it dispensed at Mr. Whitley's store or at the Thomas-Whitley Store?

By Mr. Rawle: Same objections.

A. Dispensed in the general way as we had always dispensed Coco-Quinine.

Q16. Both on call and on prescription?

By Mr. Rawle: Same objections and because the act of the druggist cannot affect the right of the defendant.

A. Dispensed on calls I am positive. I was not a regular prescription clerk at that time and I can't state as to prescriptions.

Q17. In all your experience as a clerk and druggist have you ever had a customer call for Quin-Coco?

Objected to as not rebuttal and as irrelevant.

A. I have not.

Q18. Have you ever seen a prescription written for Quin-Coco?

A. No, sir.

Q19. As I understand it you fill the prescriptions at your present store?

A. I do.

Q20. And assisted in filling prescriptions at some of the other stores?

A. Yes, sir.

Q21. Have you ever had customers ask for "Chocolate Quinine"?

A. I have had few calls for chocolate quinine. Most of my calls have always been for Coco-Quinine.

Q22. About what proportion of the calls are for "Chocolate Quinine" and what for "Coco-Quinine"?

A. I don't believe I have ever had over a half a dozen calls for chocolate quinine in all of my drug experience. As a rule the customers always call for Coco-Quinine.

Q23. Are these calls frequent?

A. Yes, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 11 A. M. without waiving objections):

XQ24. Who first called your attention to testifying in this case?

A. Lilly's traveling salesman was the first one, Mr. Broussard.

XQ25. When.

A. In the early part of 1915, I think.

XQ26. Prior to the first of April?

A. I would not say positively it was prior to that. It was in the spring of the year.

XQ27. Are you sure it was prior to July 1st, 1915?

A. Yes, sir.

XQ28. Who spoke to you about coming here this time to testify?

A. Mr. Whitley.

XQ29. Your employer?

A. Not now; my former employer, Mr. John F. Whitley.

XQ30. I understood you to say that the interview between Wilkins and Whitley to which you have testified, took place the latter part of 1910? Have you

talked to Mr. Whitley as to what was said by Wilkins at that interview?

A. Yes, sir.

XQ31. When?

A. This year.

XQ32. Recently?

A. Yes, sir; recently.

XQ33. When you talked to him did you know that he had testified as a witness in this case?

A. When I talked to him about it he asked me if I remembered about this transaction he had at that time and I told him that I did.

XQ34. What did he say?

A. He told me that had testified to this incident that had happened in 1910, the latter part, about the quinine preparation.

XQ35. Did you discuss with Whitley what had been said by Wilkins at that interview?

A. We just discussed the transaction that was made in buying the quinine preparation about how it was to be used in place of Coco-Quinine.

XQ36. Did you discuss with him what had been said by Wilkins at that interview. If you did, say so, if you did not, say so?

A. No, sir; we did not discuss the exact conversation that Wilkins had with us at the time Wilkins sold the preparation to us.

XQ37. What I want to know is whether Whitley when talking with you recently about it gave you his version of what Wilkins had said in 1910?

A. No, sir.

XQ38. Did Whitley tell you what he had testified to as having been said by Wilkins in 1910?

A. He told me that he had testified to buying this Quin-Coco and using it for Coco-Quinine and that this had been denied by Mr. Wilkins and asked me if I remembered the transaction and I told him that I did remember it.

XQ39. Did Wilkins tell you that Quin-Coco was the same preparation as Coco-Quinine and was cheaper?

A. He did not tell me personally, he told Mr. Whitley and Mr. Thomas.

XQ40. And that was the substance of what he told them was it not?

A. That was the substance of what I heard at that time, and that we could use his Quin-Coco for Coco-Quinine, at a considerable saving.

XQ41. How often have you seen Wilkins since 1910?

A. I have not seen Mr. Wilkins but once that I remember since I left Winfield in 1911.

XQ42. Did you always find him a square man?

A. What dealings that I had with him were limited as I did not do all the buying at that time.

XQ43. So far as you knew him did you consider him a square man?

A. Yes, sir.

XQ44. When Wilkins asked you or your employer to buy his Quin-Coco and use it in place of Coco-Quinine, did you consider he was making any kind of a dishonest proposition?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant and as merely calling for opinion.

A. At that time I did not give the matter any consideration in that light.

XQ45. How long was this talk with Wilkins?

A. Just during the regular business conversation, not over selling a bill of goods, it was not over half a day selling the whole bill.

XQ46. Do you mean that Wilkins was there for half a day?

A. I think he was there for half a day, during his visit to the store selling a regular bill of goods, selling the line that he sold.

XQ47. How long did the conversation last in regard to Quin-Coco as one of the items?

A. It was very brief, he just merely explained the preparation as being used and selling it to the trade as Coco-Quinine, and its being used as such.

XQ48. Did the talk about Quin-Coco take as long as three minutes?

A. Yes, I am sure that it took that long or longer.

XQ49. Did Wilkins say to you specifically that on calls for Coco-Quinine you could sell Quin-Coco to the customer without telling him anything about it?

A. In his conversation with the purchaser of the drugs he did; he stated that this Quin-Coco was being sold and successfully used as Coco-Quinine.

XQ50. When a customer calls for Coco-Quinine and you sell him Quin-Coco, without telling him, do you consider that honest or ethical in the drug business?

A. It being sold to us with the assurance that we could sell it as Coco-Quinine to the trade, I consider it all right.

XQ51. Don't you know that it is considered dishonest in your business when a customer calls for a certain preparation to sell him another preparation without telling him that you are doing so. Please answer the question, yes or no?

By Mr. Bradford: Objected to as irrelevant and immaterial.

A. No, I don't know that it is.

XQ52. What other Lilly man have you talked to about this case, or seen in relation to it except Broussard?

A. No other Lilly man.

XQ53. Since you came to Memphis have you seen R. L. Winchester, a Lilly salesman?

A. I have not.

XQ54. Who asked you to come here today?

A. Mr. Whitley asked me to come here.

XQ55. When?

A. It has been about a week ago I suppose.

XQ56. Did he say to you who had asked him to ask you?

By Mr. Bradford: Objected to as irrelevant, immaterial and incompetent.

A. Mr. Whitley did not recall any individual by name when he spoke to me about the case. He referred to it as the Lilly case.

XQ57. How do you happen to remember for nearly six years what Wilkins said to Whitley about Quin-Coco?

By Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. One reason why I remember it distinctly is that a little after this Mr. Thomas was taken sick and called away, that he had to go away for his health and for a time I had charge of the store, as Mr. Whitley was not there all the time.

XQ58. You have said that Wilkins spent half a day going over his entire line with Whitley. How do you happen to remember for nearly six years what was said about Quin-Coco which was only one of a large line?

By Mr. Bradford: Objection repeated.

A. Well, I remember one point about it was that they bought the Quin-Coco and we had it there and the first bottle we got did not give absolute satisfaction and I heard Mr. Whitley say something about it that we wanted to take it up with the house and get credit for this bottle or have it replaced with a new bottle.

XQ59. Can you give any other reason why you remember for nearly six years what was said about Quin-Coco out of a large line and in a conversation lasting half a day?

By Mr. Bradford: Same objection.

A. Well I can't give any more reason for that than for remembering other things that happened along the same time. I was working in the store pretty close and giving naturally interest to it and kept up with everything as far as I could.

XQ60. After Whitley said that the first bottle did not give satisfaction did he buy any more Quin-Coco?

Same objection.

A. I don't know, sir, whether he bought any more or not. I think probably he did but as I went away to school I would not be in a position to say positively.

XQ61. When was the interview with Gonzales?

A. Last year, about the latter part of 1915.

XQ62. Did you buy any from—any Quin-Coco from him?

A. Yes, sir.

XQ63. Was that your first interview with him?

A. No, sir; I had seen Mr. Gonzales before, had dealings with him before, I began dealing with him the latter part of 1914 or early part of 1915.

XQ64. When did he first offer you Quin-Coco?

A. In the latter part of 1915.

XQ65. When a particular drug is called for and you have not got it, but you have another drug which you consider just like it, therapeutically, do you fill the order with the latter drug?

By Mr. Bradford: Objected to as not cross-examination as incompetent, irrelevant and immaterial.

A. I have done so in the case of Coco-Quinine by using Quin-Coco, having been assured by the salesman that Quin-Coco is the same preparation and sold and used as Coco-Quinine. At this time when Mr. Gonzales told me this he told me that I could not get Lilly's Coco-Quinine in gallon bottles but that his house was still supplying it in gallon sizes. Due to the drug con-

ditions at that time he encouraged me to buy his preparation.

By Mr. Rawle: The answer is objected to as entirely unresponsive.

XQ66. XQ65 repeated.

By Mr. Bradford: Objection repeated.

A. I have done so when the therapeutical action and the physical effect were the same.

XQ67. Is it a common practice?

Same objection.

A. No, sir.

Deposition closed at 12.15.

By Mr. Rawle: Notice is given of motion to strike out this deposition.

Elzie H. White.

William G. Walker, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford (at 12.15):

Q1. Please state your name, age, residence and occupation?

A. William G. Walker, age 31; Winfield, La.; bookkeeper for the Winfield Drug Company. I am not a registered pharmacist. I do clerking in the store and sell general line items but do not have anything to do with the prescription work.

Q2. Please state how long you have been connected with the retail drug business and where?

A. I was employed in the Dodson Drug Store at Dodson, La., from about April, 1910, to about May 1912, as bookkeeper, assistant pharmacist and general store work. This store was owned by Whitley and Thomas and run as a branch of their Winfield store.

After May, 1912, I went to school for a while then went into a general merchandise store and then went back to work for Whitley at Winfield Drug Store April 1st, 1916, as bookkeeper and clerk.

Q3. Do you know a man by the name of John F. Wilkins and if so who is he and what is his business?

A. Yes, sir. When I knew him about 1911 he was with the Pfeiffer Chemical Company as a traveling salesman selling their general line. I did not know at that time whether it was called Wm. R. Warner & Co. or not. I know it is now.

Q4. Did Mr. Wilkins ever solicit business or orders for his goods at the Dodson Drug Store while you were there, and did you have anything to do with the buying?

A. Yes, sir; and I did the principal part of the buying for prescription department.

Q5. Did Mr. Wilkins ever solicit your order for a preparation called Quin-Coco, and if he did, what did he say to you respecting this item?

By Mr. Rawle: Objected to as not proper for rebuttal, the subject having been fully gone into in plaintiff's prima facie case.

A. He did. He asked us if we had any of this preparation on hand. We told him we did and he was telling us about the large sales that he had all over the country. He said that it was much cheaper than Coco-Quinine, as you could buy about a gallon for what five pints of Coco-Quinine would cost, and that it could be dispensed on a doctor's prescription when Coco-Quinine was specified and was being dispensed all over the country.

Q6. In this way?

A. Yes, in this way, as Coco-Quinine, and was being dispensed all over the country.

Q7. What do you refer to by the words "This preparation" in the first part of your answer to Q5?

A. Quin-Coco.

Q8. I infer then that you already had Quin-Coco in the store when Mr. Wilkins called on you?

A. We did.

Q9. From whom had this been purchased?

A. From Mr. Wilkins.

Q10. Was this purchased from him by you?

Same objection.

A. No.

Q11. So far as you know were there any calls at your store for Quin-Coco or prescriptions written for Quin-Coco?

A. No, not that I ever saw or knew of.

Q12. How were the perscriptions for this preparation that came to this store written?

Same objection.

A. Coco-Quinine.

Q13. By what name was it called for by the laity?

Same objection.

A. Coco-Quinine and very seldom chocolate quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 12.40 without waiving objections):

XQ14. Was this interview with Wilkins at a store with which John F. Whitley was connected?

A. Yes, sir.

XQ15. Was Elzie H. White in the employ of that Whitley Drug Store at the time of the Wilkins interview?

By Mr. Bradford: Objected to as immaterial, incompetent and irrelevant and not cross-examination.

A. Not that store, the Dodson store. He was connected with the Winfield Whitley Drug Store at that time.

XQ16. When was it that Wilkins solicited the order for Quin-Coco as you have testified?

A. About April, 1911.

XQ17. Who was present?

A. Dr. Pankey and Mr. Whitley.

XQ18. Who did the buying, you or Whitney?

A. I did the buying for the prescription department of this store.

XQ19. How long did the interview last?

A. I could not state, only a few minutes, as to Quin-Coco with me.

XQ20. Did he go over his line with you at that interview?

A. He did not, with me, as I only did the buying for the prescription department. He only went over the pharmaceutical part of it, with me.

XQ21. Had he a good many items in the pharmaceutical part of it that he was offering you?

A. I don't remember whether he mentioned any other item in this department, except Quin-Coco.

XQ22. Did you buy any Quin-Coco from him?

A. No, sir; we already had a good stock on hand.

XQ23. Did you tell him you had?

A. We did.

XQ24. If you told him you had why did he go into an argument to persuade you to buy still more when you did not need any?

By Mr. Bradford: Objected to as irrelevant and immaterial and also as incompetent.

A. I suppose he wanted to impress it on us the uses of Quin-Coco so that when we needed something in this line we would order Quin-Coco from him.

XQ25. Previous to that time were you carrying Coco-Quinine in stock regularly?

A. We had carried it in stock regularly before that.

XQ26. When prescriptions had been written for Coco-Quinine had you been filling them with Quin-Coco?

A. Yes, sir.

XQ27. How often since that interview in 1911 have you been solicited by Wilkins to buy his line?

A. I don't know as I have seen Mr. Wilkins since that time.

XQ28. With what representative of the Lilly Company have you talked to about this case and who asked you to come here?

A. Mr. Mouton talked to me about it and Mr. Whitley asked me to come. Mr. Mouton is the Lilly salesman who succeeded Mr. Broussard, who is dead.

XQ29. Have you seen Mr. R. L. Winchester since you have been here?

A. I don't know his initials. I met a Mr. Winchester a few minutes ago.

XQ30. Is he a Lilly man?

A. Mr. Whitley told me he was when I was introduced to him.

XQ31. Where and when did he tell you that?

A. In Mr. Bradford's room in this hotel, today.

XQ32. You mean John F. Whitley, do you?

A. Yes, sir.

By Mr. Bradford: It is noted by counsel for plaintiff that at the conclusion of the deposition by Mr. White, he went to his room to advise the present witness to come in for examination and found Mr. Winchester in the room talking with Mr. John F. Whitley and the witness. As to how long Mr. Winchester had been in the room he is unable to state. He objects, however, to all questions along this line as wholly incompetent, irrelevant and immaterial.

XQ33. What is the population of Dodson, La., and how many drug stores were there, I mean, in 1911?

Same objection.

A. The population was about 250; one drug store. Winfield is about 300 miles from Memphis.

XQ34. Can't you remember how many items in his line Wilkins offered you that day in 1911, approximately?

Objection repeated.

A. I don't remember anything except Quin-Coco.

XQ35. Do you mean that you don't remember whether he did or did not offer you any other thing or merely that you don't remember the names of what he did offer you?

Objection repeated.

A. Nothing was offered that I remember except Quin-Coco.

By Mr. Rawle: An objection is here made to all the questions asked this witness in chief which by stipulation is to stand as if made to each question, at the time it was asked, the objection being that the questions are not proper for rebuttal.

Notice of a motion to strike out the deposition for the same reason is given.

Cross-examination closed at 1.20.

Re-direct-examination.

By Mr. Bradford:

RDQ36. How long approximately did Mr. Wilkins talk with Mr. Whitley and Dr. Pankey at the time of the interview you have testified about?

A. He was there between trains, two or three hours in the town, spending practically all his time in the drug store, as there was only one drug store in town.

Deposition closed.

W. G. Walker.

WILLIAM C. DIRMEYER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to questions propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. William C. Dirmeyer, of legal age, Memphis, Tenn.; retail druggist. I have been in the retail drug business for twenty years.

Q2. Do you know a gentleman by the name of Alva Lee Kelton, and if so, how long have you known him and in what capacity have you known?

A. I have known him as a traveling salesman since anywhere from 1896—I met him between 1896 and 1898—I have known him up to the present time. He was a traveling salesman for the Pfeiffer Chemical Company and afterwards Wm. R. Warner & Co.

Q3. What is Mr. Kelton's reputation as a business man?

By MR. RAWLE: Objected to as inadmissible and incompetent and irrelevant.

A. His reputation has been good so far as his dealings with me are concerned. He never has misrepresented anything to me.

Q4. Were your dealings with him quite extensive covering a period of many years?

A. My dealings from 1909 until he quit the Pfeiffer Chemical Company was quite extensive. Prior to that I didn't buy as many goods from him.

Q5. Do you regard him as a man whose word is entitled to belief?

By MR. RAWLE: Same objection.

A. I do.

Direct-examination closed.

No cross-examination.

Deposition closed.

WM. C. DIRMEYER.

SOLOMON R. HAMILTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to questions propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Solomon R. Hamilton, age 34, Memphis, Tenn.; retail druggist. I have been in the retail drug business for myself a little over three years and prior to that time I worked in the drug business as manager for Mr. Bond, who had two drug stores, one at Lamar and Vesey streets, and the other at Wellington and Walker streets, in Memphis. I was with him about three years. I have been a clerk in other stores here in Memphis for about three years prior to the time I became manager for Mr. Bond, and also several years in Arkansas before coming to Memphis.

Q2. Do you know Mr. Alva Lee Kelton, and if so, how long have you known him?

A. I have known Mr. Kelton since 1907, anyway at least that long.

Q3. Did he call on you as a drug salesman representing the Pfeiffer Chemical Company and the Wm. R. Warner Co.?

A. I think at that time it was just the Pfeiffer Chemical Company; I don't know whether Warner was connected with it or not.

Q4. Up to about what period did he call on you as a drug salesman?

A. I should say until 1911 or '12.

Q5. Did you have considerable number of deals with him?

A. Yes, sir.

Q6. Know him pretty well personally?

A. I felt that I knew him fairly well.

Q7. What was his reputation as a man and as a salesman?

By MR. RAWLE: Objected to as incompetent,

irrelevant and inadmissible. And the same objection by consent is to stand to each question on this line.

A. He was considered a good salesman and a nice gentleman.

Q8. Do you regard him as a man whose word is entitled to be believed?

A. I do, yes, sir.

Q9. Would you believe him personally if he made a statement of fact to you?

A. Yes, sir.

Direct-examination closed.

By Mr. Rawle: Objection is made to the whole deposition for the same reasons and notice is given of motion to strike it out.

Deposition closed.

Sol. R. Hamilton.

Adjourned to meet at St. Charles Hotel, New Orleans, La., Monday, August 14th, 1916, at 9.30 A. M.

New Orleans, La.,
St. Charles Hotel,
August 14th, 1916, 9.30 A. M.

Met pursuant to adjournment.

Parties present as before.

John W. Culver, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. John W. Culver, age 31, Gulfport, Miss.; am

now a traveling salesman for the Parker-Blake Company, Ltd., New Orleans, La., wholesale druggists of New Orleans. I was formerly in the retail drug business in Gulfport, Miss., for approximately eight years, from January, 1908, until November, 1915. Our store was known as the Parlor Drug Store. I began work for my present employers the first of January, 1916.

Q2. Do you know a man by the name of B. F. Jones, and if so who is he, what is his business and how long have you known him?

A. I know Mr. B. F. Jones very well. He is a traveling representative for Wm. R. Warner & Co., and the Pfeiffer Chemical Company and their allied concerns in Southern Mississippi, and called on me in that capacity for quite a long while. I have known him since the early part of 1908.

Q3. Did Mr. Jones ever solicit your order for goods manufactured by Wm. R. Warner & Co., and among other items did he ever solicit your order for a preparation called Quin-Coco?

A. Yes, sir; he did; both for their general line items and including Quin-Coco.

Q4. What did Mr. Jones say to you respecting the item Quin-Coco when soliciting your order for the same?

By Mr. Rawle: Objected to as not proper for rebuttal, the subject having been fully gone into on the prima facie case.

A. He said it was absolutely identical with Coco-Quinine and could be used in its stead and solicited the business on it on the strength of the difference in price between the Quin-Coco and the Coco-Quinine.

Q5. Mr. Jones testified in this case as a witness for defendant and among other things stated (XQ96, page 219, Def. Rec.) that he never compared Quin-Coco with Coco-Quinine when making sales. What have you to say as to this?

By Mr. Rawle: Objected to as not proper for rebuttal and as immaterial.

A. It is absolutely untrue as to my own experience with him.

Q6. He also said (XQ97) that he never called it Quin-Coco, that he called it "chocolate quinine." What have you to say as to this based upon your experience with him?

Same objections.

A. I never heard him call it anything but Quin-Coco. I never heard him refer to it as "chocolate quinine," or in any other way except as "Quin-Coco."

Q7. During the period covering the several years that Mr. Jones called on you and solicited your trade, did he ever offer you Quin-Coco to be sold in the original packages put up in two ounce and four ounce bottles?

By Mr. Rawle: Objected to as not rebuttal and as immaterial and irrelevant.

A. No, sir; he did not. I was not aware that it was put up in such package at all.

Q8. Did Mr. Jones say anything to you as to how you could dispense the preparation Quin-Coco and if so what did he say?

By Mr. Rawle: Objected to as not proper for rebuttal, as leading, and because the witness (Q4) has already been asked to state what Mr. Jones said respecting the item Quin-Coco and has answered the question.

A. He sold it to be dispensed in place of Coco-Quinine on the representation that neither the doctor nor anyone else could tell the difference between that and Coco-Quinine. They guaranteed it was absolutely the same thing.

Q9. On what kind of calls and on what kind of prescriptions?

By Mr. Rawle: Objected to as not rebuttal, and because the witness has already testified in answer to Q4.

A. Primarily on physicians' prescriptions for Coco-Quinine, and also on any general counter calls for Coco-Quinine.

Q10. Mr. Jones stated as a witness for defendant in answer to XQ94, that he never told a man that he could substitute. What have you to say as to this based upon your experience with Mr. Jones?

By Mr. Rawle: Objected to as not proper for rebuttal, because the witness has already been interrogated as what Mr. Jones said (Q4) and because the question does not relate to any particular interview but to the witness's general experience with Mr. Jones, which is not relevant nor admissible.

A. His testimony is absolutely at variance with my experience with Mr. Jones.

Q11. When did the interview occur at which Mr. Jones offered you Quin-Coco concerning which you have testified?

A. My recollection is that it was in the early part of 1908. We had frequent conversations in regard to the matter of Coco-Quinine and Quin-Coco; also, in subsequent years. This being one of his main items and an item on which he boasted of the volume of his business.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 9.50 without waiver of objections):

XQ12. Did you carry Quin-Coco in stock during those eight years?

A. The greater part of it, yes, sir.

XQ13. And when your stock of Quin-Coco was out or was low, did he solicit you to buy more and did you buy more usually.

A. As a rule, yes. He sold on the basis of its

being underpriced, just as he sold the majority of the rest of his pharmaceuticals as that was about the only way he could get business on that line of merchandise.

By Mr. Rawle: All of the answer except the first clause is objected to as volunteered and irrelevant.

XQ14. Then you were a willing purchaser, were you not, of Quin-Coco?

A. To the extent that I accepted his guarantee on behalf of his company for the product being identical with Coco-Quinine and therefore subject to use in place of Coco-Quinine on that account.

XQ15. XQ14 repeated.

By Mr. Bradford: The repetition of the question is objected to on the ground that the witness' last answer is fully responsive.

A. I think my previous answer is sufficient.

XQ16. Each time he solicited your trade on Quin-Coco did he have trouble in persuading you to buy it?

A. No; he had no great difficulty, but the matter was discussed almost every time he solicited business from us.

XQ17. How many calls did he make on you, approximately, in those eight years?

A. Probably not less than thirty-two calls, possibly more.

XQ18. How large a place is Gulfport, and how many drug stores are there?

A. Gulfport has a population of approximately eight thousand people, and there were at that time three drug stores in the town.

XQ19. How many doctors?

A. Probably fifteen or sixteen doctors.

XQ20. Was yours the largest drug store there?

A. The greater part of the time referred to our store had the largest volume of business of any drug store in the town.

XQ21. When you left it did it go out of business? Or has it since?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. It is in operation under different management.

XQ22. When you get a prescription or a call over the counter for a specified preparation and without saying anything about it, you fill it with a similar preparation, therapeutically, do you consider that honest practice in a drug store?

A. I consider it bad practice from a commercial as well as a moral standpoint.

XQ23. What I want to know is whether, in your opinion, it is honest practice for a druggist, on a prescription or call for one drug, to fill the order with a similar drug, without telling the physician or the customer?

A. At that time I considered the guarantee of the manufacturers through their representatives made this a defensible act on my part, to fill or have these prescriptions for Coco-Quinine filled with Quin-Coco, which on the manufacturers' representations was absolutely identical with and could not be detected from Coco-Quinine. As to my present views in the matter, I do not approve of it, and the last year or the greater part thereof that I was in the retail drug business I discontinued handling Quin-Coco, as the only use I had for it was in substitution for Coco-Quinine.

XQ24. Are Coco-Quinine and Quin-Coco the only two preparations that you have had in stock at Gulfport, during these years which were similar to each other therapeutically?

By Mr. Bradford: Objected to as immaterial and irrelevant and as not cross-examination.

A. I had at one time a gallon of Mulford's Chocolate Quinine.

XQ25. When you are going to your shelves to fill

a prescription has it not often been the case that there were two preparations made by different houses, but therapeutically similar, either of which therapeutically would meet the prescription? I am not referring now to chocolate quinine mixtures, but to your whole stock?

By Mr. Bradford: Objection repeated.

A. Yes; there were other preparations of standard formula similar to preparations made by other manufacturers, but in the case of a proprietary or a trade-mark article being called for by a physician it was not our custom to use one product where another was indicated, except in the case of using Quin-Coco to replace Coco-Quinine.

XQ26. Did not Jones say to you in substance that the two preparations were similar and that his was cheaper?

A. No, sir; he said they were identical, and that his was cheaper; that it was the same thing as Coco-Quinine.

XQ27. And was that the substance of what he said on this subject?

A. The word "identical" and the words "the same as" were the words he used in connection with the comparison of Quin-Coco with Coco-Quinine, and he never used the words "similar to" in his discussion of the matter with me.

XQ28. Then I ask you whether Jones did not say to you, in substance, that the two preparations were identical or that his was the same as Coco-Quinine, but that his was cheaper, and I ask you whether that was not the substance of what he said to you?

By Mr. Bradford: Objected to as improper, witness having fully answered both on direct and on cross-examination as to the matter inquired about.

A. The substance of Jones' remarks to me in regard to this matter as stated in my previous answers

were that the two preparations were identical and that Quin-Coco could be used in place of Coco-Quinine, and that it was to our advantage to use it, inasmuch as the price was much lower than Coco-Quinine.

XQ29. Did you buy more or less of Jones' line at different times; that is, were you a thoroughly good customer?

A. I was so considered by the house, judging from one or two of their letters thanking me for my patronage.

XQ30. Did you consider Jones a square salesman?

A. He was very fair to his customers. He was unfair to his competitors.

XQ31. Is that what you thought of him then or what you think of him now by retrospection, you being now yourself a wholesale drug salesman?

A. It was my original opinion of him, and I have not so far had occasion to change that opinion.

XQ32. Were you at your Gulfport store on the 8th of April, 1915?

A. So far as I know, I was. I have no reason to specifically have that date in mind.

XQ33. How far is it from Gulfport to Mobile?

A. Approximately seventy miles, from Gulfport to Mobile.

XQ34. With what Lilly salesman have you talked as to this case, and when?

A. My first knowledge of this matter came from an incidental remark made by Mr. Bynum, the manager of the local branch of Eli Lilly & Co., at New Orleans, La., and hinged upon a remark made by Mr. Jones in his testimony before this court according to Mr. Bynum's remark to me, setting forth the facts that Mr. Jones claimed he had never recommended Quin-Coco as a substitute for Coco-Quinine, and that if all of the retail druggists in his territory claimed to the contrary he would still maintain that his statement was correct and theirs false. I thereupon told Mr. Bynum

that I would be extremely pleased to offer my services to Eli Lilly Company whenever they chose to make use of it to contradict Mr. Jones' statement, in so far as I myself was concerned. Since that time I have possibly mentioned the matter to Mr. Tisdale, representing Eli Lilly & Co., in the Mobile territory, and further than that do not recall any conversations with any Lilly salesmen except Mr. Bynum, the manager of the New Orleans branch. My first interview with Mr. Bynum on this subject was in New Orleans in his office probably three or four months ago. My interview with Tisdale was subsequent thereto and consisted of casual mention, if any, probably in the city of Biloxi, Miss. I have had no discussion of any consequence other that I recall.

XQ35. What is the last date of interview with Jones at which you distinctly remember and can see in your mind's eye that he stated to you the identity of Coco-Quinine with Quin-Coco and its cheaper price?

By Mr. Bradford: Objected to as immaterial and irrelevant and as an unfair prolongation of the cross-examination, especially as counsel for defendant has been advised that this witness has an important business engagement, which required him to leave here before this hour.

A. The definite date, of course, is not in my mind, but probably about two years ago.

XQ36. Do you understand the difference between giving Jones' statements to you in his exact words in the direct narration and giving them as you have given them in indirect narration, by merely stating the substance of what he said?

By Mr. Bradford: Objected to as irrelevant and immaterial.

A. I would not attempt to quote Jones verbatim at length. But the gist of his remarks and the use of the word "identical" and "substitution" in connection

with the Coco-Quinine and Quin-Coco are indelibly impressed in my mind, and I have no hesitancy whatever in such testimony and such use of those words purported to have come from him in conversation with me as have preceded this question and answer.

XQ37. Give verbatim any of his words as used to you in respect of substitution, quoting him just as the words came from his mouth?

By Mr. Bradford: Objection repeated.

A. I think my previous testimony in this matter is explicit and sets forth the terms which he habitually used in connection with it.

XQ38. I want you to give his words or any of them that you remember, or else to say that you do not remember his exact words or any of them?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. Jones frequently said that "Our Quin-Coco is identical with Lilly's Coco-Quinine and is cheaper." Or, "you can use for substitute Quin-Coco for Coco-Quinine, as it is identical, and a doctor could not tell the difference."

XQ39. Approximately how often did he say this to you during those thirty-two visits?

A. Whenever the matter was discussed.

XQ40. As many as sixteen times?

A. Fully.

XQ41. As many as twenty times.

A. I think my previous answers are all that are necessary in this connection.

XQ42. As a wholesale drug salesman are you in competition now with Jones or the Warner line?

A. To a very limited extent.

Deposition closed at 10.55.

J. W. Culver.

JOHN R. STUCKEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD (at 11 A. M.):

Q1. Please state your name, age, residence and occupation?

A. John R. Stuckey; age 34; Samson, Ala.; retail druggist. I have been in business in Samson two years, the name of my store being the Samson Drug Company. Prior to coming to Samson I was manager of the Peoples Pharmacy of Brantley, Ala., for four years and eight months. I began as a clerk with the West Brother Drug Company, retail druggists, at Montgomery, Ala., in 1905.

Q2. Do you know a gentleman by the name of Clinton G. McCarthy, and if so, who is he and how long have you known him?

A. Yes, sir; I have known him for about four or five years. He was a traveling salesman for Wm. R. Warner & Co., and I knew him as such.

Q3. Has McCarthy, while representing Wm. R. Warner & Co., solicited your orders for their products?

A. Yes, sir.

Q4. Where?

A. At Brantley, Ala.

Q5. When?

A. Between three and four years ago.

Q6. Among other products did he solicit an order for a preparation called Quin-Coco?

A. Yes, sir, he did.

Q7. What did Mr. McCarthy say to you respecting this preparation when soliciting your order for it?

By MR. RAWLE: Objected to as not proper for rebuttal, the subject forming part of plaintiff's prima facie case, and having been fully gone into in that part of the case.

A. He asked me if I used very much Coco-Quinine. I told him I did. He told me he had a preparation called Quin-Coco, which was the very same thing, and he could save me some money on it.

Q8. Did he tell you how you could dispense it, and if he did what did he say about this?

Same objection.

A. He said I could put it up and people would not know the difference between his and Lilly's.

Q9. Did he tell you on what calls you could dispense it and if so on what kind of calls?

Same objection, and as leading and the witness having already been interrogated thereto.

A. He told me I could put it up on prescriptions, that I would not be doing anything wrong, as it was the very same thing as Coco-Quinine.

Q10. On prescriptions for what?

Same objection.

A. Coco-Quinine.

Q11. Did he say anything about calls over the counter?

Same objection.

A. Yes, sir; he told me I could put it up and label it Coco-Quinine; that I could sell it under the label of Coco-Quinine.

Q12. Mr. McCarthy was called as a witness for defendant in this case, and in his testimony (Q45) he stated that in his sales talk to customers he never mentioned a competitor's name? How does this statement accord with your experience with Mr. McCarthy?

By Mr. Rawle: Objected to as not rebuttal.

A. Why, he certainly did call the name of Eli Lilly & Co. and Coco-Quinine.

Q13. He also stated (Q44) that in introducing this subject of Quin Coco to a druggist he did so by saying,

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"Mr. Druggist, how is your chocolate quinine to-day." How does this statement accord with your experience with Mr. McCarthy?

Same objection.

A. He always asked me how was my stock of Coco-Quinine.

Q14. Mr. McCarthy also stated (XQ205) that he never made any suggestions or intimation that any of the Warner products could be used as replacers or substitutes for well known products of other houses. How does this statement accord with your experience with Mr. McCarthy?

By Mr. Rawle: Same objections.

A. He told me Quin-Coco could be used instead of Coco-Quinine.

Q15. Did you buy Quin-Coco?

Same objection.

A. I bought one gallon.

Same objection.

Q16. Was it satisfactory?

Same objection.

A. No, sir; it was not.

Q16. Did you use it?

Same objection.

A. Used part of it.

Q17. Why did you not use the rest?

Same objection; also as irrelevant.

A. Because they told me it was not Coco-Quinine and I could not use it.

Q18. Whom do you mean by "they"?

Same objections.

A. The doctors prescribing it.

Q19. Prescribing what?

Same objection.

A. Coco-Quinine.

Direct-examintaion closed at 11.20.

Cross-examination.

By Mr. Rawle (at 11.30, without waiver of objections):

XQ20. What he said to you is substantially that Quin-Coco was the very same thing as Coco-Quinine and he could save you some money on it, is that correct?

A. Yes, sir.

XQ21. How often did he talk about it to you?

A. Every time he came around.

XQ22. That would be about four times a year for four or five years?

A. He came around every sixty or ninety days, I don't remember which, for three or four years.

XQ23. And every time he called he said about the same things to you in regard to Quin-Coco?

A. He always mentioned Coco-Quinine.

XQ24. And what he said about it was substantially the same every time?

A. About the same thing every time.

XQ25. When was the last time you talked with him about Quin-Coco?

A. I don't remember; it has been about two years ago.

XQ26. Can you give verbatim the words he used in regard to Quin-Coco, quoting them as he said them, and in direct form?

By Mr. Bradford: Objected to as immaterial.

A. About the same thing every time, "How is your stock of Coco-Quinine," and wanted to sell me some Quin-Coco.

XQ27. How did he say it to you? In what words?

A. He said Quin-Coco was the same thing as Coco-Quinine, and I could save money on it, about the same thing every time he talked about it.

XQ28. What were the words that he used? Have you given them all in answer to my questions?

Objected to as immaterial.

A. I think I have.

XQ29. How far from New Orleans is Samson, Ala.?

A. About 442 miles, via Montgomery, Ala.

XQ30. What is the population, and how many drug stores and doctors are there there?

A. About 2200; four drug stores; eight doctors.

XQ31. Were you a fairly good customer of Wm. R. Warner & Co.?

A. Yes, sir.

XQ32. Did you always find McCarthy a square salesman?

A. Yes, sir.

XQ33. You did not think he was dishonest, did you, or unethical?

A. I believe he was the way he did about the Quin-Coco.

XQ34. Was he about any other of the items of his line?

A. No, sir.

XQ35. Were not a great many of them in direct competition with the lines of other drug houses who solicited your trade, or whose preparations you carried in stock?

A. Yes, sir.

XQ36. If you thought he was unethical in the way he talked about Quin-Coco, why did you not let him understand that you did not like that sort of talk, as an honest druggist?

By Mr. Bradford: Objected to as irrelevant and immaterial.

A. I thought he was an honest man and thought he knew what he was talking about.

XQ37. So you did not show him that you resented anything he said about Quin-Coco?

Objection repeated.

A. I did not buy any Quin-Coco the first time, but I did after that. It was always the first thing he wanted to sell me, he said it was the same thing as Coco-Quinine.

XQ38. What Lilly man first talked to you about this case?

A. Mr. C. E. Bateman, the Lilly salesman in Southeast Alabama.

XQ39. When?

A. A short time ago.

XQ40. Only once?

A. Only one time.

XQ41. Do you not carry a good many drugs on your shelves in duplicate; that is, similar drugs therapeutically, but made by different houses?

By Mr. Bradford: Objected to as not cross-examination, incompetent and irrelevant.

A. Yes, sir.

XQ42. About how many? Fifty?

Same objection.

A. No, sir.

XQ43. Twenty?

Same objection.

A. No, I have not.

XQ44. If one such drug is called for on a prescription, which prescription does not name the maker, what would you do?

Objection repeated.

A. If I did not have what he called for I would go out and get it.

XQ45. XQ44 repeated.

Objection repeated.

A. I would go out and get it, if he specified any certain maker, and I did not have it.

XQ46. Have you sometimes filled a prescription with a preparation of a different house from the one specified in the prescription?

Objection repeated.

A. One time.

Deposition closed at 12 M.

By Mr. Rawle: Notice of motion to strike out this deposition is here given.

Jno. R. Stuckey.

Recess until 1.30 P. M.

Counsel for plaintiff advises counsel for defendant that one of the witnesses whom he expected to examine here is unable to come from Mobile, Ala., on account of illness in his family, and that in order to get his deposition it will be necessary to adjourn this afternoon in time to take the train leaving at 5.15 for Mobile, Ala., where the witness is believed to be ready for examination on arrival of the train.

After recess.

Alva Lee Kelton, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Are you the same Alva Lee Kelton who has heretofore testified on behalf of plaintiff in this cause?

A. I am.

Q2. A witness for defendant herein, Mr. Harry E. James, by name, testified respecting the amount of the product Quin-Coco sold by Wm. R. Warner & Co., both at its Philadelphia and St. Louis plants, per annum. By his testimony it would appear that the total sales of this preparation for the year 1914 were less than $13,000, and for the year 1915, less than $15,000, and while he could not state the figures for the years 1908, 1909, 1910, 1911, 1912 and 1913, the presumption from his testimony would seem to be that the sales for those years were less than for the years 1914 and 1915. He stated in answer to questions by counsel for defendant that the average sales of Quin-Coco per day per salesman for 1914 was fifty cents; the average sales per day per salesman for 1916 were sixty cents; the average sales per salesman for the year 1914 was about $160; the average sales per salesman for the year 1915 was about $185.

As a salesman who formerly worked for the Warner Company and who sold Quin-Coco among other items in defendant's lines, as appears from your former testimony in this case, I ask you to state how these figures given by Mr. James compare with the actual results of your work?

By Mr. Rawle: Objected to because the witness has not qualified to speak as to the total sales of the defendant. And because the question as to the average sales per day per salesman is mere computation, and because the question as far as it inquires as to the sales by the witness of Quin-Coco is not relevant to the issue or admissible.

A. My individual experience in the sale of the article mentioned, Quin-Coco, the record made by Mr. James would have no bearing whatever upon my sales of Quin-Coco, for they so further exceeded that amount that it is ridiculous to make the comparison.

Q3. Have you been able from any actual records

to form an approximate estimate of what your sales of this particular product amounted to per year, both in gallons and in sales price, beginning with the year 1907, down to the time your services with the company terminated?

By Mr. Rawle: Objected to because the amount or value sold by the witness is not a relevant fact, and because the question is not proper for rebuttal, and because the witness has already been examined and should then have been interrogated as touching this subject.

A. I have. In looking over duplicate orders which I found in my possession I made a compilation of the amount of Quin-Coco sold each year, beginning with 1907 to 1912, inclusive. I will state, however, as is always the case with old papers, many orders were not found; also many copies of mail orders, duplicates of which I always received.

Q4. I ask if by my request you have made up a list of the duplicate orders in your possession giving the number and date of the order, the total amount of the order, the amount of Quin-Coco, both in quantity and price, on each order, for each of the several years referred to, and if you have if you will produce this list?

By Mr. Rawle: Same objections; also because the witness can not be permitted to produce typewritten lists copied from his duplicate orders, except after production of the duplicate orders and their inspection by opposing counsel, and subject to cross-examination thereon.

By Mr. Bradford: It is understood that the originals of each of these orders identified by its number is in the possession of defendant, and counsel for defendant is notified here that no objection will be made by plaintiff at any time prior to the trial of this cause to the introduction or production of the original orders by defendant to

prove that any statement by this witness based upon these lists is inaccurate.

By Mr. Rawle: Nothing is "understood" in this respect by defendant's counsel. The objections are repeated, and the production by the witness of any original duplicate orders from which he has made any list produced by him is insisted upon as a prerequisite to the offer of any copied list.

A. I have and here produce the list, being a list contained in a book from all the orders I could find in my possession for the years mentioned, namely, 1907 to 1912, inclusive, this being the time in which I sold the article, Quin-Coco.

Q5. I ask you to read into the record the orders as recorded in this list, arranged in chronological order, beginning with the first order down to the last?

By Mr. Rawle: The objections are repeated.

A. The witness reads as follows:

For 1907.

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
36	Jan. 23rd	$26.67	$1.20	2 pints
82	June 25th	15.25	3.75	1 gallon
84	June 28th	30.40	2.50	5 pints
123	March 14th	33.25	2.50	5 pints
139	March 20th	66.97	.60	1 pint
184	April 11th	22.60	2.50	5 pints
193	April 15th	25.95	2.50	5 pints
376	August 1st	7.50	1.20	2 pints
379	August 2nd	27.70	7.00	2 gallons
387	August 5th	25.89	2.50	5 pints
505	Sept. 27th	51.08	3.75	1 gallon
567	Oct. 28th	59.75	.60	1 pint
580	Nov. 1st	18.30	1.20	2 pints
603	Nov. 1st	15.45	2.50	5 pints
655	Dec. 3rd	35.20	1.20	2 pints
678	Dec. 12th	32.	2.50	5 pints
687	Dec. 19th	52.32	1.20	2 pints
17			39.15	10 gallons

For 1908

11	Jan. 6th	$19.75	$3.75	1 gallon
48	Jan. 21st	25.05	2.50	5 pints
73	Feb. 4th	12.66	.60	1 pint
75	Feb. 4th	16.25	2.50	5 pints
91	Feb. 13th	11.34	.60	1 pint
113	Feb. 19th	47.25	2.50	5 pints
214	March 30th	43.91	1.20	2 pints
218	April 2nd	15.60	2.50	5 pints
244	April 13th	27.85	2.50	5 pints
248	April 14th	56.05	2.50	5 pints
254	April 15th	37.49	3.75	1 gallon
256	April 16th	22.55	1.20	2 pints
258	April 17th	24.45	2.50	5 pints
263	April 17th	19.32	2.50	5 pints
264	April 17th	345.92	3.75	1 gallon
266	April 20th	21.	3.75	1 gallon
268	April 20th	27.80	3.75	1 gallon

Orders.

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
420	July 11th	36.46	3.75	1 gallon
423	July 13th	32.25	3.75	1 gallon
424	July 13th	9.75	3.75	1 gallon
429	July 14th	18.65	3.75	1 gallon
443	Aug. 5th	36.42	2.50	5 pints
446	Aug. 6th	21.07	2.50	5 pints
461	Aug. 13th	24.10	2.50	5 pints
472	Aug. 18th	32.65	2.50	5 pints
478	Aug. 20th	39.35	2.50	5 pints
479	Aug. 20th	32.85	2.50	5 pints
480	Aug. 21st	16.43	.60	1 pint
481	Aug. 21st	31.61	2.50	5 pints
482	Aug. 21st	16.96	3.75	1 gallon
485	Aug. 25th	11.25	3.75	1 gallon
486	Aug. 25th	61.80	3.75	1 gallon
489	Aug. 26th	7.50	2.50	5 pints
496	Aug. 28th	45.96	3.75	1 gallon
500	Aug. 29th	44.27	1.20	2 pints
504	Aug. 31st	34.30	3.75	1 gallon
505	Aug. 31st	52.40	2.50	5 pints
508	Sept. 2nd	60.85	3.75	1 gallon
509	Sept. 3rd	17.25	2.50	5 pints
510	Sept. 3rd	31.75	3.75	1 gallon
511	Sept. 4th	29.99	3.75	1 gallon
513	Sept. 4th	22.20	3.75	1 gallon
514	Sept. 5th	51.28	3.75	1 gallon
517	Sept. 7th	30.51	3.75	1 gallon
521	Sept. 9th	15.90	3.75	1 gallon
523	Sept. 9th	25.89	7.	2 gallons
525	Sept. 11th	32.90	3.75	1 gallon
529	Sept. 11th	26.15	3.75	1 gallon
530	Sept. 12th	21.35	2.50	5 pints
531	Sept. 12th	42.03	2.50	5 pints
537	Sept. 16th	56.65	3.75	1 gallon
538	Sept. 16th	3.75	3.75	1 gallon
539	Sept. 16th	18.	3.75	1 gallon
542	Sept. 17th	34.45	3.75	1 gallon
545	Sept. 17th	16.50	3.75	1 gallon
547	Sept. 18th	30.22	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
548	Sept. 21st	8.10	3.75	1 gallon
549	Sept. 21st	29.55	3.75	1 gallon
553	Sept. 22nd	31.96	.60	1 pint
558	Sept. 23rd	8.56	2.50	5 pints
560	Sept. 25th	21.80	2.50	5 pints
562	Sept. 28th	74.95	2.50	5 pints
570	Oct. 2nd	42.35	1.20	2 pints
572	Oct. 3rd	13.10	.60	1 pint
580	Oct. 7th	14.40	3.75	1 gallon
587	Oct. 13th	10.40	.60	1 pint
(Mail Order)	Oct. 15th	15.65	3.75	1 gallon
611	Oct. 23rd	42.95	3.75	1 gallon
612	Oct. 24th	56.61	3.75	1 gallon
613	Oct. 26th	34.75	3.75	1 gallon
616	Oct. 26th	36.01	2.50	5 pints
617	Oct. 27th	15.	3.75	1 gallon
624	Oct. 30th	16.75	3.75	1 gallon
626	Oct. 31st	65.93	3.75	1 gallon
627	Oct. 31st	22.30	3.75	1 gallon
629	Nov. 2nd	7.85	3.75	1 gallon
633	Nov. 2nd	16.60	2.50	5 pints
634	Nov. 4th	15.28	1.20	2 pints
635	Nov. 4th	13.	2.50	5 pints
636	Nov. 4th	59.60	1.20	2 pints
643	Nov. 6th	20.60	3.75	1 gallon
645	Nov. 6th	12.90	.60	1 pint
653	Nov. 10th	32.35	3.75	1 gallon
654	Nov. 11th	30.10	.60	1 pint
664	Nov. 17th	22.55	.60	1 pint
668	Nov. 18th	8.00	3.75	1 gallon
669	Nov. 18th	52.30	3.75	1 gallon
673	Nov. 18th	23.85	3.75	1 gallon
678	Nov. 19th	29.25	3.75	1 gallon
689	Nov. 23rd	25.95	3.75	1 gallon
690	Nov. 23rd	56.70	3.75	1 gallon
700	Nov. 29th	37.	3.75	1 gallon
706	Nov. 28th	34.60	7.00	2 gallons
707	Nov. 28th	28.01	3.75	1 gallon
721	Dec. 4th	13.10	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
723	Dec. 4th	14.85	7.	2 gallons
729	Dec. 8th	20.95	2.50	5 pints
731	Dec. 9th	16.86	3.75	1 gallon
732	Dec. 9th	17.35	.60	1 pint
739	Dec. 11th	32.65	3.75	1 gallon
741	Dec. 12th	22.25	3.75	1 gallon
748	Dec. 19th	27.70	.60	1 pint
102			307.25	91 gallons
		For 1909		
31	Jan. 18th	37.55	$3.75	1 gallon
39	Jan. 21st	6.45	3.75	1 gallon
42	Jan. 22nd	11.50	7.	2 gallons
48	Jan. 23rd	8.77	3.75	1 gallon
52	Jan. 25th	12.50	3.75	1 gallon
54	Jan. 27th	21.20	.60	1 pint
55	Jan. 27th	7.75	7.	2 gallons
56	Jan. 27th	37.51	7.	2 gallons
61	Jan. 29th	24.02	7.	2 gallons
63	Jan. 29th	14.25	3.75	1 gallon
66	Feb. 1st	15.50	7.	2 gallons
68	Feb. 2nd	27.74	1.20	2 pints
69	Feb. 3rd	18.29	.60	1 pint
70	Feb. 3rd	53.73	7.	2 gallons
71	Feb. 3rd	7.	7.	2 gallons
76	Feb. 4th	10.92	3.75	1 gallon
79	Feb. 5th	28.65	10.20	3 gallons
82	Feb. 6th	24.84	2.50	5 pints
84	Feb. 8th	24.10	3.75	1 gallon
92	Feb. 11th	47.35	3.75	1 gallon
93	Feb. 11th	15.25	2.50	5 pints
99	Feb. 15th	39.75	3.75	1 gallon
102	Feb. 17th	35.40	3.75	1 gallon
117	Feb. 24th	43.95	3.75	1 gallon
119	Feb. 20th	13.16	3.75	1 gallon
127	Feb. 28th	21.85	2.50	5 pints
130	Feb. 29th	47.55	3.75	1 gallon
133	March 1st	35.65	3.75	1 gallon
138	March 2nd	17.45	7.	2 gallons

572

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
139	March 2nd	36.12	3.75	1 gallon
140	March 2nd	41.85	3.75	1 gallon
145	March 4th	28.19	7.	2 gallons
146	March 5th	27.80	16.25	5 gallons
154	March 7th	32.30	2.50	5 pints
156	March 10th	24.35	2.50	5 pints
160	May 11th	24.20	.60	1 pint
176	May 21st	12.70	1.20	2 pints
189	May 30th	23.50	3.75	1 gallon
196	June 2nd	54.09	.60	1 pint
212	April 8th	38.55	2.50	5 pints
219	April 12th	29.60	2.50	5 pints
239	April 20th	15.	3.75	1 gallon
243	April 22nd	11.58	3.75	1 gallon
246	April 22nd	1.20	1.20	2 pints
253	April 24th	3.75	3.75	1 gallon
254	April 26th	51.95	1.20	2 pints
277	May 5th	38.97	.60	1 pint
278	May 5th	51.05	7.	2 gallons
280	May 6th	21.	7.	2 gallons
281	May 6th	32.50	1.20	2 pints
283	May 6th	37.30	7.	2 gallons
286	May 7th	32.15	7.	2 gallons
291	May 11th	339.11	3.75	1 gallon
298	May 13th	38.	.60	1 pint
301	May 13th	31.45	3.75	1 gallon
302	May 13th	12.25	3.75	1 gallon
308	May 17th	15.15	3.75	1 gallon
311	May 18th	23.58	3.75	1 gallon
314	May 18th	21.30	2.50	5 pints
317	May 19th	25.75	3.75	1 gallon
318	May 19th	23.80	3.75	1 gallon
321	May 20th	54.95	2.50	5 pints
323	May 20th	39.45	7.	2 gallons
325	May 22nd	36.70	2.50	5 pints
328	May 28th	23.31	2.50	5 pints
329	May 28th	9.40	.60	1 pint
334	June 2nd	9.19	1.20	2 pints
336	June 4th	21.10	.60	1 pint

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
337	June 4th	29.80	3.75	1 gallon
352	June 12th	31.25	3.75	1 gallon
359	June 14th	28.60	3.75	1 gallon
381	June 24th	12.40	2.50	5 pints
387	June 28th	62.95	2.50	5 pints
389	June 28th	69.23	3.75	1 gallon
390	June 30th	27.15	7.	2 gallons
393	July 5th	3.75	3.75	1 gallon
395	July 5th	33.96	3.75	1 gallon
406	Aug. 3rd	16.80	2.50	5 pints
412	Aug. 4th	21.05	2.50	5 pints
413	Aug. 4th	3.75	3.75	1 gallon
416	Aug. 7th	45.49	7.	2 gallons
419	Aug. 9th	28.45	3.75	1 gallon
429	Aug. 16th	49.85	3.75	1 gallon
443	Aug. 20th	8.60	1.20	2 pints
445	Aug. 23rd	52.33	3.75	1 gallon
446	Aug. 23rd	10.52	7.	2 gallons
448	Aug. 23rd	33.02	7.	2 gallons
449	Aug. 24th	40.42	3.75	1 gallon
Mail Order	Aug. 26th	7.00	7.00	2 gallons
454	Aug. 26th	23.	3.75	1 gallon
455	Aug. 26th	35.28	7.	2 gallons
456	Aug. 30th	40.43	3.75	1 gallon
458	Aug. 31st	16.75	3.75	1 gallon
461	Sept. 2nd	23.95	2.50	5 pints
(Mail Order)	Sept. 3rd	15.25	3.75	1 gallon
464	Sept. 4th	17.80	3.75	1 gallon
465	Sept. 4th	46.83	3.75	1 gallon
476	Sept. 13th	21.50	2.50	5 pints
477	Sept. 13th	32.90	2 50	5 pints
480	Sept. 14th	26.26	3.75	1 gallon
482	Sept. 15th	17.10	2.50	5 pints
485	Sept. 15th	9.65	2.50	5 pints
486	Sept. 16th	13.75	3.75	1 gallon
487	Sept. 16th	14.45	3.75	1 gallon
489	Sept. 17th	39.55	3.75	1 gallon
(Mail Order)	Sept. 21st	15.25	7.00	2 gallons
(Mail Order)	Sept. 23rd	3.75	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
500	Sept. 25th	32.39	3.75	1 gallon
503	Sept. 25th	14.50	7.	2 gallons
504	Sept. 25th	45.20	3.75	1 gallon
511	Sept. 28th	21.60	2.50	5 pints
523	Oct. 1st	9.65	3.75	1 gallon
532	Oct. 5th	29.30	3.75	1 gallon
540	Oct. 8th	7.05	.60	1 pint
542	Oct. 11th	13.35	3.75	1 gallon
544	Oct. 11th	23.20	.60	1 pint
547	Oct. 12th	18.26	3.75	1 gallon
550	Oct. 14th	33.31	3.75	1 gallon
554	Oct. 16th	91.63	3.75	1 gallon
558	Oct. 19th	17.91	.60	1 pint
561	Oct. 20th	25.84	2.50	5 pints
566	Oct. 20th	30.75	3.75	1 gallon
568	Oct. 22nd	36.49	7.	2 gallons
570	Oct. 22nd	39.25	7.	2 gallons
574	Oct. 28th	70.65	7.	2 gallons
(Mail Order)	Oct. 9th	16.17	7.	2 gallons
576	Oct. 28th	12.20	3.75	1 gallon
579	Oct. 30th	11.60	3.75	1 gallon
582	Nov. 1st	20.44	1.20	2 pints
584	Nov. 1st	3.75	3.75	1 gallon
587	Nov. 3rd	9.	7.	2 gallons
588	Nov. 3rd	23.30	3.75	1 gallon
591	Nov. 3rd	42.85	3.75	1 gallon
592	Nov. 3rd	5.90	2.50	5 pints
601	Nov. 8th	36.25	3.75	1 gallon
602	Nov. 9th	28.25	3.75	1 gallon
603	Nov. 9th	16.35	3.75	1 gallon
604	Nov. 10th	27.15	7.	2 gallons
605	Nov. 10th	16.20	3.75	1 gallon
607	Nov. 10th	19.87	3.75	1 gallon
(Mail Order)	Nov. 13th	24.38	2.50	5 pints
612	Nov. 13th	41.50	7.	2 gallons
613	Nov. 13th	29.08	3.75	1 gallon
614	Nov. 13th	29.50	16.25	5 gallons
615	Nov. 13th	7.	7.	2 gallons
616	Nov. 13th	32.50	32.50	10 gallons

Orders.

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
617	Nov. 15th	10.75	3.75	1 gallon
618	Nov. 15th	17.95	7.	2 gallons
619	Nov. 15th	9.75	7.	2 gallons
(Mail Order)	Nov. 19th	7.00	7.	2 gallons
627	Nov. 25th	34.64	3.75	1 gallon
637	Nov. 30th	22.60	3.75	1 gallon
638	Nov. 30th	7.37	3.75	1 gallon
649	Dec. 7th	18.10	3.75	1 gallon
655	Dec. 8th	9.89	1.20	2 pints
656	Dec. 8th	10.75	3.75	1 gallon
657	Dec. 8th	7.	7.	2 gallons
659	Dec. 9th	25.10	1.20	2 pints
660	Dec. 10th	8.50	2.50	5 pints
663	Dec. 10th	15.25	3.75	1 gallon
669	Dec. 15th	12.37	3.75	1 gallon
161			$651.85	187 gallons
		For 1910.		
13	Jan. 6th	19.15	$3.75	1 gallon
17	Jan. 7th	20.35	7.	2 gallons
22	Jan. 10th	9.75	1.20	2 pints
35	Jan. 17th	60.85	3.75	1 gallon
54	Jan. 25th	16.70	.60	1 pint
60	Jan. 26th	19.	3.75	1 gallon
61	Jan. 26th	18.70	7.	2 gallons
65	Jan. 31st	65.37	7.	2 gallons
69	Feb. 2nd	17.42	.60	1 pint
76	Feb. 4th	10.60	7.	2 gallons
79	Feb. 7th	23.30	3.75	1 gallon
81	Feb. 8th	16.25	16.25	5 gallons
Mail Order	Feb. 12th	7.	7.	2 gallons
89	Feb. 14th	19.45	3.75	1 gallon
105	Feb. 24th	15.34	3.75	1 gallon
107	Feb. 24th	27.38	3.75	1 gallon
108	Feb. 24th	33.03	3.75	1 gallon
115	March 10th	49.24	3.75	1 gallon
118	March 11th	35.25	3.75	1 gallon
123	March 15th	9.	2.50	5 pints
124	March 15th	11.25	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
125	March 15th	56.35	7.00	2 gallons
127	March 15th	24.10	7.00	2 gallons
132	March 16th	20.75	3.75	1 gallon
133	March 18th	7.	7.00	2 gallons
143	March 21st	25.50	2.50	5 pints
173	Apr. 4th	32.30	.60	1 pint
149	March 23rd	10.49	3.75	1 gallon
Mail Order	Apr. 29th	7.	7.	2 gallons
192	May 11th	25.50	2.50	5 pints
195	May 12th	11.65	3.75	1 gallon
197	May 12th	37.35	3.75	1 gallon
200	May 14th	22.93	3.75	1 gallon
201	May 14th	11.95	3.75	1 gallon
205	May 20th	21.15	3.75	1 gallon
217	May 20th	7.46	7.	2 gallons
221	May 24th	25.76	7.	2 gallons
229	May 26th	4.65	3.75	1 gallon
230	May 26th	32.25	3.75	1 gallon
237	May 31st	20.34	2.50	5 pints
238	June 1st	26.68	3.75	1 gallon
249	June 6th	15.09	3.75	1 gallon
251	June 6th	12.30	2.50	5 pints
258	June 9th	57.45	2.50	5 pints
260	June 9th	7.75	3.75	1 gallon
Mail Order	July 1st	7.	7.	2 gallons
350	Aug. 5th	40.99	2.50	5 pints
353	Aug. 8th	13.50	3.75	1 gallon
356	Aug. 9th	75.11	7.	2 gallons
361	Aug. 11th	7.	7.	2 gallons
362	Aug. 11th	16.65	3.75	1 gallon
365	Aug. 12th	15.45	3.75	1 gallon
368	Aug. 18th	20.	1.20	2 pints
380	Aug. 18th	9.05	3.75	1 gallon
381	Aug. 19th	71.80	3.75	1 gallon
384	Aug. 19th	20.68	3.75	1 gallon
390	Aug. 23rd	15.10	3.75	1 gallon
397	Aug. 29th	20.20	3.75	1 gallon
402	Aug. 30th	15.20	2.50	5 pints
403	Aug. 31st	7.	7.	2 gallons

Orders.

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
404	Aug. 31st	22.75	3.75	1 gallon
405	Sept. 1st	23.40	7.	2 gallons
412	Sept. 6th	13.65	7.	2 gallons
421	Sept. 9th	30.10	7.	2 gallons
422	Sept. 9th	13.30	10.20	3 gallons
424	Sept. 9th	22.20	7.	2 gallons
429	Sept. 12th	15.25	7.	2 gallons
430	Sept. 12th	15.25	7.	2 gallons
431	Sept. 13th	41.66	16.25	5 gallons
432	Sept. 13th	23.25	3.75	1 gallon
435	Sept. 14th	28.52	3.75	1 gallon
438	Sept. 15th	11.25	3.75	1 gallon
440	Sept. 16th	23.34	3.75	1 gallon
442	Sept. 19th	35.65	3.75	1 gallon
449	Sept. 27th	53.87	.60	1 pint
452	Sept. 28th	20.05	3.75	1 gallon
480	Oct. 17th	38.20	2.50	5 pints
487	Oct. 20th	36.25	3.75	1 gallon
489	Oct. 21st	19.69	3.75	1 gallon
504	Oct. 28th	25.75	3.75	1 gallon
505	Oct. 30th	42.72	7.	2 gallons
509	Nov. 1st	20.44	7.	2 gallons
516	Nov. 4th	41.75	7.	2 gallons
518	Nov. 5th	22.27	3.75	1 gallon
521	Nov. 7th	52.80	7.	2 gallons
523	Nov. 7th	28.75	7.	2 gallons
524	Nov. 8th	30.30	3.75	1 gallon
525	Nov. 8th	28.33	3.75	1 gallon
526	Nov. 8th	20.25	3.75	1 gallon
529	Nov. 8th	43.45	3.75	1 gallon
530	Nov. 9th	11.05	7.	2 gallons
532	Nov. 9th	12.60	3.75	1 gallon
533	Nov. 10th	31.60	7.	2 gallons
536	Nov. 10th	3.75	3.75	1 gallon
Mail Order	Nov. 11th	7.	7.	2 gallons
546	Nov. 15th	14.30	7.	2 gallons
547	Nov. 15th	41.10	7.	2 gallons
554	Nov. 18th	6.75	3.75	1 gallon
555	Nov. 18th	8.45	2.50	5 pints

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
556	Nov. 18th	18.70	3.75	1 gallon
564	Nov. 22nd	15.40	7.	2 gallons
566	Nov. 22nd	13.47	7.	2 gallons
567	Nov. 22nd	8.	7.	2 gallons
573	Nov. 25th	63.70	7.	2 gallons
576	Nov. 29th	30.27	3.75	1 gallon
579	Nov. 30th	22.95	3.75	1 gallon
583	Dec. 1st	6.95	2.50	5 pints
585	Dec. 1st	5.75	3.75	1 gallon
603	Dec. 13th	16.95	.60	1 pint
609	Dec. 15th	12.60	2.50	5 pints
613	Dec. 16th	18.15	2.50	5 pints
113			$499.35	140 gallons
		For 1911.		
3	Jan. 3rd	43.13	7.	2 gallons
6	Jan. 5th	19.95	7.	2 gallons
8	Jan. 6th	30.20	7.	2 gallons
9	Jan. 6th	8.85	3.75	1 gallon
14	Jan. 9th	7.70	3.75	1 gallon
16	Jan. 9th	20.50	3.75	1 gallon
17	Jan. 9th	69.29	16.25	5 gallons
18	Jan. 10th	20.45	3.75	1 gallon
21	Jan. 10th	20.75	3.75	1 gallon
30	Jan. 10th	14.68	3.75	1 gallon
33	Jan. 14th	26.	7.	2 gallons
41	Jan. 17th	28.30	2.50	5 pints
45	Jan. 18th	62.95	2.50	5 pints
46	Jan. 19th	60.25	3.75	1 gallon
47	Jan. 19th	8.20	3.75	1 gallon
64	Jan. 27th	23.10	3.75	1 gallon
72	Feb. 1st	20.50	16.25	5 gallons
73	Feb. 1st	19.	16.25	5 gallons
74	Feb. 1st	13.	7.	2 gallons
76	Feb. 1st	9.25	7.	2 gallons
77	Feb. 2nd	20.50	3.75	1 gallon
79	Feb. 2nd	24.85	10.20	3 gallons
84	Feb. 9th	68.95	3.75	1 gallon
88	Feb. 11th	15.63	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
90	Feb. 13th	42.26	3.75	1 gallon
91	Feb. 14th	21.10	3.75	1 gallon
96	Feb. 17th	10.65	3.75	1 gallon
97	Feb. 17th	26.75	7.	2 gallons
102	Feb. 21st	9.75	7.	2 gallons
104	Feb. 21st	5.55	3.75	1 gallon
110	Feb. 24th	21.50	2.50	5 pints
123	March 3rd	9.25	3.75	1 gallon
131	March 8th	46.64	3.75	1 gallon
141	March 14th	37.32	3.75	1 gallon
152	March 17th	12.35	3.75	1 gallon
161	March 23rd	20.35	3.75	1 gallon
169	March 28th	68.90	7.	2 gallons
180	April 3rd	37.45	3.75	1 gallon
181	April 3rd	37.95	3.75	1 gallon
184	April 4th	38.65	7.	2 gallons
185	April 5th	42.15	3.75	1 gallon
189	April 6th	31.15	7.	2 gallons
191	April 6th	26.	7.	2 gallons
195	April 7th	28.35	7.	2 gallons
198	April 10th	15.80	3.75	1 gallon
200	April 11th	25.	7.	2 gallons
203	April 12th	47.40	3.75	1 gallon
207	April 14th	36.60	3.75	1 gallon
208	April 14th	58.40	1.20	2 pints
217	April 16th	23.15	3.75	1 gallon
219	April 17th	69.54	3.75	1 gallon
229	April 26th	7.	3.75	1 gallon
236	April 29th	18.15	3.75	1 gallon
237	April 29th	16.25	16.25	5 gallons
238	April 29th	20.20	10.20	3 gallons
241	May 2nd	45.62	7.	2 gallons
242	May 3rd	100.06	3.75	1 gallon
244	May 4th	12.15	3.75	1 gallon
258	May 11th	46.50	3.75	1 gallon
259	May 17th	58.90	1.20	2 pints
284	May 31st	64.88	3.75	1 gallon
290	June 1st	26.10	7.	2 gallons
300	June 10th	43.95	7.	2 gallons
301	June 10th	17.50	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
302	June 12th	9.	3.75	1 gallon
305	June 13th	96 10	7.	2 gallons
306	June 14th	69.70	3.75	1 gallon
307	June 14th	22.40	3.75	1 gallon
310	June 15th	12.25	3.75	1 gallon
313	June 17th	61.75	3.75	1 gallon
317	June 19th	24.49	3.75	1 gallon
319	June 21st	13.40	3.75	1 gallon
326	June 27th	28.25	3.75	1 gallon
327	June 28th	19.40	3.75	1 gallon
328	July 1st	7.	7.	2 gallons
337	Aug. 15th	15.75	3.75	1 gallon
Mail Order	Aug. 24th	7.	7.	2 gallons
Mail Order	Sept. 8th	13.50	3.75	1 gallon
407	Sept. 18th	42.18	3.75	1 gallon
414	Sept. 19th	24.85	3.75	1 gallon
416	Sept. 19th	49.57	3.75	1 gallon
417	Sept. 20th	69.25	3.75	1 gallon
429	Sept. 25th	34.31	7.	2 gallons
430	Sept. 25th	52.92	3.75	1 gallon
433	Sept. 25th	39.85	3.75	1 gallon
439	Sept. 27th	47.27	7.	2 gallons
441	Sept. 27th	64.60	7.	2 gallons
445	Sept. 29th	50.60	7.	2 gallons
448	Oct. 2nd	27.06	3.75	1 gallon
449	Oct. 2nd	34.90	1.20	2 pints
450	Oct. 2nd	97.33	16.25	5 gallons
451	Oct. 3rd	34.73	3.75	1 gallon
452	Oct. 3rd	28.68	7.	2 gallons
453	Oct. 4th	28.95	3.75	1 gallon
454	Oct. 4th	51.69	3.75	1 gallon
455	Oct. 4th	48.15	7.	2 gallons
458	Oct. 5th	67.25	3.75	1 gallon
462	Oct. 6th	21.32	3.75	1 gallon
Mail Order	Oct. 7th	16.25	16.25	5 gallons
471	Oct. 10th	25.13	3.75	1 gallon
Mail Order	Oct. 11th	20.20	16.25	5 gallons
481	Oct. 13th	76.08	3.75	1 gallon
485	Oct. 17th	58.85	3.75	1 gallon
486	Oct. 18th	16.80	10.20	3 gallons

Orders.

Order No.	Date	Amount Order	Amount of Quin-Coco	Quantity Quin-Coco
487	Oct. 18th	33.50	10.20	3 gallons
488	Oct. 18th	28.46	3.75	1 gallon
491	Oct. 19th	38.93	3.75	1 gallon
496	Oct. 20th	49.60	3.75	1 gallon
499	Oct. 25th	57.59	3.75	1 gallon
500	Oct. 25th	56.87	3.75	1 gallon
501	Oct. 25th	44.60	3.75	1 gallon
507	Oct. 31st	16.15	3.75	1 gallon
512	Nov. 6th	63.75	3.75	1 gallon
Mail Order	Nov. 11th	9.70	7.	2 gallons
521	Nov. 14th	76.80	3.75	1 gallon
522	Nov. 14th	41.54	3.75	1 gallon
524	Nov. 16th	23.95	3.75	1 gallon
546	Nov. 30th	9.20	3.75	1 gallon
558	Dec. 10th	27.75	3.75	1 gallon
Mail Order	Dec. 11th	22.50	16.25	5 gallons
120			$642.20	186 gallons

For 1912

1	Jan. 3rd	39.40	13.	4 gallons
6	Jan. 9th	27.50	3.75	1 gallon
10	Jan. 10th	7.	7.	2 gallons
11	Jan. 10th	21.45	3.75	1 gallon
14	Jan. 12th	50.	3.75	1 gallon
15	Jan. 12th	67.99	3.75	1 gallon
34	Jan. 16th	24.90	3.75	1 gallon
35	Jan. 16th	72.65	7.	2 gallons
39	Jan. 18th	10.40	3.75	1 gallon
40	Jan. 18th	18.	3.75	1 gallon
43	Jan. 18th	16.05	3.75	1 gallon
44	Jan. 18th	26.32	3.75	1 gallon
53	Jan. 23rd	29.85	3.75	1 gallon
54	Jan. 24th	33.70	3.75	1 gallon
55	Jan. 24th	13.35	3.75	1 gallon
59	Jan. 26th	18.10	7.	2 gallons
60	Jan. 26th	5.85	.60	1 pint
62	Jan. 27th	18.45	2.50	5 pints
64	Jan. 27th	13.93	3.75	1 gallon
70	Jan. 21st	30.70	7.	2 gallons

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
Mail Order	Jan. 26th	7.	7.	2 gallons
71	Jan. 21st	38.45	16.25	5 gallons
Mail Order	Jan. 30th	16.25	16.25	5 gallons
72	Jan. 31st	40.63	3.75	1 gallon
73	Jan. 31st	7.	7.	2 gallons
74	Jan. 31st	17.	3.75	1 gallon
76	Jan. 31st	36.70	3.75	1 gallon
78	Feb. 2nd	30.80	13.	4 gallons
80	Feb. 5th	52.20	13.	4 gallons
82	Feb. 5th	47.42	3.75	1 gallon
83	Feb. 5th	47.70	3.75	1 gallon
87	Feb. 7th	32.25	3.75	1 gallon
88	Feb. 7th	11.75	3.75	1 gallon
102	Feb. 14th	32.87	3.75	1 gallon
105	Feb. 15th	43.50	3.75	1 gallon
113	Feb. 17th	26.79	3.75	1 gallon
117	Feb. 19th	34.25	3.75	1 gallon
170	March 12th	40.08	3.75	1 gallon
173	March 14th	30.93	3.75	1 gallon
180	March 18th	14.80	3.75	1 gallon
192	March 22nd	19.30	3.75	1 gallon
Mail Order	March 21st	10.13	3.75	1 gallon
194	March 25th	67.25	3.75	1 gallon
198	March 27th	58.65	2.50	5 pints
Mail Order	April 2nd	21.78	3.75	1 gallon
206	April 4th	7.	7.	2 gallons
208	April 6th	38.10	16.25	5 gallons
209	April 6th	34.73	16.25	5 gallons
211	April 8th	20.75	7.	2 gallons
212	April 8th	37.50	3.75	1 gallon
213	April 9th	62.40	15.	4 gallons
216	April 9th	20.45	3.75	1 gallon
223	April 13th	14.25	3.75	1 gallon
224	April 13th	28.45	3.75	1 gallon
239	April 24th	19.25	16.25	5 gallons
240	April 24th	19.55	7.	2 gallons
241	April 24th	14.25	10.20	3 gallons
248	April 26th	30.74	13.	4 gallons
252	April 29th	33.70	7.	2 gallons
256	May 1st	23.50	3.75	1 gallon

Order No.	Date	Amount of Order	Amount of Quin-Coco	Quantity Quin-Coco
257	May 1st	26.25	.60	1 pint
Mail Order	May 24th	14.80	3.75	1 gallon
229	April 17th	13.35	3.75	1 gallon
232	April 19th	30.18	3.75	1 gallon
233	April 22nd	29.80	3.75	1 gallon
234	April 22nd	33.48	3.75	1 gallon
237	April 24th	18.50	10.20	3 gallons
238	April 24th	16.65	7.	2 gallons
272	May 9th	65.72	3.75	1 gallon
274	May 14th	55.	3.75	1 gallon
276	May 15th	22.90	3.75	1 gallon
356	July 24th	52.99	3.75	1 gallon
360	Aug. 3rd	14.17	3.75	1 gallon
361	Aug. 5th	78.30	3.75	1 gallon
365	Aug. 6th	67.45	16.25	5 gallons
366	Aug. 6th	25.41	.60	1 pint
Mail Order	Aug. 7th	7.	7.	2 gallons
368	Aug. 7th	41.35	7.	2 gallons
369	Aug. 7th	15.80	3.75	1 gallon
370	Aug. 7th	16.15	3.75	1 gallon
376	Aug. 12th	20.08	3.75	1 gallon
390	Aug. 16th	29.35	3.75	1 gallon
392	Aug. 17th	27.65	3.75	1 gallon
398	Aug. 20th	16.25	16.25	5 gallons
399	Aug. 20th	39.98	7.	2 gallons
400	Aug. 20th	12.40	7.	2 gallons
402	Aug. 21st	35.80	2.50	5 pints
403	Aug. 22nd	44.27	10.20	3 gallons
408	Aug. 23rd	128.15	10.20	3 gallons
409	Aug. 24th	22.30	3.75	1 gallon
411	Aug. 26th	9.15	3.75	1 gallon
414	Aug. 29th	51.43	3.75	1 gallon
417	Aug. 30th	22.14	3.75	1 gallon
93			$544.75	161 gals. 2 pts.

Q6. I note in the list of orders for the year 1907 that there are wide jumps between numbers. For example, there appears to be a jump from Order No. 193, dated April 15th, to Order No. 376, dated Aug. 1st. Another jump from Order No. 387 dated August 5th to Order No. 505, dated Sept. 27th. Please explain as to this?

By Mr. Rawle: Same objections and as not rebuttal and as irrelevant.

A. That is due to the fact already explained that numbers of my orders were misplaced, lost or destroyed, as is always the case in looking up old papers.

Q7. The seventeen orders, as listed, for the year 1907, amount in value of Quin-Coco to $39.15. Would this be a fair estimate of the amount of business you did in Quin-Coco for that year?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant and as calling for a mere guess on the part of the witness.

A. The number of missing orders shows conclusively that the total amount of sales on Quin-Coco for 1907 could not possibly be a proper estimate, as given in this record.

Q8. I notice that the number of orders listed for 1908 is a hundred and two, showing sales of Quin-Coco amounting to $307.25. I also note that there is a jump between orders 113, dated February 19th, and 214, dated March 30th; another jump between orders 268, dated April 20th, and 420, dated July 11th. Besides a number of other jumps of lesser magnitude. I also note that the number of the last order listed is 748. From these figures what would be your best estimate of the amount of Quin-Coco you sold in the year 1908?

By Mr. Rawle: Same objections.

A. I would be very glad indeed if all the orders for 1908 could have been found, for as that was my second year in the sale of Quin-Coco, and finding it to be

such a wonderful repeater I feel certain that I had it on at least seventy-five per cent. of my orders. The exact amount I could not possibly give on account of the missing orders.

Q9. What proportion of your total sales for the year 1908, would you say conservatively, is listed on this list?

By Mr. Rawle: Objected to as not proper for rebuttal, as not relevant or admissible, and as calling for guesswork.

A. I would judge not exceeding forty per cent.

Q10. I note that the list for 1909 contains a hundred and sixty-one orders, representing a hundred and eighty-seven gallons of Quin-Coco of the value of $651.85. Please make the same explanation or answer respecting this year?

By Mr. Rawle: Same objections.

A. Quin-Coco was one of my hobbies in the line I sold. I always tried to get each man to try it. If he only bought it in pints he did not interest me, but if his customers were consumers of a chocolate preparation I always talked the gallon price to him. Consequently as above stated I sincerely believe that at least seventy-five per cent. of my orders would show Quin-Coco. I usually sold approximately seven hundred orders per year. In this instance the total amount of orders for Quin-Coco amounts to only a hundred and sixty-one, which is nothing like the smallest estimate even that could possibly be put upon my sales for Quin-Coco during any year.

Q11. For the year 1910, I note that you have in this list a hundred and thirteen orders, representing a hundred and forty gallons of Quin-Coco and total value of $499.35.

For the year 1911 I note that you have a list of 120 orders, representing 186 gallons of Quin-Coco of a total value of $642.30.

For the year 1912 up to August 30th I note you have a list of 93 orders representing 161 gallons of Quin-Coco, and value of $544.75.

Does your explanation as to the previous years apply with equal pertinency to the years I have just referred to?

Objections repeated.

A. It most positively does.

Q12. I show you a letter on the letter head of Wm. R. Warner & Co., dated Philadelphia, Nov. 29, 1909, and ask you to state whether or not this is an original letter received by you and if it is to read it into the record?

The letter is submitted to counsel for defendant.

By Mr. Rawle: Same objections and because the witness has already been examined in the *prima facie case.*

By Mr. Rawle: No objection is made to the authenticity of the letter.

A. This is an original letter received by me and reads as follows:

(Letter No. 1)

"Philadelphia, November 29, 1909.

Friend Kelton:

Your letter of November 27th with copies on Quin-Coco orders received and it certainly pleases us very much to note the nice business you are doing on Quin-Coco. It only proves that a good article in the hands of a salesman can be sold and will repeat and the more of them you can get started, the larger your orders will become, and under our contract with you, you reap a benefit with us, as every dollar's extra business means a commission to you.

Too bad that your health is not as good as it

should be, for a salesman, of all men, must be a good feeler to be able to induce the dealer to give an order, especially on our proposition. Order takers are not in the game, and fools fall by the wayside.

As you know, there is a prize contest on for December, and we certainly hope to see you as one of the Prize Winners.

With best wishes, and kind regards to yourself, and wife, we are,

Respectfully yours,

Wm. R. Warner & Co.,

H. Pfeiffer, V. Prest."

The letter is offered in evidence and marked "Plaintiff's Exhibit, Kelton Correspondence, Letter No. 1."

Q13. Have you ever had any means of knowing as to the amount of Quin-Coco manufactured at defendant's St. Louis laboratories, and if so, please state the means of your knowledge and the amount manufactured as ascertained by such means?

By Mr. Rawle: Objected to unless the witness brings home his evidence to some duly qualified officer of the defendant company, directly.

A. In going through the laboratories in the St. Louis office on December 23rd, 1909, I made notes of several things which particularly interested me. Among these was the immense cost of shipping the products to the State of California. Another was the amount of Ingluvin seen at one time in the house. Another was the number of employees. Another a very large order of elixirs and fluid extracts which had been taken by the Arkansas representative. And still another was the item in question, namely, Quin-Coco, which on the sheet I have in my possession shows that Mr. Garvin, the head chemist, informed me that the Pfeiffer Chemical Company

at this time were manufacturing a hundred and sixty gallons of Quin-Coco a week.

By Mr. Rawle: The answer is objected to because the statement alleged to have been made to the witness by Mr. Garvin can not affect the rights of the defendant, because the records from which he made these surreptitious notes are not produced, or even testified to.

Q14. What is the paper you hold in your hand?

A. This is the notes I made December 23rd, 1909.

Q15. Were these notes made by you personally and at that time?

A. They were, they are in my own handwriting.

By Mr. Bradford: The sheet in question is offered in evidence and marked "Complainant's Exhibit, Kelton Memorandum 1909".

For the convenience of the court the Examiner is requested to copy sheet on the record.

By Mr. Rawle: The offer of the sheet and placing of it on the record is objected to as not rebuttal, as not relevant and immaterial and because the only possible use that can be made of the piece of paper is by way of refreshing the witness' memory after proof that it was contemporaneously made.

The sheet reads as follows:

"Shipment to San Francisco, Cal.
1775 # — $34.75.
$6480 Ingluvin
500 employes.
200 gallons Comstock
160 " Quin-Coco a week.
Dr. J. F. Fletcher.
12 doz. Vitalia $24.50
6/29
7114

Dec. 23, 1909."

Q16. What other evidence have you of your visit to the St. Louis Laboratories on Dec. 23rd, 1909?

By Mr. Rawle: Objected to for the same reasons.

A. I have my itinerary card for the day, dated December 23rd, 1909, Thursday. These cards were furnished by the house, and began with the duties for the early morning and until the close of the day.

Q17. Do you remember distinctly what Mr. Garvin said to you at this time in reference to the quantity of Quin-Coco he was manufacturing each week?

By Mr. Rawle: Objected to for the same reasons and because statements by Garvin do not bind the defendant.

A. I remember very distinctly that the amount of Quin-Coco which Mr. Garvin stated to me they were manufacturing each week was a further incentive on my part to push the article named. I remember I told the trade of the amount of this preparation the house was manufacturing, showing to them that it was one of the best articles for a reproducer they could possibly stock in the drug store.

Q18. I show you a letter on the letter head of the Pfeiffer Chemical Company, dated January 4, 1905, and ask you if this is an original letter and if it is to read it into the record?

A. This is an original letter received by me. The letter reads as follows:

(Letter No. 2)

"St. Louis, Jan. 4, 1905.

Mr. Alva Lee Kelton,
Nashville, Tenn.

Friend Kelton:—

Your orders etc. received. We are pleased to note that you are '*taking care of Memphis*' and can assure you that you can not please us better than to give your competitor a black eye, not only in

Memphis, but in every other town in your territory.

Under separate cover we are mailing Bradstreets for the State of Tennessee.

We hope 1906 will prove the banner year for you and that you will be fortunate in not having any unusual obstacles to overcome.

You can rest assured that we will aid you whenever possible.

With kind regards, we are,

Respectfully yours,

Pfeiffer Chemical Co.,

G. A. Pfeiffer, Secy."

By Mr. Rawle: The letter is objected to as immaterial and irrelevant and not rebuttal.

Q19. I show you another letter on the letter head of the Pfeiffer Chemical Company, dated St. Louis, March 15th, 1906, ask you if it is an original letter and if so to read it into the record?

A. This is an original letter received by me. It reads as follows:

(Letter No. 3)

"St. Louis, Mar. 15, 1906.

Mr. Alva Lee Kelton,

Bristol, Tenn.

Friend Kelton:—

Your orders, letters, etc., received. We enclose as usual notations in reference to accounts together with expense check and salary check to Mar. 15th.

We note with a great deal of satisfaction that your business this year is keeping up well. Make it a point to see that your customers when you have left him has sufficient goods of what you are selling to last him until your next trip. Do not let up on your efforts to sell goods under P. C. Co.'s name. By fulfilling these two plans to the

limit, you will freeze out practically every competitor in your territory, and will make the strongest-hearted salesman weak when he realizes the strength of the opposition and the proposition he is up against.

The P. C. Co., while often pleased with the business they get, are not satisfied with anything less than all the business in their line. In other words, we want it all.

We note you overlooked carrying out the balance on hand on your last book. The correct amount to carry forward to book #11 is $38.55.

With kind regards, and best wishes, we are,

Respectfully yours,

Pfeiffer Chemical Co.,

G. A. Pfeiffer, Secy."

By Mr. Rawle: Objected to for the same reasons and because the date, 1906, is more than two years before the defendants had anything to do with Quin-Coco.

By Mr. Bradford: Both letters are offered in evidence, and marked respectively "Plaintiff's Exhibit, Kelton Correspondence, Letter No. 2" and "Letter No. 3".

By Mr. Rawle: Same objections are repeated to the offer.

Q20. I show you another letter on the letter head of the Pfeiffer Chemical Company, dated St. Louis, Mar. 30, 1906, and ask you if it is an original letter and if so to read it into the record?

A. This is an original, highly prized, received by me. It reads as follows:

(Letter No. 4)

"St. Louis, Mar. 30, 1906.

Mr. Alva Lee Kelton,

Memphis, Tenn.

Friend Kelton:—

Your business from Memphis is certainly a big surprise. You are getting to be as good a

man as the President of the Company and we doubt if we could have done as well. This is certainly big business when you reach over $200.00 a day, but 'Nothing succeeds like success'.

Now that you have them on the run keep it that way.

Hoping you are enjoying good health, and with kind regards, we are,

Respectfully yours,
Pfeiffer Chemical Co."

By MR. RAWLE: Objected to for the same reason.

By MR. BRADFORD: This letter is also offered in evidence and marked "Plaintiff's Exhibit, Kelton Correspondence., Letter No. 4."

By MR. RAWLE: Same objection to exhibit.

Q21. I also show you a letter of a similar character dated Dec. 14, 1905, and ask you if it is an original letters and if so to read it into the record?

A. This is an original letter received by me and reads as follows:

(Letter No. 5)

"St. Louis, Dec. 14, 1905.

"Mr. Alva Lee Kelton,
Nashville, Tenn.

Friend Kelton:—

Your orders, etc., received. We note that business is keeping up in spite of the nearness of the Holidays. We realize that at this time orders are more difficult to get than in seasonable times, you can rest assured that they are more desired, and appreciated by the House.

Are glad to note that you and Mr. H. Pfeiffer had a pleasant and agreeable time together.

With kind regards we are,

Respectfully yours,
Pfeiffer Chemical Co.,
G. A. Pfeiffer, Secy."

By MR. RAWLE: Same objections.

Q22. I also show you another letter on the letter head of the Wm. R. Warner Co., dated Sept. 29, 1908, and ask you if it is an original letter and if so to read it into the record?

A. This is an original letter and reads as follows:

(Letter No. 6)

"Philadelphia, September 29, 1908.

Friend Kelton:

Your letter of September 27th received and the writer is always pleased to hear from you. Am afraid you rather over-estimate his talent as a letter-writer for really Friend Kelton, you are the only salesman that has given me such a strong endorsement in this line. If at some future time I am out of a job and apply for a position as correspondent I am surely going to refer them to you for endorsement.

In reference to Mr. Henry Pfeiffer he is now on his circuit trip, which does not however include your territory. Will be back here about October 15th, then he will make another circuit trip which may or may not lead him to Tennessee. In either case however you will be advised. You can rest assured that absolute justice will be done in the matter of territory division. We do not want any man to be cramped for room to use his ability, neither do we desire that the territory be neglected.

With best wishes, we are,

Respectfully yours,

Wm. R. Warner & Co.,

G. A. Pfeiffer."

By Mr. Rawle: Same objection except as to date.

Q23. I also show you another letter dated August 12, 1907, and ask you if it is an original letter and if so to read it into the record?

A. This is an original letter and reads as follows:

(Letter No. 7)

"Aug. 12, 1907.

Friend Kelton:

Your letters also notation on circular letter received. It is certainly a pleasure to have a traveling man that is in harmony with the house, and the house in harmony with the traveling man. It does one good to see the traveler take these letters in the spirit they are given, that is to help do more business so that we can pay them more money for the work they are doing, instead of every time they receive a letter, scrutinize it with a view of sending a kick back.

We also note carefully what you say in regard to Dr. Glass.

Hoping business will continue good with you, we are,

Respectfully yours,
Pfeiffer Chemical Co.,
H. Pfeiffer, Prest."

By Mr. Rawle: Same objection and also as to date.

Q24. I also show you another letter dated Nov. 30, 1908 and ask you if it is an original letter and if so to read it into the record?

A. This is an original letter and reads as follows:

(Letter No. 8)

"Nov. 30, 1908.

Friend Kelton:

We return herewith the letter you received, also copy of our reply to the letter and remittance we received from the Doctor. Wish to say the Doctor has taken a rather hasty view in blaming us for rough handling by the Railroad Company, and as to the error of Cold Tablets, can say, our packers and checkers are human and with a line, comprising about *fifteen thousand items*, mistakes will occasionally creep in.

Believe me can truthfully say the Doctor has in his day made a mistake or two himself. Don't you think so?

Hope you can get him in line again, and we can assure you we shall be glad to use our best efforts to bring about that result.

Cordially yours,
Pfeiffer Chemical Company,
G. D. Merner, Treas."

G.D.M/4
Recd. Dec. 5, 1908.
Alva Lee Kelton.

By Mr. Rawle: Same objection, but not as to date.

Q25. I hand you another letter dated August 24th, 1903, and ask you if it is an original letter and if so to read it into the record?

A. This is an original letter and reads as follows:

(Letter No. 9)

"St. Louis, Aug. 24, 1903.

Mr. Frank Gleaves,
Nashville, Tenn.

Dear Sir:—

Our Mr. Kelton requested us to write you in regard to himself. We will say that Mr. Kelton has been with us over a year and we have always found him reliable and are satisfied that he will not enter into any contract that he is not able to live up to, for we consider him careful and conservative.

We are,
Respectfully yours,
Pfeiffer Chemical Co.,
H. Pfeiffer, Prest."

By Mr. Rawle: Same objections.

By Mr. Bradford: The last five letters above

produced and read into the record, are offered in evidence and marked "Plaintiff's Exhibit, Kelton Correspondence, Letter No. 5", and "Letter No. 6", "Letter No. 7", "Letter No. 8" and "Letter No. 9", respectively.

By Mr. Rawle: Same objections to the offer of exhibits.

Pursuant to notice given at noon, an adjournment is now taken for the purpose of going to Mobile, Ala., and taking the deposition of witness Larkin E. Edmondson, of that city, which will appear in the record, immediately following the examination of the witness Kelton.

New Orleans, La.,
St. Charles Hotel,
August 15th, 1916.
9.30 a. m.

Met pursuant to adjournment (from Mobile, Ala.).

Parties present as before.

It is agreed that counsel for defendant may place of record any objections to questions, answers and documents introduced by this witness at the end of the examination along this line, to be of the same force and effect as if made following each question, answer or exhibit.

Q26. I think it has been made of record in your former deposition that your relations with Mr. Henry Pfeiffer were of a friendly, personal character, as well as agreeable in a business way. Is this true and have you any documentary evidence to this fact and to the

character of the relations existing between you and the other heads or officers of the Pfeiffer Chemical Company and the Wm. R. Warner & Co.?

A. My pleasant business relations began with Mr. Henry Pfeiffer when I was just entering the business arena as it were of the world. I have always looked upon him as my tutor as a salesman and I made no small success under his supervising hand. Our relations have always been and now are the most pleasant possible. Mr. Pfeiffer formerly made numbers of trips with me, these trips varying from one or two days to a week or ten days each, and during this time we had ample time to become thoroughly acquainted with one another, he realizing my method as a salesman and my record as a man. He has spent as much as a whole week as a guest in my home in Nashville, Tenn. By way of pleasant parenthesis I would state that my wife and children are particularly fond of Mr. Pfeiffer.

Yes, I have a number of letters and documents to show that the business and social relations between Mr. Henry Pfeiffer and Mr. G. A. Pfeiffer, Mr. G. D. Merner, and other members of the Pfeiffer Chemical Company and Wm. R. Warner & Co. concerns and myself were and are, so far as I am concerned, the most pleasant and agreeable to be found.

Any man might well be proud to show these documents I am producing to show the mutual confidence existing between the members of the concerns above mentioned and myself, and the appreciation of my employers for my efforts in their behalf. I was always absolutely conscientious in every business transaction I made for the Pfeiffer Chemical Company and the Wm. R. Warner & Co., and there is no man to whom I have ever sold a bill of goods whom I would dread to meet.

I have with me a number of original letters received from my employers, written and signed by Mr. Henry Pfeiffer, Mr. G. A. Pfeiffer and Mr. G. D. Merner, re-

spectively, which I take pleasure in handing to you for such use as you may deem advisable.

Q27. I ask you to read these letters into the record and following your answer I ask the Examiner to note their introduction as exhibits on behalf of plaintiff and to mark them "Plaintiff's Exhibit, Kelton Correspondence, Letters Nos. 10 to 44 Inclusive."

A. I recognize these as the original letters and read as follows:

(Letter No. 10)

"St. Louis, Dec. 30, 1905.

Mr. Alva Lee Kelton,
Memphis, Tenn.

Friend Kelton:

We enclose check for sample case shipped over the Frisco R. R. Kindly return your old case promptly as we are rather short at this season of the year.

In reference to Memphis statements you have all there are for Memphis at this date.

With kind regards, we are,
Respectfully yours,
PFEIFFER CHEMICAL CO.,
G. D. Merner.

Mr. Kelton:

Am informed that Rose is also in Memphis, so go for your best and most doubtful trade first.
H. P.

(On back of letter)

Mr. H. Pfeiffer,
Dear Sir and Friend:

I will surely take care of the trade in Memphis and all other towns in my territory, if I can keep my health I know no such thing as fearing competition.

Very sincerly,
Alva Lee Kelton."

(Letter No. 11)

"St. Louis, July 5, 1906.

Mr. Alva Lee Kelton,
Jackson, Tenn.

Friend Kelton:

We enclose expense check, notations, etc. You certainly are to be doubly complimented on your record in Memphis. Also, we wish to again compliment you upon the good prices you are getting.

We have gone over your Memphis business from Jan. 1st up to July 5th with the following results:

Total orders shipped amount to 1785.94
List price— 1886.84

The above included mail and personal orders. We feel you are more than going to make the 3000.00 for the year. Would suggest that you raise your mark to $3500 and you will have our confidence that you will reach the goal.

We are depending on you, Mr. Kelton, to keep the P. C. Co. banner on top in not only Memphis, but in the entire state of Tennessee.

Again complimenting you upon the above record, and with best wishes, we are,

Respectfully yours,
PFEIFFER CHEMICAL CO.,
G. D. Merner."

(Letter No. 12)

"Apr. 16, 1907.

Mr. Kelton:

You certainly deserve congratulations on your sales in Memphis. For this reason we have led all our salesmen and it is going to put you near the top for April. Why not make a determined effort to be number one for this month? You certainly have a fine start.

Respectfully,
PFEIFFER CHEMICAL CO.,
G. A. Pfeiffer, Secy."

(Letter No. 13)

"St. Louis, Sep. 12, 1907.

Mr. Alva Lee Kelton,

Friend Kelton:

We have decided to have all you travelers come to St. Louis and we would like to have you arrange your trip to be in St. Louis Thursday morning, Oct. 17th.

We have arranged to have you stop at the Planters Hotel and enclose a letter which please present to them after registering. The St. Louis Transfer Co. runs a bus from the depot at 25c. and it probably will be well for you to take the bus to the Hotel.

The object in having you come to St. Louis is to have you see how nicely we are fixed for business, also to make arrangements to close a contract for next year, and to talk over matters concerning the business that you do not fully understand. We expect you to stay in St. Louis three days and the writer will arrange to give you most of his time while here.

Please commence taking memorandums of every item that you wish to talk about so that we can go into detail and explain them to you fully. We want to put you in position so you can talk our line of goods to the trade knowingly.

Please let us know if it is going to be convenient for you to be here on the above date. Be sure and bring your sample case with you so we can have it thoroughly fixed up for you.

We feel we are in better shape now to give you full information in regard to our business than ever before.

Respectfully yours,
PFEIFFER CHEMICAL CO.,
H. Pfeiffer, Prest."

Letter.

(Letter No. 14)

"Nov. 9, 1907.

Friend Kelton:

Your special delivery of Nov. 8th received this morning and we are happy to say Bravo! Mr. Kelton. You did splendid. The order is in the shipping room and will be shipped today. Nothing like having a good man to represent the House for they do what they start out for. It just simply proves again, Mr. Kelton, what you can do if you deliberately set your mind on doing it and work for that end.

You can readily see what this means for the future with this man. Please don't forget this when you start another man. You will find that this same theory will also hold good on your collections. Determination and push always wins out.

With best wishes, we are,

Respectfully yours,
PFEIFFER CHEMICAL CO.,
H. Pfeiffer, Prest."

(Letter No. 15)

"St. Louis, Dec. 4, 1907.

Mr. Alva Lee Kelton,
Decatur, Ala.

Friend Kelton:

Your expense book also letters received. We wrote you to Nashville in regard to the order that you wish to send to your relatives. These are altogether too small to send by freight as the freight would be as large as the orders amount to and we are holding them as we could not allow freight charges on orders of this kind. We would be pleased to send them by express charging whatever the express charges are to your account.

We also note that you are going to be at the Hotel Echols, Decatur, Ala. We do not believe in visits of this kind as we feel it makes extra expense and what we want is orders.

Lay your plans for a good December and to not listen to anybody, but do your duty and put in your time and show your customers what they are losing by not pushing our goods harder than ever. Every dollar's worth of business you are selling now you make besides your salary and expense 10% commission and the larger this commission check is the better we are pleased.

We have not laid off a single employee in the House and do not intend to do so and we are paying them all in cash too. This is too good a country and there is too big a demand for goods for us to quit.

Hoping you are enjoying good health, and with kind regards, we are,

Respectfully yours,
PFEIFFER CHEMICAL CO.,
H. Pfeiffer, Prest."

(Letter No. 16)

"St. Louis, Jan. 25, 1908.

Mr. Alva Lee Kelton,
Memphis, Tenn.

Friend Kelton:

Enclosed please find statement of your commission account for the year 1907. Please examine the same carefully and if there are any errors please notify us and the same will be corrected.

We are pleased to note that you again drew a nice commission and we hope that the year 1908 will prove still better. You can readily see what it means when you reach your sale limit, for after that every dollar you sell you get your salary and expenses paid and in addition to that 10%. We

feel that Tennessee has great possibilities as you can readily see that if we could get every dealer in the state pushing P. C. Co.'s goods you would draw an immense commission and the more you draw the better we like it. The business is in the state, Brother Kelton, and it takes smooth work to get it. With your acquaintance and with the prompt service and good goods we are giving them, we certainly feel that every year should show a nice increase.

Your business this year increased over last year nearly $500, so set your mark high and we believe you will not fall much short.

With best wishes, we are,

Respectfully yours,

PFEIFFER CHEMICAL CO.,

H. Pfeiffer, Prest.

P. S. In looking over your statement we notice that your past due accounts including offsets and items charged to profit and loss amount in 1907 to $2084 compared with the year previous of $1422, so you can see, Brother Kelton, that your increased business has been entirely exhausted by your increased past due accounts. Now, if everything that you have sold had been paid for you would have gotten $208.45 more commission than you are getting. The point we wish to make is to show you the importance of collecting past due accounts, for every time you close one up it means 10% commission for you and it is surprising what one can do with these people when he is on the ground if he presses the matter, and gives them to understand that they have had the goods and sold them and made a profit and that they should pay for them.

As you know, Mr. Kelton, you are right in your best years and we want to see you make a big salary. The more you make the better we like it

and under your contract it is mutual; for if you do the business you get the money.

With best wishes,

PFEIFFER CHEMICAL CO.,

H. Pfeiffer, Prest.

You should make $2000. in 1908, try for it for it can be done."

(Letter No. 17)

"Feb. 13, 1908.

Dear Travelers:

We hope you will pardon our not notifying you of the results of the prize mailed you Jan. 17, 1907. On account of the time necessary to decide, we were unable to notify you soon.

As you are aware, we have 32 travelers and there were only five prizes offered, and the only item we figured was the per cent. of increase over orders of the previous year, so it is out of the question for all to receive prizes.

We are certainly very much pleased with the results as 16 travelers show a nice increase on their orders compared with a year ago, while seven show a decrease. Of course only the travelers were taken in consideration that were with us in 1906 and 1907. This accounts for the discrepancy in the total number that we have now.

We are pleased to announce the following winners:

First prize, D. W. Nolin of North Texas. 100.00
Second price, C. E. Whitlock of Southern Iowa 60.00
Third prize, C. J. Thurman of Nebraska.... 40.00
Fourth prize, Alva Lee Kelton of Tennessee. 30.00
Fifth prize, J. F. Comstock of Arkansas.... 20.00

We also wish to make favorable mention of the following travelers who have made satisfactory in-

creases, C. E. Miller of Missouri would have come in for the seventh prize if there had been one, A. N. Harris of Iowa, eighth, Mr. H. L. Roy of Kansas City, Ninth, Mr. T. D. Van Horn of Mississippi, Tenth, Mr. S. H. Searle of Indiana, Eleventh, Mr. L. B. Hardy, Georgia, Twelfth, Mr. L. C. Gill of Texas, Thirteenth, Mr. S. S. Kerns, Iowa, fourteenth, Mr. O. M. Human of Oklahoma, Fifteenth, Mr. E. J. Fe..of California, Sixteenth.

We enclose checks for the amount of the prizes to the prize winners.

With best wishes, we are,

Respectfully yours,

Friend Kelton:

We wish to compliment you as one of the prize winners for 1907. Your average size of increase is $2.70. This is very gratifying, but do not let this fact discourage you towards making an effort for the prize of 1908. The larger the orders, the larger your commission, with the possibility of a prize.

PFEIFFER CHEMICAL CO.,
H. Pfeiffer, Prest."

(Letter No. 18)

"Feb. 13, 1908.

Dear Travelers:

With this mail you are notified of the results of the prize offer of 1907 with checks to the prize winners. We are so much pleased with the results that we have decided to make the same prize offer for 1908.

The conditions are the same as 1907, namely $250.00 divided into five prizes as follows:

First prize, $100.00 Third prize, $40.00
Second prize 60.00 Fourth prize 30.00
Fifth prize, $20.00

The conditions are that the first prize winner

is to show the largest increase in size of orders over 1907, etc., through the list, but the traveler is supposed to send in something near the same amount of orders as he did the previous year.

We certainly feel that the ones that did not draw a prize this year are the most likely to win a prize in 1908, especially those that have shown a decrease in the size of the order instead of an increase as the orders of 1907 will be taken as a basis to be compared with 1908, do not get discouraged because you failed in winning a prize this year.

We also feel that some of our travelers either forgot or thought there was no use trying for it when the facts are it is, you might say, in the reach of any one of our travelers to get, the first prize. The conditions are equitable, and to show you what a little increase on each other will do towards getting it, Mr. Nowlin, who won first prize, has increased the size of his orders only $4.67 per order. You all know that with the constant increased demand on our goods and the addition of new items all the time, that this does not look like an unreasonable increase, and if any one of our travelers would have added a gallon of Fluid Extract to each of his orders he would have been the prize winner. It shows the little margin of increase that will bring one of the prizes.

Now please do not let this prize offer go by default, but constantly keep in mind on every order that you take and you may be among the lucky ones in the contest for 1908.

On account of the statistics necessary we regret to say that we will not be in a position to give the names of the prize winners on Jan. 1st when the time expires, but we will make every effort to notify you as soon as we can, but reserve the right of delaying the answer until March 1, 1909.

This prize offer is certainly on an equitable

and mutual basis for you can readily see that the more business you do the more commission you draw, so you see come in for your percentage of benefit. 1-2-3 off you are for ten and one-half month race.

Respectfully yours,
PFEIFFER CHEMICAL CO.,
H. Pfeiffer, Prest.

SPECIAL NOTICE:
Please keep this letter
for future reference."

(Letter No. 19)

"Apr. 7, 1908.

Friend Kelton:

Enclosed we hand you statement for March. We wish to compliment you on this statement. It is very gratifying. You will note for the six years you have been with us that each year has showed an improvement over the previous year. For the month of March you are also at the head of the class as to sales rank.

We feel that this is one of the best monthly reports that we have mailed out.

You will note one item, off-sets and allowances, something we or the travelers do not take into consideration, still during the month of March it amounted to nearly 3% of our business. It just shows how the money gradually slips away from us and the leaks there are that must be stopped up before we get our profits.

You have done splendid and we hope that April will not be far behind.

With best wishes, we are,

Respectfully yours,
PFEIFFER CHEMICAL CO.,
H. Pfeiffer, Prest."

(Letter No. 20)

"St. Louis, Apr. 15, 1908.

Friend Kelton:

Your letters received and the same carefully noted. We are pleased that you and Mr. Richards met and the enemy is yours.

In regard to Harrison's Pharmacy will say that the only plan we can suggest is for you to go there and see if you cannot in some way get his business. You can readily see that if you cannot do anything meeting him face to face it would be very hard for us to try to do anything by corresponding, so put on your thinking cap and land the man if you can.

On your March report 1-A means that you were the leader of all the salesmen. No. 1 is mail orders which of course leads all the men and 1-a is the next and so. You certainly have very just reasons for feeling proud of the March Report, and we hope you will get more of them during the year, which will mean a nice commission check at the end of the year for it is always a pleasure to us to send our travelers a big commission check.

With best wishes, we are,

Respectfully yours,

PFEIFFER CHEMICAL CO.,

H. Pfeiffer, Prest."

(Letter No. 21)

"St. Louis, Apr. 30, 1908.

Mr. Alva Lee Kelton,

Nashville, Tenn.

Dear Sir:

Is there a thief in your store?

We do not mean the kind that reaches in your cash drawer and appropriates the contents. There is a worse kind of thief than the one that holds you up with a gun. (We refer to that little thief in

your mind that keeps you from selling profitable goods.)

Add up the sales you make in one day on unprofitable goods. We will warrant that you could have made at least 50% of those sales twice as profitable as they were had you sold your customers the right goods.

Gross sales do not mean anything.

It is profits that count.

Yes, it is easier to sell high priced advertised goods. We know that, and it take a little hard work to introduce a line of profit paying packages, but once you have them introduced, you will have smooth sailing.

The Pfeiffer Chemical Co.'s goods fill your bill.

Just give the enclosed order blank careful study. Write your name at the top and let us ship the goods to be an entering wedge to drive out the little thief.

You are entitled to these profits. Now get them.

Everything we furnish is guaranteed to give satisfaction to the consumer, and besides, pays you from 100% to 300% profit.

Respectfully yours,

PFEIFFER CHEMICAL CO.,

H. Pfeiffer, Prest.

P. S. This is a letter that we are sending to every druggist in your territory whether a customer or not, and the postage alone is $800.00. This again proves to you that we are aggressive and use every means possible to help our travelers increase their business and we hope you will work to get the benefit of this expense."

(Letter No. 22)

"Jul. 1, 1908.

Friend Kelton:

So 'everybody' was at Elizabethton for Eagle

Drug Co.'s order. The only way we can figure it out there was but one salesman that got the order. You certainly deserve credit for the nice assortment sold, and the purchaser can recommend these preparations to his customers in the highest terms. They certainly give satisfaction.

Wishing you continued success and with best wishes, we remain,

Respectfully yours,

P. C. Co."

(Letter No. 23)

"St. Louis, Jul. 9, 1908.

Friend Kelton:

Your letters of different dates duly received and the same carefully noted. It will be entirely satisfactory for you to have your usual Summer vacation and we hope you will get the rest desired and come back ready for a big business.

We also want to thank you for your hearty congratulations in the success in securing the management of William R. Warner & Co. We will assure you, Mr. Kelton, that all P. C. Co. men will be well taken care of. We will guard your interests and try and arrange things mutually satisfactory.

With this additional line you will be able to sell dealers goods that you never were able to sell before which will be a big help and in time you will work in your P. C. Co. and Mellier's perfumes and your S & H goods, but with all that it takes good men and we know we have a good man in Tennessee.

Hoping you will enjoy your vacation and with best wishes, and kind regards, we are,

Respectfully yours,

PFEIFFER CHEMICAL CO.,

H. Pfeiffer, Prest."

(Letter No. 24)

"Aug. 25, 1908.

Friend Kelton:

Re—Enthusiasm.

We are happy to note from your various letters that your enthusiasm is at high pitch. Enthusiasm, Brother Kelton, is one of the most catching things on earth, it even beats Small-pox and if you can give enthusiasm to your trade their success with P. C. Co.'s goods is assured.

PFEIFFER CHEMICAL CO.,
G. D. Merner, Treas."

(Letter No. 25)

"Philadelphia, September 14, 1908.

Friend Kelton:

Re. Duplicate orders sent us.

These orders are certainly ideal orders for the P. C. Co. In examining them carefully, we note you are a fine combination man and know how to sell Profit Paying Patents, Pharmaceuticals and Mellier's Perfumes and have learned the trick of building up the order so as to justify a direct shipment. We find that the orders amount to over $520.00 and are about as fine a lot of orders as any house can hope to get. Such a record certainly must re-double your enthusiasm on the Combination Line and make you put forth your very best efforts to duplicate it.

With best wishes for continued success, we are,

Respectfully yours,
WM. R. WARNER & CO."

(Letter No. 26)

"Oct. 19, 1908.

Friend Kelton:

Re—Your September Record.

When a salesman ranks 3 in point of sales and

good in point of prices we really feel the report speaks for itself and is in itself the heartiest kind of a congratulation the House can give. The writer enjoys writing letters, but in times like the present (the busiest of the year) the accumulation of work will not permit going into details otherwise indulged in with pleasure. You can rest assured, however, Brother Kelton, you have our best and heartiest congratulations. The record is one you can be proud of and we know will prove only on your part a desire to better it.

Cordially yours,
PFEIFFER CHEMICAL CO.,
G. D. Merner, Treas."

(Letter No. 27)

"Nov. 19, 1908.

Friend Kelton:

October, 1908, shows the largest month's business you have ever had with the House. We are pleased to congratulate you on this increase. We have no doubt it will be put a stepping stone to further breaking of records.

Respectfully yours,
PFEIFFER CHEMICAL CO.,
G. D. Merner, Treas."

(Letter No. 28)

"Philadelphia, Dec. 5, 1908.

Mr. Alva Lee Kelton,
521 Woodland St.,
Nashville, Tenn

Dear Mr. Kelton:

Your letter of December 1st received. It, of course, is a pleasure to the writer to know that you are continuing to make good with the combined lines. It seems you have been with the firm so long that it would be a mistake from every stand-

point for you to consider any other sales position. You know the line, you know the customer, and you know the house. It would take a good long time to become so thoroughly acquainted with a new connection, and no doubt would cause you, as you said to the writer in St. Louis, to sweat some blood.

Pleased to note that your business is showing a nice increase, and convinced that you will not be satisfied with 1909 unless your previous increases hold good, and it proves to be your banner year. We always should, and salesmen in particular, aim to exceed previous efforts. Such results, however, only come from good, faithful, steady work and when one can work with the conviction that he is traveling for the right house, selling the best goods to the best druggists in existence.

With kind regards to Mrs. Kelton, and best wishes for yourself, I remain, as ever,

Very sincerely yours,

G. A. Pfeiffer.

We look for you in Old Phila.
The cradle of Independence during 1909.
G. A. P."

(Letter No. 29)

"Mar. 24, 1909.

Friend Kelton:

The spirit shown in your letter of Mar. 20th is certainly appreciated and we feel we have your co-operation, Brother Kelton, in making the St. Louis House the leader each and every month. You know those Eastern boys are making us look a little to our laurel and if we don't watch out they will give us a close race.

Cordially yours,
PFEIFFER CHEMICAL COMPANY,
G. D. Merner, Vice Pres. & Treas."

(Letter No. 30)

"May 12, 1909.

Friend Kelton:

It was indeed pleasant that you and Mr. Van Horn could spend Sunday together. He also wrote us of the good visit you had together. Also mentioned that you two gave Mr. Young a good portion of P. C. Co. enthusiasm.

Cordially,
PFEIFFER CHEMICAL COMPANY,
G. D. Merner, Vice Pres. & Treas."

(Letter No. 31)

"Does it sell?

Well, here is a sample!

Albany, Ga. 6/12/09.

Pfeiffer Chemical Co.,
St. Louis, Mo.

Gentlemen:

Forward by express or freight, prepaid,
1 GAL. Vogue.
Bill same as July 1st, to
Artesian Drug Co."

When a dealer orders in gallon lots by mail it looks as though it is a winner, doesn't it?

Vogue is a repeater, Summer and Winter, its sales prove it.

Cordially,
PFEIFFER CHEMICAL COMPANY,
G. D. Merner, Vice Pres. Treas.
PFEIFFER CHEMICAL COMPANY,

I have always known that Mellier's Vogue is an excellent repeater. I have a number of very large buyers of this odor—that you know.

June 19, 1909, Alva Lee Kelton."

(Letter No. 32)

"Philadelphia, Jan. 7, 1909.

Friend Kelton:

The writer acknowledges your poem 'THE VALUE OF A SMILE' and can assure you that the value of a smile has never been over-estimated. It usually dulls a sharp edge and helps make life worth living. What would this mass of human being be if none of them would smile. The thought of such condition almost staggers one. It does me, and I know it does you, who have such acute sensibilities. Keep your smile as big as possible for '1909'. The writer assures you that it will help you climb some hills, and over-come many obstacles.

With best wishes, we are,

Respectfully yours,

G. A. PFEIFFER."

(Letter No. 33)

"Jan. 20, 1909.

Friend Kelton:

Re—Your December Business.

This report shows the biggest sales for the seven Decembers you have been with us and we are happy to again congratulate you. We trust your record in December will be repeated each of the twelve months during 1909.

Cordially yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner, Vice Pres. & Treas."

(Letter No. 34)

"Jul. 2, 1909.

Friend Kelton:

Your letters of different dates received and we are certainly pleased that you are feeling some better, also that you have been elected to the posi-

tion of Chairman of the Reception Committee of the Pharmaceutical Association. It is certainly very gratifying to think that one of our travelers is so honored. If you feel that it would be a good investment it would certainly be well for you to attend that meeting and of course incidentally get in as much good work for the P. C. Co. as you possibly can. Conditions are that none of the members of the firm are in a position to attend, having made arrangements for other work.

You will also no doubt be surprised at the contents of the circular letter. We will assure you, Mr. Kelton, that the P. C. men will be properly taken care of and we certainly feel that this is going to put every one of our travelers in a position to draw a larger salary and that is the kernel of the nut.

With best wishes, we are

Respectfully yours,

PFEIFFER CHEMICAL CO.,

H. Pfeiffer, Prest."

(Letter No. 35)

"Philadelphia, Nov. 12, 1909.

Friend Kelton:

Have received your line by Delmas. Evidently friend Delmas became acquainted with a different part of New York than the writer on his several visits, for frankly, he was very well pleased with New York and with the fresh air and nice wide streets, and the well kept buildings.

There is nothing shoddy about the streets of New York, in fact most everybody, I believe, is agreeably surprised on their first visit.

Hope everything is going nicely with you, and and that Mrs. Kelton and the children are enjoying good health.

With kind regards, I am, as ever

Respectfully yours,

G. A. PFEIFFER."

(Letter No. 36)

"Aug. 20, 1910.

Friend Kelton:

SUBJECT—YOUR ORDER FROM GEO. H. BATTIER.

This certainly was a fine order—four items of one gross each, besides a gallon of Quin-Coco.

Congratulating you, we are,

Cordially yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner, Vice Pres. & Treas.

Henry, the shipping clerk, also called my attention to it.

G. D. M."

(Letter No. 37)

"Aug. 22, 1910.

Friend Kelton:

Regarding competition in Memphis, we know you are right after business, nursing it carefully and we feel you are holding up your end of it.

Cordially yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner, Vice Pres. & Treas."

(Letter No. 38)

"SUBJECT—YOUR ORDER #280, EDW. V. SHEELY, VANCE & LAUDERDALE, Memphis, Tenn.

Friend Kelton:

We are pleased to note your landing him for a 5 gallon lot of Glycerole-Thymol Comp. It is indeed a matter of much satisfaction to get a big order after making a test.

Cordially,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner, Vice Pres. & Treas."

(Letter No. 39)

"October 23d, 1911.

Friend Kelton:

Your letter of the 20th taking exception to the writer's criticism on the concession you made Taylor Drug Co., Dyersburg, Tenn., received. It was farthest from the writer's intention to offend you in any way, and the notation was written you just as it would have been written to any other salesman, and even to a brother making the same concession.

Surely you know the writer's friendship for you, and the pleasure he always has in noting your success and good sales. And nothing pleases him better than to see your name on the Star List with the amount of sales representing large figures.

Don't fall into the bad habit of carrying a 'Chip on your shoulder' ready to be offended at an exception taken to one of your transactions.

Now, the writer is going to make a confession to you, namely, that he was always opposed to this five gallon proposition, and if he had had his way it never would have been given the salesmen. To confirm this—with a few exceptions, the Philadelphia Salesmen do not enjoy this privilege.

So naturally, when he saw the order making a concession, in addition to the five gallon proposition, it was like stepping on his most tender corn. If you ever had this experience, you know it most generally causes a yell.

Now, Friend Kelton, don't let anything the house says or does, or the mood of the man writing the letter in any way interfere with your work. Your business is to sell goods and the more of them you sell the better for all concerned.

With best wishes, we remain,

Cordially yours,

PFEIFFER CHEMICAL COMPANY,

G. A. PFEIFFER."

(Letter No. 40)

"November 23, 1911.

Dear Travelers:

Below we give Photo through our screen analysis of the Composite Salesman, for the month of October:

Pfeiffer	(Mr. Alva L. Kelton)	1385.06
Alfred Wright	(Mr. F. C. Stevenson)	963.29
Warner	(Mr. B. F. Jones)	914.41
S & H	(Mr. C. E. Whitlock)	640.78
Mellier	(Mr. J. W. Wilkins)	509.01
Harter	(Mr. O. M. Human)	224.33
	Total	$4637.88

The above includes only the sales of the salesman for the particular line mentioned, of course, each salesman sold some of all the other lines, but in the line given he leads all other salesmen. To illustrate, Mr. Kelton sold more Pfeiffer goods, Mr. Stevenson, more Alfred Wright goods; Mr. Jones, more Warner goods, than any other salesman.

The combined sales show what one salesman would have sold, had he been the leader in each line of products, and demonstrates the wonderful possibilities with our combination. We do not doubt, but that each salesman mentioned above, could have sold as much of each of the other lines as the leader in that particular line, provided he had given each of the other lines the same attention and effort. The real lesson to learn from the results of the Composite Salesman is, the mistake of neglecting any of our different lines. Such neglect almost always means loss of business. Only when you succeed in selling a good average of each the different lines you represent, will you have become a versatile selling salesman.

We know all our salesmen join with the house

in congratulating each representative who forms part of the October Composite Salesman, and will determine to be part of the Nov. Star Composite Salesman. The month of October shows this Composite Salesman to be composed of six different men; it is possible, and it is very likely to happen, that one salesman will form two or more parts of this Composite Salesman.

With best wishes, we remain,

Cordially yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner,

Vice Pres. & Treas.

O. K. Nov. 25, 1911.
Alva Lee Kelton."

(Letter No. 41)

"St. Louis, Apr. 9, 1912.

Friend Kelton:

We notice the good work you are doing in behalf of the Tennessee Pharmaceutical Association and are pleased that you can be of efficient service in promoting the interests of the Legitimate retail drug trade.

Cordially yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner, Vice Pres. & Treas."

(Letter No. 42)

"SALESMAN'S LETTER.

What is More Welcome Than Orders?

Dear Traveler:

The answer to the above is 'The large order'. Possibly the greatest weakness of our position is the small order.

For years it has been our constant effort to develop a plan to eliminate the small order, filled at a loss. To confess, that was one of the funda-

mental reasons for our various consolidations, the purpose being to supply such a broad line as to enable you to sell an order which justifies direct shipment, and which returns a fair profit.

The small order has no advantage, and is at a disadvantage, in every respect, compared with the large order. We believe you constantly aim to sell your customers a big order. At the risk of being tiresome, we recapitulate a few suggestions for selling the big order:

First, Time:—

Your plans should be perfected before you enter the store, and you should know whether you have called at a time when you can reasonably expect to hold the buyer's attention.

Second, Demonstrating the Line:

Unless you can do this, your chances of selling a large order are limited. If on the other hand you can properly demonstrate and interest the dealer in the different lines, even though he may buy a small quantity of each, you will leave him with a nice sized order.

Third, Think Big Ideas:

This is absolutely necessary, for you are constantly in touch with dealers whose surroundings handicap them in doing so, and unless you can impress big ideas on your customers, the chances are he will impress small ideas on you. The true salesman controls the situation, the order-taker is controlled by the buyer.

Fourth, Develop your Memory and Know your Business:

This is the best time prolonger known. You can say in two seconds, what it takes you perhaps two minutes or more to look up. Knowing the answer to your buyer's question means you can have a minute and fifty-eight seconds to build up your order.

Waste of time is probably the greatest leak in modern business transactions. If you're weak in not knowing your prices, or weak on the different lines, do not lose an opportunity to overcome your weakness. Absolutely know your lines from A to Z. You cannot find a better lever to build orders.

There are other ways to build orders, and after you have read this letter, take a piece of paper and write out the different schemes for doing so. We assure you of one thing, namely, that the last item you place on the order, is the best part of the order. All expenses attached to an order, are the same whether this item is placed on the order or not, and you really have shown the highest quality of salesmanship when you succeed in inducing a dealer to give you an order for an item after he has quit buying.

You will find another advantage in the increase in your sales, for when you consider you average from two to five orders per day, you can realize what an increase in your sales, a few additional dollars to each other, will make.

The large order merits your constant, careful, conscientious and intelligent thought. Time put in thinking it over is not wasted; it will reap a splendid harvest.

Kindly send us any plan you have found successful in increasing your orders; we would like to give your brother salesman the advantage of it.

Truly yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner, Vice Pres. & Treas.

Recd. June 1, 1912.

Alva Lee Kelton."

(Letter No. 43)

"Aug. 10, 1912.

Mr. E. W. Gladhill,
Dyer, Tenn.

Dear Sir:

Answering yours in references to Rheumatic Comp. sold your customer, Mr. Peter Morecraft, who has no doubt a Chronic case. If Mr. Morecraft feels he has not received his money's worth, we suggest you refund amount paid you. Please find attached credit memorandum as your protection.

We are today writing our Mr. Kelton, to advise you when he will again be in your vicinity. However, as Mr. Kelton receives full credit for mail orders, he, as well as ourselves, will much appreciate your order direct. To assist you, we are mailing under separate cover, copy of our latest catalog, also price lists of the Wm. R. Warner & Co., The Searle & Hereth Co., Mellier's & Alfred Wright's Perfumes. As you, of course, know we are affiliated with these concerns and fill orders for their products in addition to Dr. Harter, Kickapoo & B. B. B. Family Medicines.

You will note that practically every item we supply nets you at least 100% profit, and from then on up to 300% clear. Besides, the quality is such that we give you our authority to guarantee everything you get from us to give entire satisfaction to your customers. We would appreciate your looking over our catalogues, and favoring us with your order, covering your wants in our line. Stamped envelope is enclosed for your reply.

Assuring you of our heartiest co-operation at all times, and with kindest regards.

Cordially yours,
PFEIFFER CHEMICAL COMPANY,
Ben L. Brockman.

O. K. Aug. 17, 1912.
Alva Lee Kelton."

(Letter No. 44)

"SALESMAN'S LETTER.

Suggestion.

Dear Traveler:

Suggestion is undoubtedly the greatest sales weapon, and thousands, in fact, millions of dollars, are spent in making suggestions. Every window display is to suggest; just think of the thousand of dollars the leading stores spend on their window displays, and the only purpose is to suggest a need in the mind of the customer.

All salesmen on the road are for like purpose; —they are sent out to suggest to the buyer something that he needs or can use to advantage. To assist you, we supply you with samples. These offer you a direct means to make your suggestions, and every salesman of experience, who has been a success, fully realizes and appreciates sample value, and instead of groaning under their weight, or objecting to them, he welcomes samples above everything else as a means of increasing his efficiency and sales.

Granting the value of samples, the next point is to keep them in such condition that they will make a favorable impression. Really, it would be too bad, if you are carrying the weight of a lot of samples, and then when you show them to a prospective buyer, they are in such condition that instead of making a favorable impression and suggesting a desire to have those goods in his store, they have just the opposite effect, and you can rest assured, that if your samples are not in good condition, not clean, not well kept, that opposite effect is just the kind of impression they make.

The purpose of this letter is to enlist your cooperation in keeping your sample case up to date,

filled with nice, neat, clean samples, and demonstrating them in such a way as to transfer the favorable impression and suggestion made into an order.

It costs the house money to supply samples, and we do not desire that you be extravagant or wasteful with them, but we realize that the most expensive samples you can have is a dirty one, and one that doesn't create the desired favorable impression. Upon receipt of this letter open up your sample case, look at it and ask yourself, Are they the kind of samples that would make a favorable impression upon me, if I were buyer? Could they be improved so as to make a more favorable impression if the salesman called on me with that case?

Selling goods is your business. You put time and effort calling on your customers. Why not have everything as favorable as possible when you do so, and let us add right here, that your results will depend largely upon the condition of your samples, and the way you demonstrate them.

Proper suggestion is the greatest selling force known. We repeat, it's the best weapon a salesman has, and samples are one of the best methods of making suggestions. Once more, think of the thousands of dollars the leading department stores spend in window displays. What do you see in these windows? Samples. Are they dirty? No. Are they placed in haphazard method? No; on the contrary, they are the nicest, cleanest goods in the store, arranged in the most tasteful and attractive manner possible.

That is just the way your sample case and your samples should be kept. Perhaps you do not appreciate the advantage of your samples and sample case, but if you will stop and give this matter a little thought, their value will be readily ap-

parent. Arrange at once to put them in first class condition, and realize the full advantage of them.

With best wishes, we remain,

Truly yours,

PFEIFFER CHEMICAL COMPANY,

G. D. Merner.

Aug. 10, 1912.

Dear Mr. Merner:

This is, undoubtedly, one of the very best letters you have ever written. I like the correction.

Very sincerely,

ALVA LEE KELTON."

Q28. On the bottom of letter No. 10 I find a note written in long hand, as follows:—

"Am informed that Rose is also in Memphis; so go for your best and most doubtful trade first. H. P."

Please explain who is the "H. P." whose initials are signed to this note, and who is referred to as "Rose"?

A. This is a note written by Mr. Henry Pfeiffer in his own hand, and Rose referred to therein was my competitor, representing the Allen-Pfeiffer Chemical Company.

Q29. On the back of letter No. 10, I find a note signed by you. Please explain what this is?

A. This is a copy of my letter written to Mr. Pfeiffer in response to his note referring to Rose on the bottom of Letter No. 10. I frequently kept copies of my replies to house letters by writing them on the house letters themselves.

Q30. I call your attention to letter No. 36, and ask you to explain, if you remember, what it refers to?

A. It is with much reluctance that I turn letter No. 36 over to you, even temporarily. It is a letter referring to an order which is like an oasis in the life of a

commercial traveller. This order was of such magnitude that even "Henry," the shipping clerk, called Mr. Warner's attention to it. An order for four items of one gross each is hard to get in any place, especially in a city like Memphis, Tenn., and from such a large drug store as the George H. Battier was.

Q31. I notice that Letter No. 41 refers to your work in behalf of the Tennessee Pharmaceutical Association. Will you kindly explain with reference to this?

A. I was at the time Letter No. 41 was written, April 9th, 1912, secretary and treasurer of the Travellers Auxiliary of the Tennessee Pharmaceutical Association. This is the reference Mr. Merner makes in his letter. I had done considerable work in promoting activity and interest in this auxiliary, sending out letters and devising plans to make the work of the auxiliary helpful and effective. I had received complimentary letters from Mr. Eberle, secretary of the Texas Pharmaceutical Association. These I had sent to the house for perusal, and this letter was in response and returning the Eberle correspondence.

Q32. Please state your comparative rank in the list of salesmen employed by the Wm. R. Warner & Co., and what evidence you have to substantiate your reply?

A. The Wm. R. Warner & Co. kept a record of the sales of what they termed the "Star Salesman." Any man whose name appeared on this list was always proud of the fact that he had achieved the pace set by the house for his record. I here produce a number of salesman's letters issued by the house during the years 1911 and 1912, being all that I could find among my old papers, showing these star lists. I find my name included in each of these lists, sometimes in one position and sometimes in another, but frequently near the top, and I feel that these letters justify my claim as producing my share of business for the house, and that the other letters above referred to justify my claim of en-

joying the confidence of the house, as well as their appreciation of my work.

By Mr. Bradford: The letters above referred to are produced and exhibited to counsel for defendant, but not offered as exhibits unless he so desires.

Q33. Were letters ever written to the house by your customers in reference to your work?

A. Very frequently, and I have a number of such letters, which I show you, together with copies of letters from the house transmitting such letters to me, all showing the appreciation of my work by my customers, as well as by my house.

Q34. Do you recall any notably large orders for Quin-Coco while you were selling this item? If so, please relate?

A. Quin-Coco was by far the best seller I had in the entire pharmaceutical line, after I once introduced it to the trade. As stated in a former answer, unless a man could use it in quantities he did not interest me as a buyer. One day in particular which I remember was my sales in Dyersburg, Tenn., on November 13, 1909. My sales for that day, five orders, amounted to 20 gallons, total.

Q35. How large a town is Dyersburg?

A. Dyersburg is about 7,000 population.

Q36. Did you have any difficulty in believing the statement made to you by Mr. Garvin, as before stated in your testimony, that the Pfeiffer Chemical Company was manufacturing a hundred and sixty gallons of Quin-Coco per week, in December, 1909?

A. I feel certain Mr. Garvin was conscientious in his statement to me concerning the amount of Quin-Coco manufactured by the Pfeiffer Chemical Company. I used this as an argument, or, rather, as a proof, to the trade if I accidentally found a man who was not a buyer of Quin-Coco, to show him that we were actually knocking the eye out of Eli Lilly & Co., in their sales of Coco-

Quinine. It seemed entirely reasonable to me, in view of the volume of my own sales, that the house should be manufacturing this quantity, or even more.

Recess until 1.30.

At this point Mr. Kelton's deposition was resumed—Tuesday, August 15th, 1916—at 2.45 P. M.

Mr. Rawle now being present, enters of record the following objections:

To Q26—Because the question is irrelevant and immaterial.

To Q27—The question and the writings offered are objected to as irrelevant, inadmissible and immaterial.

To Q28 to Q31—Same objections.

To Q32 to Q36—Same objections.

Q37. About the middle of February, 1916, I asked you by wire to meet me in Memphis for a conference. We spent a couple of days in Memphis and a day in Nashville, at which time you showed me the larger part of the documents that have been introduced in evidence. You also advised me that you felt that some of your old customers could substantiate the testimony you had given in the case. I asked you if you would during leisure time and at our expense see some of your old customers in the vicinity of Nashville and advise me the results of your interviews with them.

I am asking you this question because I assume that counsel for defendant would like the facts of record and to give him an opportunity to ask any questions on the subject he may care to.

Please explain if you did any work in response to my request and in a general way the result of it?

By Mr. Rawle: Objected to as irrelevant and inadmissible. Defendant's counsel however accepting as a statement of fact the facts known to him and set forth in the question.

A. Pursuant to your request I called upon twenty-five or thirty former customers and found that they remembered very well having purchased Quin-Coco, most of them agreeing that they had been told by me that it could be used as a substitute for Coco-Quinine, and almost invariably they would make a request not to be drawn into the case, not that they could not agree that they had used Quin-Coco in the manner above stated, but that they simply did not care to be mixed up, as they put it, in any controversy.

By Mr. Rawle: I object to the answer for the same reasons and as hearsay and cannot help calling the attention of the Court to the very grave impropriety of eliciting such statements and the placing of them on the record.

Q38. In your sales work for Wm. R. Warner & Co., were the officials of the house fully conversant with your methods of selling goods?

By Mr. Rawle: Objected to as not proper for rebuttal, and as calling for a general statement instead of for facts, or a statement of precisely how such officials became conversant if the witness should testify that they did.

A. I would certainly see no reason why they should not be so, for I tried very hard to conscientiously represent them, in a reputable manner, during all the years I was in their service.

Q39. Are you in any way under any obligation, financial or otherwise, to Eli Lilly & Company, or to any one connected with that house, and has your testimony in this case as given at this time or at any former time, been influenced by any such obligation now existing or then existing, or any promises for any future reward?

By Mr. Rawle: Objected to as inadmissible and irrelevant.

A. I am in no way under any obligation to any one

in any way whatever, connected with Eli Lilly & Co. Concerning my testimony in this case, my friend, Mr. G. W. Madden, the local representative of the Eli Lilly & Co., and who lives in Nashville, my home and his home, is my neighbor and friend. He insisted when I gave my deposition last year several times that I do this for him. Although we had been competitors still we had been friends. I was very reluctant to give any testimony but on account of our friendship I agreed to do so, and did last year. I unhesitatingly state that I have the highest regard for every member connected with both the Wm. R. Warner & Co. and those whom I know in Eli Lilly & Company.

By Mr. Rawle: The answer is further objected to as entirely irresponsive in almost all respects and the irresponsive part is objected to for the same reasons.

Direct examination closed at 3.10 P. M.

Cross-examination (at 3.10)

By Mr. Rawle (without waiver of objections):

XQ40. What compensation have you had for the work you have done for Eli Lilly & Co., in this case (apart from your time spent on the witness stand) and what compensation do you expect or hope, or have you arranged to receive, therefor?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I have received a reasonable compensation for time I spent and have no hesitancy in stating that I have no idea nor desire for any reward in any manner.

XQ41. XQ40 repeated.

A. As already stated I received a reasonable compensation and when I say that that is all that is necessary.

XQ42. How much compensation have you re-

ceived in money or other thing of value or consideration?

Objection repeated.

A. I have always tried to be reasonable in everything. All that I have ever had up to date is a salary and I never have been and I never shall be dependent upon any individual, corporation or set of individuals for my livelihood. I do not belong to the grafter class. If I had been I certainly would never have taken up the life of a commercial traveler, as I did. Under no circumstances or conditions would I accept anything from any one except in a reasonable manner.

XQ43. XQ42 repeated.

Objection repeated.

A. I repeat the answer above.

By Mr. Bradford: I object to this line of examination unless counsel phrases his questions to discover from the witness whether or not he has been paid or promised compensation in return for giving testimony in this case, or the further fact that he may have been paid or promised an excessive price for his time devoted to the work in order to influence his testimony. It is believed that plaintiff has the right to pay any man a reasonable compensation for the discovery of evidence to be used in this case and I am willing that counsel shall know and to place of record, if he shall insist, the exact price per day and per hour which was paid to the witness for these services. I think, however, that it is immaterial and irrelevant except to determine whether or not it may have been sufficient to unduly influence or bias the witness in his testimony.

By Mr. Rawle: The objection just made is itself objected to as highly improper to be placed on the record, and as leaning rather in the direction of suggestion to the witness.

XQ44. I have asked you what compensation you have received for work done by you for Eli Lilly & Co., in connection with this case (other than for the time you spent on the witness stand before and during the past two days). Do you decline to state the amount of compensation you have received and the nature of it?

A. I see no necessity for a long drawn-out answer to these questions. And I see no reason in divulging any affairs of a personal nature, other than that above stated, namely, that my compensation was simply reasonable, that's all.

XQ45. I now ask you for the last time to state the amount and nature of the compensation you had for work done for plaintiff, in this case, other than the time spent on the witness stand, and I ask whether you decline to answer the question?

Objection repeated.

A. Based upon the salary I had been making I will state that the money I received was none other than that about equalized with what I had been making.

XQ46. How much has the Lilly Company or any person for the Lilly Company actually paid you in fact for the services referred to?

Objection repeated.

A. I do not know the exact amount. I would not under any circumstances make a statement which I could not absolutely verify.

XQ47. State approximately and as near as you can the amount of actual compensation in money that the plaintiff or any one for the plaintiff has paid you for work done for the plaintiff in this case?

Objection repeated.

A. In one time that I was out of the city I found upon my return that the trip actually was made at a

loss on my part, but as I had promised to do a certain thing I simply accepted the amount I had already agreed upon. I would say that altogether I have received very little profit, if any, over what I might have made in my duties connected with my office.

By Mr. Rawle: The witness having steadfastly refused to answer questions touching his compensation for work done for the plaintiff in this case, notice is given of a motion to strike his deposition from the record for that reason.

By Mr. Bradford: The attention of the Court is called to the fact that I have above offered to either furnish counsel for defendant the facts inquired about or place the facts in the record, as he may wish.

By Mr. Rawle: I leave the matter to the discretion and judgment of the opposing counsel.

XQ48. Have you now any expectation or hope of receiving additional compensation from plaintiff or any of its officers or employees, for work that you have done for plaintiff in this case, but which has not yet been paid for? If so, state the amount you hope or expect to receive?

A. I will most positively state that each day I am away from my business is such as cannot be determined in dollars and cents. I am quite certain that no man can tell exactly what time is worth, and time is the material on which I work. I have no hesitancy in stating that the small compensation I may receive at this time will in no manner justify my being away from my business. As to the future I have, as I have already stated, no desire nor inclination in any way whatever to receive any compensation.

XQ49. What I asked you is whether or not you consider that you have been already fully paid by or for the Lilly Company for work done in this case, or whether on the contrary you have done some work for

that company which has not yet been paid for, and if so, how much you expect or hope to receive or expect to ask for?

A. As already stated I have no hope to receive what my actual time would be worth. If so, I certainly would not be here today. I would not under any circumstances receive money which did not merely compensate me for the small time put into it now.

XQ50. Have you been fully paid for what you have done, or do you consider that there is something still coming to you?

A. My compensation has already been accounted for, but it will by no means justify me in the loss of time I am losing from my own business.

XQ51. You say your compensation has been accounted for. I ask you whether it has been paid you?

A. It has.

XQ52. How much has been paid you?

A. As already stated only the small amount agreed upon when I agreed to do any work in this connection.

XQ53. When you previously testified in this case which was in March, 1915, you stated that you were "assistant general manager Phoenix Mutual Life Insurance Company," and that you lived in Nashville. Has that been your business ever since until now?

A. It has up until August 1st, 1916.

XQ54. What happened then?

A. I received a letter from Frederick Stearns & Company asking if I would accept a position as traveling salesman for them. Later we exchanged one or two letters and they wired me asking me to come to Detroit at their expense. I am now in the employ of Frederick Stearns & Co.

XQ55. In what territory?

A. The exact territory has not yet been determined, but I hope to get Texas on account of my wife's declining health.

XQ56. Have you begun actual work for that house?

A. I am at the present time in the employ of Frederick Stearns & Company and have had to wire them the second time on account of my delay in this city.

XQ57. Have you sold any drugs for Frederick Stearns & Co.

A. My first week's sales went in Saturday night of last week. At this very hour I should be representing them.

XQ58. When did you first begin to put in any of your time in helping plaintiff prepare the testimony in this case?

A. I believe it was in February of this year.

XQ59. When did you complete your labors for plaintiff?

A. I have forgotten the exact date, but it has been possibly sixty days ago. However, I put in days at odd times between February and the time stated.

XQ60. In what cities, towns or villages did you call upon your former druggist customers to interview them about testifying for plaintiff in this case?

A. I was in Memphis with Mr. Bradford in February, and later made some towns contiguous to Nashville, covering as above stated, some twenty-five or thirty druggists in all, I presume.

XQ61. Name the towns or cities, other than Nashville.

A. I was in Clarksville, Springfield, Murfreesboro, and a few other towns.

XQ62. What other towns or cities?

A. I was in Gallatin and Franklin, both being nearby towns.

XQ63. Name the others?

A. I made one trip in which I was in Union City, Martin, and Paris, and a few smaller towns.

XQ64. What other towns or cities?

A. Near Union City I was in one day in Rives, Kenton, Rutherford, Trenton and Dyer. As near as I now recall this covers the entire list of towns where I saw any customers.

XQ65. In the insurance business what was the particular nature of your duties in connection with the company?

A. I was a solicitor of business and also assisted the manager in the duties of the office.

XQ66. Were you paid commissions for insurance business brought to the company, or did you get a salary or both?

A. I received both.

XQ67. Did Madden visit any of the old customers with you?

A. He did not.

XQ68. Have you discussed with Madden or any other person connected with plaintiff the subject of obtaining employment as a drug salesman for the Lilly Company?

A. Positively no.

XQ69. Referring to the list of your sales of Quin-Coco which you have produced, I understand that you found a number of duplicate orders turned in to the company and that then at the request of plaintiff you copied these into your book, which book you produced and that the list as read off by you is a reproduction, perhaps in changed order, of the list copied into the book. Is that correct?

A. That is correct.

XQ70. I have asked you several times to state the amount of compensation you have received or expect to receive from the plaintiff for work done for it on this case. I now ask you again to state what compensation you have received or expect to receive?

By Mr. Bradford: Objected to as immaterial and irrelevant, but since counsel seems so insist-

ent on obtaining this information, counsel for plaintiff states that his agreement with the witness was that he should be paid $10 for each day he spent making the trips outside of Nashville and his actual expenses and that he promised him a compensation of $1 per hour for the number of hours necessary to go through his mass of old papers, select therefrom such duplicate orders as he could find and make up the list, heretofore referred to. He did this after some investigation in the full belief that he was only paying witness a fair remuneration for the time required, based upon his usual earnings. No other compensation of any name or nature past, present or future has been promised to the witness to counsel's knowledge on behalf of plaintiff.

A. The objection states the matter in full.

Cross-examination closed at 4.25.

Re-direct-examination.

By Mr. Bradford:

RDQ71. Have you received or been promised on behalf of plaintiff any compensation of any name or nature other than as above stated?

A. None whatever.

Deposition closed.

Alva Lee Kelton.

Adjourned to meet at St. Anthony Hotel, San Antonio, Texas, at 10 A. M., August 17th, 1916.

Mobile, Ala., Aug. 14, 1916.
Battle House, 11 P. M.
Mobile, Ala.

Met pursuant to adjournment from New Orleans, La.

Parties present as before.

LARKIN E. EDMONDSON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Larkin E. Edmondson, age 27, Mobile, Ala.; retail druggist. I am a stockholder in the Burkett Drug Company, Inc., and manager of one of the stores.

Q2. Do you know Mr. B. F. Jones, a traveling salesman for Wm. R. Warner & Co., and if you do, how long have you known him?

A. Yes, sir, I do. I have known him about three years.

Q3. Has he solicited your orders for goods in his line?

A. He has.

Q4. Among other items has he solicited your order for Quin-Coco?

A. He has.

Q5. In soliciting your order for Quin-Coco what did Mr. Jones say to you respecting this item?

By MR. RAWLE: Objected to as not proper for rebuttal.

A. He said that it was a chocolate quinine that

could be sold and dispensed in place of Coco-Quinine; that it was the same kind of preparation.

Q6. Did he say it was the same thing as Coco-Quinine?

By Mr. Rawle: Same objection and as leading.

A. He said it could be used for the same purpose as Coco-Quinine.

Q7. Did he mention Coco-Quinine, Lilly, in his talk respecting this item, and make a direct comparison with this Lilly preparation?

A. He mentioned Coco-Quinine but he did not make any comparison that I know of.

Q8. What do you mean by did not make any comparison?

Objected to as not rebuttal and because the answer is clear without any explanation.

A. Well, he did not compare the consistency of the syrup or any other line of comparison that I know of.

Q9. How did he introduce the subject at this interview?

Same objection.

A. I can't remember how he introduced Quin-Coco the first time it has been such a long time ago. It has been about three years since I first bought Quin-Coco from him.

Q10. Has he solicited your order for it more than once and if so did he use the same argument each time?

Objected to as not rebuttal and as leading.

A. He always asked me every time he made a trip if I wanted any Quin-Coco or chocolate quinine as he called it. It was not necessary for him to make an argument each time. He merely asked me if I wanted any and I told him yes or no as the case was.

Q11. When was the last time you saw Mr. Jones?
A. About sixty days and may be longer.

Direct-examination closed.

No cross-examination.

LARKIN E. EDMONDSON.

New Orleans, La.
August 15th, 1916.

After recess, 1.30 P. M.

Parties present as before recess.

It is agreed by counsel that further examination of witness Kelton may be suspended to accommodate other witnesses desirous of leaving the city on afternoon train and that these depositions may be inserted to follow the deposition of witness Edmondson.

JOHN MOISE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. John J. Moise, age 22; Napoleonville, La.; clerk in the Imperial Drug Store, Napoleonville, La., Charles Heno, proprietor.

Q2. Have you any knowledge of the purchasing of the goods for the store where you are employed?

A. Yes, sir; I am frequently present and participate with Mr. Heno in making purchases.

Q3. Do you know Mr. B. F. Jones, a traveling salesman for Wm. R. Warner & Co.

A. I do.

Q4. Have you ever been present at any interview between Mr. Jones and Mr. Heno when Mr. Jones was soliciting an order for the Warner goods?

A. Yes, sir.

Q5. Have you ever heard Mr. Jones solicit Mr. Heno's order for an item called Quin-Coco?

A. No, sir.

Q6. Have you ever heard any other representative of Wm. R. Warner & Co. solicit Mr. Heno's order for the item Quin-Coco, and if so, whom?

A. Yes, sir; Mr. Ritayik.

Q7. When was this?

A. It was about a year ago. It was about a year ago, I could not say just exactly when.

Q8. Were there any circumstances connected with this interview whereby you can fix the date?

A. No, sir.

XQ9. Could you say that it was not more than a year ago, say a year and a half ago?

A. No, sir; I could not.

Q10. Might it not have been as much as a year and half ago?

A. No, sir; it was about the time when the Internal Revenue stamps came out, just about when the bill had been passed.

Q11. You mean the bill requiring internal revenue stamps to be pasted on patent medicines?

A. Yes, sir; on toilet articles and soap.

Q12. Was any one with Mr. Ritayik on this visit?

A. Yes, sir; Mr. Jones.

Q13. Did Mr. Jones have anything to say at the interview?

By Mr. Rawle: The question and all the previous questions leading up to it are objected to as not proper for rebuttal the same obviously

forming part of plaintiff's prima facie case and having been fully gone into there.

A. The only thing he said was that it was right, backing Mr. Ritayik.

Q14. What did Mr. Ritayik say to Mr. Heno respecting this item Quin-Coco?

Same objections and because Heno has already been examined as a witness for plaintiff on the prima facie case, Plaintiff's Rec., 319.

A. He said—he wanted to know if he wanted to buy Coco-Quinine, that is, Quin-Coco, and that everybody along the road where he had been were using it when the doctors prescribed Coco-Quinine and they could not tell the difference.

By Mr. Bradford: It is here noted that the witness, on having his last answer read to him, attempted to correct it, and that counsel for defendant interrupted and insists that the answer must stand as read. Protest is made against this practice by counsel for defendant, as entirely beyond his right and indulging in a practice that is neither proper or in accordance with the rules of evidence. The witness having made an error is clearly entitled to correct it if he sees fit.

By Mr. Rawle: The answer was taken down by the Examiner as spoken and the Examiner so understands. Defendant's counsel has no objection to witness correcting his answer in a proper way by the asking of another question. Defendant's counsel is entitled to have taken down exactly what is said, and no harm is done the witness if he has an opportunity to explain if he made an error. The reason for defendant's counsel taking this position which he does not usually take in this case seems perfectly obvious and proper.

Q15. With what words did Mr. Ritayik introduce the subject of Quin-Coco in his talk to Mr. Heno?

Same objections.

A. He said that he had Quin-Coco which the druggists were using all over on their prescriptions for Coco-Quinine, and you could not detect the difference.

Q16. Did he say anything about the price?

A. I don't remember. But it was cheaper than Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 1.35, without waiver of objections):

XQ17. Were both you and Mr. Heno present when Ritayik talked about Quin-Coco?

A. Yes, sir.

XQ18. Were you present during the entire time he talked about it?

A. Not the whole time.

XQ19. Did he say that Quin-Coco was just like Coco-Quinine, or was the same thing and that it was cheaper?

A. He said it is the same thing and everybody was using it and that it was cheaper.

XQ20. And that is about the substance of what he said?

A. Yes, sir.

XQ21. How do you remember the name of the Warner salesman who talked?

A. Well, when I came in today I met Mr. Bynum, and I did not remember his name. So I asked him. But at the time of the transaction I was introduced to him.

XQ22. Is Mr. Bynum the Eli Lilly & Co. salesman for Louisiana?

A. I could not tell you sir.

XQ23. Do you understand that he is in the employ of Eli Lilly & Co.?

A. Yes, sir.

XQ24. And he told you today the name of the Warner salesman was Ritayik?

A. That is, when I asked him; yes, sir.

XQ25. Who asked you to come here to testify?

A. Mr. Lyle, of Eli Lilly & Co., asked me, and Mr. Bynum rang me up on the telephone.

XQ26. How far is Napoleonville from New Orleans?

A. About eighty miles.

XQ27. Were you in Napoleonville during the month of April, 1915?

A. Yes, sir; in the employ of Mr. Heno.

XQ28. How close were you standing to Heno and Ritayik when they were talking about Quin-Coco?

A. While I was there I was leaning on the same counter that the sample was on, and they were there, too.

XQ29. Did not Ritayik say that the doctors were using Quin-Coco all over in their prescriptions in place of Coco-Quinine?

A. No, sir.

XQ30. Had that drug store been carrying Quin-Coco in stock before that?

A. It never has had it since I have been there. That has been three years that I have been there.

XQ31. Before you came here did you talk to Mr. Heno about what was said at that interview? By Ritayik?

A. No, sir; because he did not remember the name of the man.

XQ32. Did you talk with Mr. Heno about what that Warner salesman had said at that interview though he did not remember his name?

A. The only thing I asked Mr. Heno was what was his name.

XQ33. Did Ritayik say to Mr. Heno that they had been selling Quin-Coco to take the place of Coco-Quinine?

A. He did not say it that way. He said the druggists were using it for the same thing.

XQ34. That is to take the place of Coco-Quinine?

A. I did not say that.

XQ35. How long did you stand at the counter and listen to the talk between these three men?

A. I stood there all the time he was trying to sell the quinine preparation.

XQ36. How many minutes was that?

A. I could not say.

XQ37. Was it ten minutes?

A. I don't know how long it was.

XQ38. You can't remember at all how long it was?

A. He talked for a long time; I could not tell you exactly how long.

XQ39. Did you stand there while he talked about other Warner items?

A. Some.

XQ40. Which ones?

A. At that same time Mr. Heno bought some pills and Mr. Ritayik spoke of how cheap he could make essence of pepsin. He said he could make it a whole lot cheaper than buying it. He said he knew, because he was right out of the laboratories.

XQ41. What kind of pills?

A. It is a pill with the same formula as lapactic pills.

XQ42. Was Heno carrying lapactic pills at that time?

A. Yes, sir.

XQ43. And he bought some of the Warner pills that were just like them?

A. Yes, sir.

XQ44. Did Ritayik say that the Warner pill was just like the lapactic pill of Sharp & Dohme?

A. No, sir.

XQ45. What did he say about the Warner pill in relation to the lapactic pills?

A. I don't remember.

XQ46. Did not he say it was just like the lapactic pill, therapeutically?

A. Therapeutically; yes.

XQ47. And you understood him to say that Quin-Coco was just like Coco-Quinine, therapeutically, did you not?

A. Yes, sir.

XQ48. Did you understand him to say that the druggists all over were dishonest and were using Quin-Coco in prescriptions calling for Coco-Quinine? Or substantially that?

A. No, sir; he did not say they were dishonest. He said they were using it for that.

XQ49. Would you say they were dishonest if they used the one for the other on prescriptions?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir; I think so. That is, if the doctor called for Coco-Quinine.

XQ50. Then it is pretty clear to me that you understood him to be accusing the druggists all over of being dishonest. Is that correct?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. That is what I understood him to say.

XQ51. At the time of that interview, how long had you been in the employ of Heno, or in the drug business? Anywhere?

A. About two years.

XQ52. I understand that you are not yet a registered druggist?

A. No, sir.

XQ53. What were your duties in the drug store at that time?

A. Just clerk.

XQ54. You did not put up prescriptions?

A. No, sir.

XQ55. Nor yet?

A. No, sir.

XQ56. Just keep books and wait on the store in selling articles that were not drugs?

A. I don't keep books; selling articles that are not drugs, such as patent medicines, tooth brushes, soda water, etc.

Cross-examination closed at 2.15 P. M.

Re-direct-examination.

By Mr. Bradford:

RDQ57. Can you describe the personal appearance of this salesman whom you have referred to as Ritayik?

A. Yes, sir. He weighed about a 140 to 160 pounds, and was thin faced. He was a little taller than I am, and I am about five feet four. Smooth face. A rapid talker.

RDQ58. Did you hear Jones introduce him at the time?

A. Yes, sir.

RDQ59. When Mr. Bynum gave you his name today did you recall clearly that this is the name by which he was introduced by Mr. Jones?

A. Yes, sir.

RDQ60. You spoke of the date being about the time of the passage of the bill requiring revenue stamps on perfumeries, soaps, etc. How is this fixed in your mind?

A. We had an argument about it, and I showed it to him in one of the drug journals, in the Ruby drug store, back of the prescription counter. I went up there to borrow some stuff from Dr. Duffel and we had an argument, and I went and got the Journal at the Imperial Drug Store.

RDQ61. Has Ritayik ever called at the store more than one time since you have been there?

A. No, sir.

RDQ62. Do you remember the exact date when you entered the employ of Mr. Heno?

A. On the 31st of August, 1913.

RDQ63. Do you remember that Mr. Heno came up here some time last year to testify in this case?

A. Yes, sir.

RDQ64. Was Mr. Ritayik's call before Mr. Heno came to testify?

A. Yes. sir.

Deposition closed.

By Mr. Rawle: Notice of motion to strike out for reasons given.

John Moise.

San Antonio, Texas,
St. Anthony Hotel,
August 17, 1916—10 A. M.

Met pursuant to adjournment.

Parties present as before.

Jeptha C. White, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. Jeptha C. White; age 28; Kingsbury, Texas; retail druggist. Kingsbury is 45 miles from San Antonio, Texas, and has a population of about 300, and has one drug store and two doctors. I have been in the

retail drug business a little over five years, at Kingsbury. I am now the proprietor of the store and run it as J. C. White Drug Store. I formerly had a partner, and it was then run as the Kingsbury Drug Store.

Q2. Do you know Mr. Howard H. Richards, a traveling salesman for Wm. R. Warner & Co.?

A. Yes, sir.

Q3. Has Mr. Richards solicitedyour order for Warner products?

A. Yes, sir.

Q4. How long has Mr. Richards been calling on you for orders in the Warner line?

A. I suppose two and a half or possibly three years.

Q5. Has Mr. Richards at any of his calls solicited an order for Quin-Coco, and if so, what did he say about this preparation?

By Mr. Rawle: Objected to as not proper for rebuttal, the subject having been fully gone into in plaintiff's prima facie case and necessarily forming a part thereof under the pleadings.

A. Yes, sir; he has solicited orders for it. He comes in and goes through his catalogue where he has the pharmaceutical preparations listed, and he comes to the product called Quin-Coco, and he asks me how much Quin-Coco and Coco-Quinine do I need. He tells me that Quin-Coco and Coco-Quinine are the same product, and that he can sell me Quin-Coco at $3.25 or $3.50 a gallon, I don't remember which, where Coco-Quinine costs me $5. He asks me how much I can use.

Q6. Does he say anything about how you can dispense it, and if so, what does he say on this subject?

By Mr. Rawle: Same objection and as leading.

A. Well, he tells me that it is the same preparation as Coco-Quinine.

Q7. Do you ever have any prescriptions for Quin-Coco?

Objected to as not rebuttal.

A. No, sir.

Q8. Do you ever have any calls for Quin-Coco?

Same objection.

A. No, sir.

Q9. Has Mr. Richards ever told you on what kind of calls and on what kind of prescriptions you could sell Quin-Coco, and if so, what did he say?

By Mr. Rawle: Same objection and as leading. The witness has already been asked what Richards said and has answered the question.

A. No, sir. He never did tell me on what kind of prescriptions I could sell Quin-Coco. He, on his representations that Quin-Coco was the same product as Coco-Quinine, I have used it on prescriptions calling for Coco-Quinine.

By Mr. Rawle: The last part of the answer is objected to as not responsive, and because the act of the witness does not bind the defendant, and his statement is immaterial.

Q10. Did Mr. Richards ever ask you if you had any calls for Quin-Coco?

By Mr. Rawle: Objected to as not rebuttal and as leading.

A. No, sir.

Q11. Did he ever ask you if you had any demand or calls for Coco-Quinine?

Same objections.

A. No, sir; not that I remember of.

Q12. When did Mr. Richards first interview you on the subject of Quin-Coco?

A. If I remember correctly it was in February, 1916, and it was the only Quin-Coco I ever bought.

Q13. And that was the time Mr. Richards told you it was the same thing as Coco-Quinine?

Same objections.

A. Yes, sir.

Q14. Have you seen Mr. Richards since?

A. I don't remember if he has called on me since February or not.

Q15. Have you seen him at any other time when he has not been calling on you?

A. No, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 10 A. M., without waiver of objections):

XQ16. I understand you to say, in answer to Q12, that the first time Richards interviewed you on the subject of Quin-Coco was last February, and that you don't remember whether he has called on you since? Is that correct?

A. Yes, sir.

XQ17. What other Warner salesman was with Mr. Richards at that February interview?

A. I don't remember any one being with him.

XQ18. Do you not remember that a Warner salesman named Ritayik was with him?

A. No, sir.

XQ19. Where did the interview take place, and in what part of your store?

A. Well, I suppose, it took place in the front; that is, I generally meet the salesmen in the front. When we get down to the pharmaceutical line we go back behind the prescription counter, where these preparations are kept on the shelves.

XQ20. Had you at that time a practicing physician who was in any way connected with your business?

A. No, sir.

XQ21. Had you previously had?

A. Well, I disremember now, at what time I bought out my partner. It was about two and a half years ago.

XQ22. Was your partner a practicing physician?

A. Yes, sir.

XQ23. At the February interview, was that practicing physician present?

A. I don't think so. If he was he was not connected with the buying of the preparation at all. He may have been in the store. I don't remember.

XQ24. Can not you remember that when Richards came in he was accompanied by another man?

A. No, sir.

XQ25. What is the name of the doctor who used to be interested in the drug store?

A. E. A. Benbow.

XQ26. How long did the interview in February last?

A. I could not say exactly, but I would imagine may be the whole time occupied in the interview was thirty minutes, possibly a little bit longer, may be not so much.

XQ27. Did the salesman go over his entire line with you?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.

XQ28. And you bought a fairly large order from him? Consisting of perhaps fifteen or twenty items?

A. I think the order amounted to something like $50; I don't remember.

XQ29. Did you at that time buy any of Hobson's Chocolate Quinine?

By Mr. Bradford: Same objection.

A. No, sir.

XQ30. Do you carry in stock other preparations of which you have products of two or more drug houses, which are therapeutically the same, and which, therapeutically speaking, could be used one for the other?

By Mr. Bradford: Objected to as not cross-examination, as an attempt by counsel to make witness his own, and as improper, immaterial and irrelevant.

A. Yes, sir.

XQ31. Approximately how many such preparations do you carry in stock? Ten or fifty?

Objection repeated.

A. No, sir; I don't suppose I have over possibly half a dozen preparations that might be termed therapeutically the same.

XQ32. Please name them?

Objection repeated.

A. One of them might be a preparation that Lilly puts out as Elixir of Alkali and Antiseptic. I think that is practically the same thing as Park Davis preparation called Borol. Then there is another preparation called Listerine. I believe it is the Lambeth Chemical Co. that puts that up. I am not certain. I carry in stock Euthymol, P. D. preparation, and I believe that Warner's preparation is Thy-Menthol. I believe that is it. I have some of it in stock. I don't remember the exact name. These preparations have been represented to me to be the same thing pharmaceutically.

XQ33. How about a cascara preparation?

Objection repeated.

A. I don't think I have anything in stock except Cascara Sagrada Aromatic. All the houses make that preparation. I have two or three of them. Warner's, I have theirs. S. & D. and I think I have Lilly's. I would not be certain.

XQ34. How about pepsin preparations?

Objection repeated.

A. Lilly's Elixir Lactated, I have that. Mulford's Elixir Lactated preparation. I don't remember if I have any of Warner's or not.

XQ35. How about iron, quinine and strychnine preparations?

By Mr. Bradford: Same objections.

A. I have that in both Lilly's and Warner's.

XQ36. How about Aloin, Belladonna and strychnine?

Same objection.

A. I have that in the pill form, A. S. B. & I., under the S. & H. label, sold by Warner & Co., the same formula of Sharp & Dohme's lapactic pills.

XQ37. How about aletris compounds?

Same objection.

A. If I remember correctly I only have that in Park-Davis.

XQ38. Have you had calls for any chocolate quinine preparation under that name or any other name indicating a mixture of chocolate or cocoa and quinine?

A. Yes, sir. I don't remember if I ever had a call specifying any certain one.

XQ39. Have you ever had calls over the counter for "chocolate quinine"?

A. Yes, sir.

XQ40. Have you had calls for "sweet quinine," or "syrup of quinine"?

A. I don't remember ever having a call for "sweet quinine," but think I have had a call for "syrup of quinine."

XQ41. Have you had calls for quinine where the customer gave you to understand that he wanted it mixed in some way that would disguise the bitter taste?

By Mr. Bradford: Objection repeated.

A. Yes, sir.

XQ42. In answer to Q5 you said that when Richards goes through his catalogue and comes to the Quin-Coco item he asks, "how much Quin-Coco or Coco-Quinine do I need." In your answer to XQ16 you said that the first time Richards interviewed you on the subject of Quin-Coco was last February, and that you did not remember seeing him since? Do you wish your last statement, which is to the effect that the first time Richards interviewed you on the subject of Quin-Coco was last February, to stand as your evidence?

A. I think I intended to say that if I remembered correctly, it was February when he first interviewed me on it.

XQ43. With what Lilly salesman or other employee have you talked about this present case of Lilly & Co. against Warner & Co., and when?

A. Mr. Fred A. Burns, the San Antonio representative of Eli Lilly & Co. I don't remember when it was; he was with the San Antonio's drug company's salesman, Mr. Dorsey, I think it was about four weeks ago, as well as I can remember. It may have been a little longer, or a little less. This was at my store.

XQ44. Is that the only time Mr. Burns ever talked to you about this case?

A. Yes, except this morning, after my arrival. He met me at the San Antonio depot this morning and brought me to the St. Anthony Hotel.

XQ45. Since March 1st, 1915, had Burns called at your store on any other occasion than the one mentioned?

By Mr. Bradford: Objected to as immaterial and irrrelevant.

A. Yes, sir; I think so. He generally makes that territory about every sixty or ninety days.

XQ46. On any of these calls did he talk to you about this case? Or about your buying Quin-Coco?

A. Not that I remember of; no, sir.

XQ47. How long have you known Richards?

A. Possibly two and a half years; I don't remember. I think it was two and a half years ago he commenced calling on me.

XQ48. Has he been calling on you during that time, three or four times a year?

A. I think the first year or two he only came about twice a year. Since then he has been coming a little more often, possibly three times a year may be.

XQ49. Have you been buying some of his line?

By Mr. Bradford: Objected to as immaterial and irrrelevant.

A. Yes, sir; I think I have given him an order every time he came, if I remember aright.

XQ50. Have you considered him a square salesman?

Same objection.

A. Honest in his dealings, do you mean?

XQ51. Yes.

Same objections.

A. Yes.

Cross-examination closed at 11.05.

Re-direct-examination.

By Mr. Bradford:

RDQ52. By what name do the prescriptions received at your store call for a mixture containing syrup of quinine and chocolate or cocoa?

By Mr. Rawle: Objected to as not rebuttal.

A. Generally they come in "Coco-Quinine." I have had prescriptions came in for "syrup of cinchona alkaloid."

RDQ53. What does such a prescription call for?

Same objection.

A. Syrup of Cinchona Alkaloid is a preparation put up by Park-Davis. That is a white preparation and does not resemble Coco-Quinine in appearance.

RDQ54. By what name do your customers ask for a chocolate quinine preparation in calling for it over the counter?

A. Some call for chocolate quinine, some for Coco-Quinine, but I never had one specify any certain pharmaceutical house's preparation.

RDQ55. About what proportion ask for Coco-Quinine, and what proportion ask for chocolate quinine?

A. I should imagine that the majority called for Coco-Quinine.

Deposition closed.

J. C. White.

REGINALD V. PERINE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD (at 11.10 A. M.):

Q1. Please state your name, age, residence and occupation?

A. Reginald V. Perine; age 34; San Antonio, Texas; traveling salesman for H. K. Mulford & Co.

Q2. Do you appear here as a willing witness or in response to a subpoena?

A. In response to a subpoena served on me this morning. I have steadfastly refused to be called as a witness all the time, when requested by Mr. Burns.

Q3. Were you formerly employed by Wm. R. Warner & Co., and if so, when and in what capacity?

A. For approximately two and a half years prior to October, 1908, I was a traveling salesman for them; also as State sales manager the latter part of the time for Texas and Oklahoma.

Q4. You were in the employ of the Wm. R. Warner & Co. when it was bought by the Pfeiffer Chemical Company?

A. I was.

Q5. After the purchase of the Wm. R. Warner & Co. by the Pfeiffer Chemical Company, did you receive any instructions from the house indicating their business policy in any way at variance with the policy that had prevailed prior to that time? If so, please explain.

A. Yes, there was nearly an entirely reorganization, both in selling policy and in methods. I had instructions not only direct from the home office, but from a special representative by name Nowlin, who traveled with me between one and two weeks. One thing that I particularly remember that impressed me disagreeably at the time was that formerly as we prepaid freight on shipments of $15 or over, and it had always been my

custom on order blanks to fill in the space following the "ship via" with "freight prepaid," the new instructions under the new management were to the effect that I should simply mark it "by freight." It was explained that by so doing the shipment would be made freight charges collect, and therefore should the customer fail to notice that he had to pay the freight and preserve his freight receipt, the house would be in to the amount of this freight expense. But if the customer called for it, it would, of course, be allowed as promised.

In other words, while I sold the goods delivered, this method would possibly obviate the necessity of paying the freight. This particular instruction was given me personally by one of the Mr. Pfeiffer's, who was an officer of the company. As this was entirely at variance with the former management's policy it made a very unfavorable impression upon me, for it was obviously giving the customer less than promised.

Q6. Did any one representing the company over have anything to say to you about a preparation called Quin-Coco, and if so, what was said and by whom?

By Mr. Rawle: Mr. Rawle having gone to his room in the hotel to get some papers, finds that the examination has proceeded without him. He objects to the last question and the answer as not proper for rebuttal and as irrelevant and immaterial. He objects to Q6 as not rebuttal and as inadmissible, unless proper authority from defendant is shown.

By Mr. Bradford: It is noted that when Mr. Rawle retired from the room, the examination of the witness had begun, and he did not request either to be excused or that the examination be suspended.

A. Yes, Mr. Nowlin was one, who told me to add this item to the replacer list I carried.

Q7. What do you mean by the replacer list?

Same objections.

A. A list of products manufactured by the Warner Company that would replace special preparations manufactured by other companies.

Q8. What did Mr. Nowlin say about this particular item, Quin-Coco?

Same objection.

A. He said that Quin-Coco would replace the product known as Coco-Quinine.

Q9. Manufactured by whom?

A. Manufactured by Eli Lilly & Co. I don't know whether Mr. Nowlin mentioned the name of the manufacturer, but I knew who it was manufactured by and he knew that I had that information.

Q10. Did you add the Quin-Coco to the replacer list, and if so, how was it done?

Same objections.

A. Yes, by simply putting the name of one preparation under the first heading, Coco-Quinine, and the other preparation, Quin-Coco, under the second heading.

Direct-examination closed at 11.35.

Cross-examination.

By Mr. Rawle (at 11.35, without waiver of objections):

XQ11. How often has Mr. Burns talked to you about your testifying in this case, and when?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I am not able to speak positively, as I don't remember, but my recollection is that it was several times, the first several months ago.

XQ12. Where?

Same objection.

A. The first time at the San Antonio Drug Co. store in San Antonio.

XQ13. How often since?

Same objection.

A. I do not remember; possibly three, or possibly as many as half a dozen times.

XQ14. I understand that you were in July, 1908, and had been for some time a Warner salesman, and that when the Pfeiffers took over the Warner business you continued for a short time to sell the Warner line and that you separated from the Warner Company in September, 1908, and that in the meantime, you had not taken on a Pfeiffer line. Are those statements correct?

By Mr. Bradford: Objected to as unwarranted from any statements by witness on direct-examination; therefore not cross-examination.

A. As to the Pfeiffer line, that is correct, but not as to the Searle & Hereth line. I sold the Searle & Hereth line, in addition to the Warner line. That was given me, but not the Pfeiffer line, from the time the Pfeiffer people took over the Warner line until the first of October, when I severed my connection with them. My salary was paid to the first of October.

XQ15. When you left the Warner employ did you have any grievance against the company?

A. None whatever. Mr. Pfeiffer himself personally arranged this with me, taking over the Warner property that was in my possession.

XQ16. Taking the items of the Warner line, were not a great many of them in competition with similar items of other preparations and drugs on the market?

By Mr. Bradford: Objected to as not cross-examination, as immaterial and irrelevant and improper.

A. Why, the only competition was that they could be used in replacing them, if you refer to the items on the replacer list, when used on prescriptions.

XQ17. How about how many items were there on the Warner list? I mean the entire list.

Objection repeated.

A. Do I understand you to mean the entire Warner catalogue?

XQ18. That is what I mean?

Same objection.

A. I do not know positively, but I estimate at about three thousand. The former general sales manager used this amount in a circular letter at one time in referring to the list.

XQ19. And were not all or most of those Warner items in competition with similar items of other wholesale drug houses?

Same objection.

A. The great majority were.

XQ20. When was that interview with Nowlin? You will remember that you left the Warner employ on or before October 1st, 1908.

A. I can not state the definite time. It was during the week or ten days he spent with me.

XQ21. Was it in September?

A. I think not. My recollection of it is it was just about a month, possibly a little less, after the Pfeiffer Company took over the Warner concern.

XQ22. Did you refuse to take over the Pfeiffer line?

By Mr. Bradford: Objected to as immaterial.

A. It was not offered to me in the territory I occupied. I could not therefore neither refuse nor accept.

XQ23. Did you not inform the Warner Company that you were dissatisfied, because you were no longer to have the Texas territory, but were to be transferred to some other part of the country?

Objection repeated.

A. Yes; I would not entertain such a proposition.

XQ24. Did you write the Warner Company to that effect?

Objection repeated.

A. I do not remember whether I wrote them, or told Mr. Nowlin, or Mr. Pfeiffer personally. But it is my recollection that I did convey that impression.

XQ25. And it was after you conveyed that impression that you took a trip with Nowlin, was it not?

Same objection.

A. I do not remember. My recollection is that the trip with Nowlin was made previous to the time the change of territory proposition was brought up.

XQ26. I hand you a typewritten paper. Do you believe this to be a copy of the letter you wrote Warner & Co. It is dated August 23rd, 1908?

Objection repeated.

A. I am not sure, but I think so.

XQ27. Do you believe it is or do you believe it is not?

Same objection.

A. I can not state positively.

XQ28. Whether it is what you wrote, does it express the feelings you had at that time toward the Warner Company?

Same objection.

A. That occurred eight years ago, approximately, and I can not state positively as to my feelings at that time. My memory does not serve me to that extent.

XQ29. At that time were you dissatisfied with the Warner Company's apparent intention to change your territory?

Same objection.

A. I believe I was.

XQ30. At that time did you feel that you had not

been fairly treated by the Warner Company or Mr. Pfeiffer?

Same objection.

A. Possibly; I do not remember.

R. V. PERINE.

By agreement of counsel the letter shown this witness is here offered in evidence for the information of the Court and marked "Plaintiff's Exhibit, Perine Letter." It is noted that the letter has no signature, and apparently does not contain the closing part of the letter.

The letter is as follows:

"August 23rd, 1908.

Messrs. Wm. R. Warner & Co.,
Philadelphia, Pa.

Gentlemen:

I have just returned to my office from an interview with Mr. W. D. Nowlin, who informs me that I am no longer to work for Wm. R. Warner & Co., but am to become an employee of the Pfeiffer Chemical Co. Further, I am to no longer have a Texas territory, but am to be transferred to some other part of the country—(Mr. Nowlin does not know just where)—and am to have an entirely new contract, too,—with the P. C. Co., and he wanted me to leave with him tonight, for a week's trip, to be instructed regarding the Pfeiffer line and policies. Now, I can not work in certain territories,—in the North, for instance; I cannot stand the Northern winters, and as my wife is subject to malaria, we could not live in a malarial section—in Mississippi or Arkansas, for example. I gave up a better position with another house, in Louisiana, to accept one with Mr. Nickells and the Warner Co., because I could get a Texas territory. So I can not accept Mr. Nowlin's proposition, nor, on

the other hand, do I wish to decline it, until I know definitely what territory and what contract the Pfeiffer Co. have to offer me, and it seems a needless expense to go out with Mr. Nowlin on the proposed trip, incurring double expense, when there is a chance that it will be unnecessary—that I can not continue with the line.

Incidentally I must say that I do not feel that I have been accorded the fair treatment Mr. Pfeiffer's original letter on the subject promised Warner's representatives. Mr. Nowlin has just finished coaching a brand new salesman—a Mr. Moor —who is to have a Texas territory. I certainly think I should have been given a chance at the territory in question, as I am entirely familiar with it, while Mr. Moore is not—besides, being already in your employ, I should have taken precedent over a new man.

Until I hear from you I shall continue working in this section in the interests of Wm. R. Warner & Co., as heretofore, and will try to adjust the differences with the San Antonio Drug Co., and the Houston Drug Co., as per instructions from Mr. G. A. Pfeiffer."

Recess until 2 P. M.

After recess.

WILLIAM SEEGER, JR., a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation.

A. William Seeger, Jr.; age 32; San Antonio, Texas;

retail druggist, proprietor of the Sap Drug Store. I have been proprietor of that store about four and a half years.

Q2. Do you know a traveling salesman for Wm. R. Warner & Co. by the name of H. H. Richards?

A. Yes.

Q3. How long have known him?

A. About two years.

Q4. Does he call at your store and solicit orders for products sold by his house?

A. Yes, sir.

Q5. Among other preparations which he sells has he ever asked you to buy Quin-Coco, and if so, what did he say about this preparation?

By Mr. Rawle: Objected to as not proper for rebuttal, the subject having been fully taken up in plaintiff's prima facie case, of which it formed an essential part.

A. Yes, and he said it looked like Coco-Quinine, and that it was cheaper and could be used in the place of Coco-Quinine.

Q6. Do you recall anything else that he said about it?

A. That is all.

Q7. Did he tell you whether or not any one could tell the difference between the two?

By Mr. Rawle: Objected to as not rebuttal, and as leading, the witness having already answered the question.

By Mr. Bradford: Question withdrawn.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (at 3 P. M., without waiver of objections):

XQ8. Have you talked with any Lilly man about this case?

A. I have talked with Mr. Fred A. Burns.

XQ9. When?

A. I guess it has been six months ago the first time.

XQ10. How often since?

A. I don't think we talked about it since. I have seen him several times, but all he said about it in a joking way was that he wanted me as a witness, to give my evidence in the case.

XQ11. Have you seen him here today?

A. Yes, sir.

XQ12. Have you been a customer of Wm. R. Warner & Co.?

A. Yes, sir.

XQ13. A pretty good one?

A. Mr. Richards said I was one of the best customers he has in town.

XQ14. I understand that you keep a first class drug store in San Antonio, is that correct?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I try to.

XQ15. Are you good friends with Richards?

Same objection.

A. Yes, sir.

XQ16. Do you consider him an honest and square drug salesman?

Same objection.

A. Yes, sir.

XQ17. For how many years have you been carrying Quin-Coco in stock?

A. I don't remember the first shipment, exactly when I bought it, a couple of years ago, when I bought my first shipment of it.

XQ18. I show you an order for Quin-Coco, received from you, dated October 19th, 1912. Is that the first time that you bought Quin-Coco from Mr. Richards?

A. I guess it must be along there. But that goes to show that I bought it there at that date.

XQ19. And you have been carrying some of it ever since?

A. Yes, but I have not got any just now.

Cross-examination closed at 3.07.

Re-direct-examination.

By Mr. Bradford:

RDQ20. I notice the order shown you by defendant's counsel is headed "Sold to Sap Drug Store, Simon & Seeger." Who was Mr. Simon?

A. Mr. Simon was my partner at that time. I bought him out since.

RDQ21. When did you buy him out?

A. I bought him out in 1913. It was either May or June, 1913, or 1914; I can't remember which.

RDQ22. Do you remember whether this particular bill of goods was purchased by you or by Mr. Simon?

A. No, I don't remember, but I think it was by myself.

RDQ23. When you first talked about this matter with Mr. Burns, what did you tell Mr. Burns?

By Mr. Rawle: Objected to as not proper for cross-examination and as inadmissible.

A. He asked me whether I needed any Coco-Quinine, and I told him I had plenty of Quin-Coco at that time on hand, and he said that that was not Coco-Quinine. Then I said, Mr. Richards said it looked like Coco-Quinine, and that it is cheaper, and that you could not tell the difference from Coco-Quinine. That was about all that was said about it.

RDQ24. Do you sell it for Coco-Quinine?

A. No.

RDQ25. What do you sell it for?

Same objections.

A. Chocolate quinine.

RDQ26. Do your customers ever ask for Quin-Coco?

A. No, sir.

Re-cross-examination.

By Mr. Rawle (without waiver of objections):

RXQ27. Have you calls for chocolate quinine?

A. No, we don't have very many calls for it. We have some.

RXQ28. Any for sweet quinine, or syrup for quinine?

A. We have calls for syrup of quinine, where we recommend it over the counter.

RXQ29. What do you mean by "it"?

A. We recommend chocolate quinine.

RXQ30. And what do you give them?

A. We give them Quin-Coco as long as we had any on hand.

Re-re-direct-examination.

By Mr. Bradford:

RRDQ31. What is syrup of quinine?

A. It is amorpheus quinine made up in lemon syrup; it is white.

By Mr. Rawle:

RRXQ32. Please explain what you mean by "amorpheus quinine"?

A. It is termed "amorpheus" after giving a treatment with citric acid solution, in order to hold it in suspension or solution.

Deposition closed.

Wm. Seeger, Jr.

Counsel for defendant having been notified that the deposition of Dr. H. H. Brown, a physician, of Yokum, Texas, will be taken at that place tomorrow, and that this involves a night ride of a hundred and twenty miles, to be followed by another night ride to Dallas, Texas, is willing to stipulate, and does stipulate, that if Dr. Brown be called as a witness he would testify substantially as follows:

That he was interviewed by counsel for plaintiff in Boston, Mass., about June, 1915, and afterwards in Yokum, Texas, by counsel, and Mr. Fred A. Burns, representing Eli Lilly & Co., in reference to statements made by G. H. Turner, when testifying as a witness for plaintiff in this case, particularly said witness Turner's statement in answers to Q4 to Q10, pages 595-597, Plaintiff's Record; that he remembers having prescribed Coco-Quinine in his practice, and that prescriptions for this preparation were filled at the drug stone of the Weyman-Garner Drug Company, in Yokum; that after a time the results of the use of the medicine with his patients became unsatisfactory, in that the children could not seem to retain it; that because of these unsatisfactory results he quit using Coco-Quinine in his practice; that he recalls having stated to said Turner that Eli Lilly & Co. must be doing business on their past reputation, believing that their preparation had been depreciated in quality because of these bad results; that said witness Turner confessed to him that he had filled the prescriptions in question with Quin-Coco, Warner, and not with Coco-Quinine, Lilly; that this incident and others determined him to have a drug store of his own, where he could know that his prescriptions would be filled as written, and he bought a drug store chiefly for this reason; that some time later he stocked Coco-Quinine, Lilly, at his own

store, resumed the use of the preparation in his prescriptions, and that its use since that time has been uniformly satisfactory, the results expected being secured.

By Mr. Rawle: The deposition is objected to as *res inter alios acta*, as irrrelevant and immaterial and not affecting any right of the defendant.

By Mr. Rawle: Notice is given of motion to strike out the depositions taken here at San Antonio, for the reasons given, and because the same are not proper for rebuttal.

Fred A. Burns, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows:

By Mr. Bradford:

Q1. Are you the same Fred A. Burns who has heretofore testified in this case on behalf of plaintiff?

A. I am.

Q2. Please state on the record the facts regarding an incident that took place in the drug store of F. A. Chapa, in this city, some time ago, in your presence and within your knowledge, respecting the filling of a prescription calling for "Coco-Quinine," with the preparation called "Quin-Coco"?

By Mr. Rawle: Objected to as not proper for rebuttal, and because the matter inquired of is *res inter alios acta*, and can not affect any right of the defendant.

A. While I was in the prescription room of F. A. Chapa's drug store, a prescription came in written for "Coco-Quinine." The druggist picked up the prescription and filled it from a bottle labeled "Quin-Coco." The druggist was R. A. Alejandro, the prescription clerk in Chapa's drug store. After he had

filled the prescription, written the label, pasted it on the bottle, I asked him why he used "Quin-Coco" when the prescription plainly called for Coco-Quinine. He said he had instructions from Mr. Chapa, the proprietor of the drug store, to fill all prescriptions for Coco-Quinine with Quin-Coco. That they did not have any Coco-Quinine in stock and did not carry it.

I went back to the drug store the next day to see Mr. Chapa, who was not in. I called the second day and found Mr. Chapa in. I related the circumstance of the clerk filling the prescription written for Coco-Quinine with Quin-Coco, and asked him why he did it. He said that Quin-Coco was the same preparation as Coco-Quinine, and the difference between the two could not be detected. I asked him how he knew this. Why he did not use essence of pepsin or elixir lactated pepsin when Coco-Quinine was written for, that he would be just as justifiable in using those as in using Quin-Coco. He said that Wm. R. Warner & Co.'s representative told him that Quin-Coco and Coco-Quinine were identical and that it was the same thing.

This was about the middle of May, 1915.

By Mr. Rawle: The answer is objected to for the same reasons and as being hearsay.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ3. At this talk did Mr. Chapa say, in substance, that if he used Quin-Coco or Coco-Quinine in any improper way the Lilly Company could sue him if they wanted to?

A. No, sir, he did not say that.

XQ4. Is not Mr. Chapa the gentleman called Col. Chapa, occupying a position on the Governor's staff, and of importance in the Texas militia?

A. He is the same man; yes, sir.

XQ5. How often have you seen him to ask him to be a witness in this case?

A. About twice.

XQ6. About how many drug stores are there in San Antonio?

By Mr. Bradford: Objected to as irrelevant and immaterial, and not cross-examination.

A. About sixty.

Deposition closed.

Fred A. Burns.

Notice of motion to strike out this deposition for the reasons given is here made.

Adjourned to meet Saturday, August 19th, 1916, at 10 A. M., at Hotel Oriental, Dallas, Texas.

Dallas, Texas,
Oriental Hotel,
August 19th, 1916.

Met pursuant to adjournment.

Parties present as before.

By agreement of counsel, owing to illness of witness Nowlin, his deposition was taken at his residence, 613 West Ninth Street, Oak Cliff, Dallas, Texas.

Dabney W. Nowlin, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. Dabney W. Nowlin; aged 44; Dallas, Texas; traveling salesman; that is, I was, but I have not been

traveling since November, 1915, when I met with an accident and have been laid up since. I was formerly a drug salesman. I traveled last for Nelson Baker Company.

Q2. I understand that you formerly traveled for the Pfeiffer Chemical Company and Wm. R. Warner & Co.; that Mr. John Hudson and Mr. R. J. Bynum, representatives of the Eli Lilly & Co., have talked with you about this case; that they asked you to be a witness on behalf of plaintiff in this case; that you declined to do so, and that you have been subpoenaed and are testifying this morning in response to the subpoena. This is correct, is it not?

A. Yes, sir.

Q3. When acting as a traveling salesman for Wm. R. Warner & Co. did you, among other items, sell an item called Quin-Coco?

A. Yes.

Q4. What was your territory?

A. I believe they called it Central Texas; I believe that is the way it was mapped, including Dallas, Fort Worth, Greenville, Cleburne, Waxahatchi, Hillsboro, Waco Tyler and smaller towns in the same territory.

Q5. How did the preparation Quin-Coco compare as a seller with other items in your line?

A. It was a good seller. I believe it was about, if not, the largest seller that I had in the pharmaceutical line.

Q6. Can you state approximately or give an approximate estimate of what your sales per month would be of this one item, Quin-Coco?

A. That would be very hard for me to do.

By Mr. Rawle: Question and answer objected to as immaterial.

Q7. What is your best judgment, based upon your recollection of the sales you made?

Same objection.

A. Some months I would possibly sell, I would say, two hundred gallons; other months my sales would be very small, possibly averaging fifty gallons.

Q8. How much, if you remember, did you ever sell in any single day of this one item?

Same objection.

A. I believe that I have sold as much as thirty to forty gallons some days.

Q9. How often would you think you had a two-hundred-gallon month?

Same objection.

A. Quite often.

Q10. And how often the thirty or forty gallon days?

Same objection.

A. Comparatively speaking, seldom.

Q11. Did you have any special reason for pushing this particular item, and if so, what was it?

Same objection.

A. My house had told me it was a profitable item and my instructions were to push all profitable goods.

By Mr. Rawle: The answer is objected to unless the name of the house is given.

Q12. Any other reasons?

Same objection.

A. No other particular reason, only I liked to romp on my friend Bynum.

Q13. Who was Mr. Bynum, and what was he doing at that time?

Same objection.

A. Mr. Bynum was traveling the same territory for Eli Lilly & Co.

Q14. And selling their preparations, including Coco-Quinine?

Same objection.

A. Yes, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ15. When did you leave the Warner employ?

A. I believe it was in the latter part of 1912, as well as I remember.

XQ16. Is the Mr. Bynum, who used to represent Lilly, the gentleman who is here present?

A. Yes, sir.

XQ17. And Hudson is the present Lilly salesman in the territory including Dallas?

A. Yes, sir.

XQ18. How often have you seen either of those gentlemen about testifying in this case, or talked to them about this case?

A. I have seen Hudson four times and Bynum three times, I believe.

XQ19. When did you first see each of them and talk about the case, and where?

A. Hudson called at my house April 29th, 1916, in the afternoon; Hudson and Bynum then called several weeks later, July 4th; then Hudson called again by himself a few weeks later; then Hudson and Bynum called together yesterday.

XQ20. About when did you begin to sell Quin-Coco for Warner?

A. When I first went in their employ; I was with them seven years; I started with them in December, 1905, as well as I remember; it might have been in 1906.

XQ21. In selling these quanaities of Quin-Coco

what book or catalogue did you use in your interview with the druggist?

A. Searle & Hereth catalogue.

XQ22. But you sold the entire Warner line, did you not, after August, 1908, when the Warner Company and Pfeiffer Company came together?

A. A part of the time I sold the combined lines and a part of the time they had two sets of salesmen working the same territory. During this latter time I did not sell pharmaceuticals.

XQ23. When you sold the combined lines, what catalogue or demonstration book did you have?

A. I had Pfeiffer Chemical Company, Searle & Hereth, Mellier's and Wm. R. Warner & Company's.

XQ24. Did you not have the salesman's demonstration book; a blank book with labels pasted in it?

A. Yes.

XQ25. Did these labels cover practically the entire line you were selling to the particular customer?

A. They did.

XQ26. And the druggist would turn over the pages of the book containing the labels and would buy from that; is that correct?

A. Sometimes they would turn the pages; sometimes I would turn the pages. But they most invariably made their selection from the labels in what we called a demonstration book.

XQ27. Whether you turned the pages or the druggist did, I assume that the printing on the labels was facing the druggist in either case?

A. It was always my intention to have the labels facing him.

XQ28. Was this demonstration book part of your salesman's outfit furnished by the company?

By Mr. Bradford: Objected to as not cross-examination and as immaterial and irrelevant; the same objection is made to all questions based on this demonstration book. It is not seen to have

any bearing upon any fact developed in the direct-examination.

A. It was.

By Mr. Rawle: Mr. Rawle states that he had expected to have the demonstration books present for identification by the witness, but it did not reach him, but reserves the right to produce them and identify them at a later date.

By Mr. Bradford: Objection is made to any production or identification of any demonstration book as improper, irrelevant, and not cross-examination.

XQ29. Approximately how many drug stores were there in your territory?

A. It would be almost impossible for me to answer that question. I would say something more than a thousand, but that is merely guesswork.

XQ30. You have no doubt, have you, that there was over eight hundred?

A. I am sure there were.

Re-direct-examination.

By Mr. Bradford:

RDQ31. You stated that you used a Searle & Hereth catalogue in selling Quin-Coco. I show you a book bearing the imprint "Price List 1908-9, Searle & Hereth Co." and ask you if this is the catalogue you had in mind when you answered Mr. Rawle's question?

A. That is one of the catalogues that I used, and I am of the opinion the last catalogue that I used was returned with the samples when I resigned.

RDQ32. Do you recall whether you had any Searle & Hereth catalogue, in which the item Quin-Coco was listed, prior to the 1908-9 issue?

A. The first Searle & Hereth catalogue that I had, as I remember, was a catalogue that was gotten out by

the Searle & Hereth people before the Pfeiffer Company acquired the Searle & Hereth Company. I can not say at this time whether Quin-Coco was mentioned in that catalogue.

Deposition closed.

D. W. NOWLIN.

A. HOMER SINCLAIR, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. A. Homer Sinclair; age 35; Dallas, Texas; retail drug clerk. I am employed at the El Merito Pharmacy, Main and Irving Streets, as prescription clerk. I have been there four years next November. I was prescription clerk and buyer at the Oak Cliff Pharmacy during the years 1909, 1910 and 1911. I then bought an interest in the Red Cross Pharmacy in Oak Cliff and was there until June, 1912. I was out of business for about four months, until November, 1912, when I took my present position. I am here in response to subpoena served on me.

By MR. RAWLE: Provisional objection made to the witness, as his name has not previously been given to defendant's counsel.

Q2. As a buyer of pharmaceuticals for any of the stores where you have been employed, have you ever been solicited to buy Quin-Coco, and if so by whom and when?

A. Yes, sir; by Mr. D. W. Nowlin, salesman for Wm. R. Warner & Co., the Searle & Hereth Company and the Pfeiffer Chemical Company. He handled the

combined line. It was in 1909 or 1910, while I was buyer at the Oak Cliff Pharmacy.

Q3. What statements did he make to you respecting Quin-Coco when soliciting your orders?

By Mr. Rawle: Objected to as not proper for rebuttal, the subject constituting plaintiff's prima facie case, and having been fully examined on that part of the proceedings.

A. He told me that it was the same article as Coco-Quinine, and that it could be bought considerably cheaper; that he could sell me a gallon for the same price as five pints of Coco-Quinine, plus about twenty cents.

Q4. Did he say anything to you about how you could dispense Quin-Coco, or what did he say?

By Mr. Rawle: Same objection and as leading, the witness having already answered the question.

A. I don't remember that he said anything specifically to that effect, but the impression that I gained was that it was the same formula, the same strength as Coco-Quinine.

Q5. Have you ever seen a prescription written by a physician for Quin-Coco?

A. I don't remember that I ever have.

Q6. About how many years have you been in the retail drug business?

A. About fifteen or sixteen.

Direct-examination closed.

No cross-examination.

Deposition closed.

A. Homer Sinclair.

Recess until 2 P. M.

After recess.

WILLIAM J. POWELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. William J. Powell; aged 37; Dallas, Texas; retail druggist, one of the proprietors of Browder's Drug Store, located at the corner of Jefferson and Beckley Streets, this city. I have been at this store about one month. Prior to that time for seven and a half years at the Oak Cliff Pharmacy, and prior to that time I was at the Red Cross Pharmacy for about a year, and prior to that time for about one year I was at Fort Worth at Covey & Martin's drug store. Prior to that I was with the Yeager Drug Company, Mineral Wells, Texas, a little over six years.

By MR. RAWLE: Objection is made that the name of the witness was not given in the notice.

By MR. BRADFORD: This witness and the last one examined were called under notice given to counsel for defendant, that while on this trip it might be necessary to call some witnesses whose names were not known to counsel for plaintiff at that time, in order to avoid making trips or going to unnecessary expense to obtain the evidence.

Q2. At what stores named in your last answer have you done the buying or had to do with the buying?

A. Not any, except the Oak Cliff Pharmacy and the Red Cross Pharmacy.

Q3. While at either of these stores did you buy a preparation called Quin-Coco, and if so from whom did you buy it?

A. Yes, sir; from Mr. D. W. Nowlin, and also Mr. E. R. Russell, both representatives of Wm. R. Warner & Co.

Q4. About when and where did Mr. D. W. Nowlin solicit your order for Quin-Coco?

A. It has been about seven years ago, at the Oak Cliff Pharmacy.

Q5. What did Mr. Nowlin say to you respecting Quin-Coco when soliciting your order?

By Mr. Rawle: Objected to as not proper for rebuttal, as forming part of plaintiff's *prima facie* case and having been there fully gone into.

A. I would not say at all times, but he has at times said how much Coco-Quinine do you want. He has asked me how much Quin-Coco do you want, at times.

Q6. What else did he have to say to you about this preparation?

Same objection.

A. At first, when he first used to come to the store, he used to always say that it is just as good as Coco-Quinine, if not better.

Q7. How did you dispense Quin-Coco?

Same objections and because the matter inquired of is between third parties and can not affect any rights of the defendant.

A. In two and four ounce bottles, usually. We kept one ounce bottles put up too, 15 cent sellers. Two ounce bottles sold for 25 cents and four ounce bottles for 50 cents.

Q8. How were these bottles labeled?

Same objection.

A. Coco-Quinine.

Q9. How about prescriptions for Coco-Quinine?

Same objection.

A. Well all prescriptions come as Coco-Quinine, and were filled with Quin-Coco.

Q10. Why did you use Quin-Coco in filling prescriptions calling for Coco-Quinine?

By Mr. Rawle: Objected to for the same reason and for the even stronger reason that the witness' "why" is not admissible evidence against this defendant.

A. Well, it was sold us as good as Coco-Quinine, but a cheaper article, you might call it.

By Mr. Rawle: The answer is objected to as stating a mere generalization on the mind of the witness and not facts.

Q11. What do you mean by the words "as good as"?

Same objections.

A. I mean this, that his Quin-Coco was the same as the Coco-Quinine. He represented the Quin-Coco to be the same as Coco-Quinine.

Q12. In what respect as good, therapeutically, physically or in what respect as good?

Same objection.

A. Only as he represented it, as Mr. Nowlin represented it.

Q13. Did you feel justified in dispensing Quin-Coco on calls for Coco-Quinine, because of these representations to you by Mr. Nowlin?

By Mr. Rawle: Same objections, what the witness "felt" is not evidence.

A. Yes, sir.

Q14. In what quantities as a rule did the Oak Cliff Pharmacy purchase Quin-Coco?

Objected to as not rebuttal and as immaterial.

A. Five one gallons, at a time.

Q15. How often did you purchase five gallons?

Same objections.

A. Every two to three months.

Q16. On what representations did Mr. Russell solicit your order for Quin-Coco?

Objected to as not proper for rebuttal.

A. About the same as Mr. Nowlin.

Q17. Did you also purchase Coco-Quinine during the same period?

A. We usually bought about five pints a year.

Q18. Did you ever see a prescription written for Quin-Coco either at the Oak Cliff Pharmacy or at any other pharmacy where you had worked?

A. No, sir.

Q19. Did you ever hear a customer ask for Quin-Coco?

A. No, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ20. When you were buying Quin-Coco from Nowlin, I suppose you knew that Coco-Quinine was a Lilly product and that the Warner product was Quin-Coco. Is that correct?

A. Yes, sir.

XQ21. When Nowlin or Russell would open up the interview and begin his efforts to sell you his line, did he have a blank book having the labels of his line pasted in it, and did he lay this book with the labels in it before you, and did you run over his stock by looking at the labels in his demonstration book?

By Mr. Bradford: Objected to as not cross-examination, as irrelevant and immaterial.

A. No, sir; I don't know that I ever did.

XQ22. When did you last buy any goods from Russell?

A. I would say about six or seven years ago.

XQ23. When you bought from Nowlin might it have been as early as 1907?

A. Well, sir, I could not say, exactly, it might have been.

XQ24. Could it have been as early as that when you bought from Russell?

A. No, sir; I think we bought from Mr. Russell after we bought from Mr. Nowlin.

XQ25. And about how many years ago?

A. Six or seven years ago.

XQ26. Did not Russell go over his list by placing before you a book that had all the labels pasted in it?

By Mr. Bradford: Objected to as not cross-examination and as irrelevant and immaterial.

A. No, sir; he never had any book with labels pasted in it, as far as I saw.

XQ27. When Nowlin or Russell called on you would they offer you the entire Warner or Pfeiffer Chemical Company line, or Searle & Hereth line?

A. Yes, sir.

XQ28. What employee of the Lilly Company have you talked with in regard to testifying in this case and when?

A. I talked with Mr. Hudson about six weeks ago, and have not talked to him about this case since. I saw him again this morning about nine o'clock when I came here in answer to a subpoena, served on me yesterday.

XQ29. Did you ever have a call for a sweet chocolate preparation under the name of chocolate quinine, or sweet quinine?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir; I have had calls for chocolate quinine and also calls for sweet quinine, but the majority of the calls were for Coco-Quinine.

XQ30. Do you have calls for that kind of a prep-

aration under any other name than those you have just given?

By Mr. Bradford: Same objection and as not cross-examination.

A. No, sir.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ31. Did the Oak Cliff Pharmacy ever buy Quin-Coco from Wm. R. Warner & Co., through any other agency than Mr. Nowlin or Mr. Russell?

A. No, sir; except direct from them by mail.

RDQ32. How were the orders for this preparation written when they were sent in by mail?

By Mr. Rawle: Objected to as not rebuttal and as not evidence without the production of the orders.

A. I am not positive, but I think that each time it was ordered as Coco-Quinine, the order was for Coco-Quinine.

RDQ33. Are you reasonably certain that it was some of the time?

By Mr. Rawle: Objected to as not rebuttal, as leading the witness, and because the order is not produced, and because the act of the witness is the act of a third party and can not bind the defendant, and because no time is stated.

A. Yes, sir.

RDQ34. What did you receive from Wm. R. Warner & Co., in response to your written orders for Coco-Quinine?

A. Quin-Coco.

Re-cross-examination.

By Mr. Rawle:

RXQ35. Did you not know that Wm. R. Warner marketed Quin-Coco and that Coco-Quinine was the product of Lilly & Co. when you sent mail orders?

A. Yes, sir; I would say to Mr. Grigsby, the bookkeeper, order five gallons of Coco-Quinine from Wm. R. Warner & Co.

RXQ36. And then Grigsby would send the order?

A. Yes, sir.

RXQ37. And you did not write the order yourself?

A. No, sir.

RXQ38. When was this?

A. Well, I would say from six to nine years ago.

RXQ39. Nearer nine than six.

A. Between the two, anywhere from six to nine.

Re-re-direct-examination.

By Mr. Bradford:

RRDQ40. Did you see the orders after written by Grigsby and did you ever read one written for Coco-Quinine and addressed to Wm. R. Warner & Co.?

A. Yes, sir.

Re-re-cross-examination.

By Mr. Rawle:

RRXQ41. Did you know you were getting Quin-Coco when you sent that mail order to Warner?

A. Yes, sir.

RRXQ42. Can you remember of a period of from six to nine years exactly what Grigsby wrote down on a mail order, when you told him to order a certain preparation?

A. No, sir; I could not give you exactly the time.

RRXQ43. Q42 repeated.

A. No, sir.
RRXQ44. Where is Grigsby?
A. He is in Dallas.

Deposition Closed.

WILLIAM J. POWELL.

By MR. RAWLE: The notice is renewed of a motion to strike out the depositions as objected to and for the reasons given.

Defendant's counsel asks plaintiff's counsel whether a noticed witness, E. R. Russell, of Dallas, Texas, who has not been this day examined at Dallas, is a person who was a former salesman of the defendant?

By MR. BRADFORD: Mr. Bradford responds, the E. R. Russell referred to has acknowledged to him at an interview today that he was formerly employed by Wm. R. Warner & Co., but that he does not remember what representations he made to the trade when soliciting their orders for Quin-Coco and has shown a disposition not to answer frankly questions which it was desired to submit to him and that although he was subpoenaed as a witness he has been excused. It is understood, however, that he has been paid his legal fee of $1.50 as a witness.

Adjourned subject to notice and agreement of counsel.

Indianapolis, Indiana,
October 23, 1916—2 p. m.

Met pursuant to agreement and notice.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

G. A. Lavison, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. G. A. Lavison; age 45; Memphis, Tenn.; retail druggist.

Q2. How long have you been in the retail drug business?

A. I began as a clerk when I was about sixteen or seventeen years of age in the store of H. H. Collier, in Memphis, Tenn., and have been in the retail drug business ever since. I clerked for Mr. Collier for about ten or twelve years, then for Bond & Company, in Memphis, Tenn., up to the time I went in business for myself on January 1st, 1905. I then opened a drug store known as Lavison's Pharmacy, 247 McLemore Avenue, Memphis, Tenn., where I was in business until about the first of 1912, when I moved across the street, where I was in business for about three years. I sold out this business about the last of February, 1915, on account of ill health and was away for four months in Tampa, Florida, for my health. Since my return to Memphis I have been doing relief work in different drug stores as a prescription clerk.

Q3. Do you know a man by the name of Alva Lee

Kelton, and if so, who is he and when did you know him?

A. I knew Mr. Kelton as a salesman for the Pfeiffer Chemical Company, and later he included the line of Wm. R. Warner & Co. I knew him from the time I went in business. He sold me goods right from the beginning of my opening of Lavison's Pharmacy. In fact I knew him while I was clerking for Bond & Company.

Q4. Did Mr. Kelton ever solicit your order for a preparation known as Quin-Coco, and if so, when and on what representations?

A. He did. It was about eight years ago, while I was in business for myself. He represented it to be exactly the same in every respect as Coco-Quinine, a preparation made by Eli Lilly & Company, and that it could be used as a substitute on physicians' prescriptions written for Coco-Quinine, without any one knowing the difference. He said it was identically the same thing.

Q5. Did you purchase the preparation?

A. I hesitated to accept Mr. Kelton's representations and did not buy when he first solicited my order. The next day he returned with Mr. Henry Pfeiffer and took up the subject again, and Mr. Pfeiffer represented it the same as he did, that it was the same as Coco-Quinine, and told me that I could use it for Coco-Quinine, in any way that Coco-Quinine was used. They both assured me that it was the same thing and much cheaper. It being the same thing and cheaper was the inducement offered to purchase.

I don't remember whether I purchased then, but I did later. I purchased it all the time thereafter while I was in business.

By Mr. Rawle: Mr. Rawle, having just come into the room at this point, Mr. Bradford, having, with Mr. Rawle's acquiescence, proceeded with the witness, now objects as follows:

Because the questions and the answers thereto are not proper for rebuttal, the subject matter constituting part of the plaintiff's evidence on the *prima facie* case.

Notice of a motion to strike out such evidence and any evidence to be taken along the same line, is hereby given.

Q6. What other items, if any, were discussed at the interview above referred to?

By Mr. Rawle: Same objection.

A. They handled a variety of things. I gave them a general order for such. I bought different things from them. I can tell you mighty near everything I ever bought from them.

Q7. Name over some of the items that you bought from them?

Same objection and because the evidence is immaterial and inadmissible and irrelevant.

A. I bought some perfumes from them. I bought other non-secret preparations from them at different times, that consisted of cough syrups, liver preparations and their whole line. I carried a complete line of their stuff.

Q8. What perfumes were bought?

Same objection.

A. I bought Violet extract from them, White Rose, Florita, Heliotrope and half a dozen others. I may have bought others.

Q9. Were any of these perfumes represented to you to be substitutes for other perfumes, and if so, which ones?

Objected to as not proper for rebuttal, as immaterial, and inadmissible, as leading, and because the question calls for inferences and not for a statement of what was said.

A. Mr. Kelton represented the "Florita" as a substitute for "Janice". "Janice" is a perfume made by Allen Pfeiffer Chemical Company. I bought and sold quite a bit of "Florita" and found that it was a duplicate of "Janice", so much so, that a representative of the Allen Pfeiffer Chemical Company told me positively that it was "Janice".

Q10. How was the test made by the representative of the Allen Pfeiffer Chemical Company?

Same objections.

A. By color and odor of same, and it being in a "Janice" bottle.

Q11. Did you customarily sell it from a "Janice" bottle?

Objected to as not proper for rebuttal, as irrelevant and as leading.

A. I sold it both ways.

Q12. Was any other inducement held out to you to purchase goods from Mr. Kelton and Mr. Pfeiffer, and if so, what was it?

Objected to as not proper for rebuttal, and because the question is not confined to the preparation here in dispute, and because the only proper question is as to what was said.

A. What do you mean by "inducement"?

Q13. I mean did they give you any present or offer you any present or anything of this kind?

Same objections.

A. They gave me a large glass mortar sign to go out in front of the store. Said sign was lit up by electricity and advertised Mellier's Perfumes as well as having my name on same.

Q14. Was this given as a premium with the goods purchased, or for what purpose?

Objected to as not rebuttal and as leading, the only proper question being as to what was said.

A. This sign was given to any one who purchased a certain quantity of their perfumes. While I did not purchase quite the amount required at that time, yet they gave me the sign on the strength of future orders.

Q15. Why did you hesitate to accept Mr. Kelton's assurance that Quin-Coco was the same thing as Coco-Quinine, and could be sold for the same?

Objected to as not rebuttal, as irrelevant, and because the only motive that actuated the witness is not evidence for any purpose in this case.

A. Mr. Kelton being a salesman would naturally try to show causes why this article should be purchased when such perhaps were not really the case. He afterwards brought Mr. Pfeiffer out to see me and upon being assured by Mr. Pfeiffer that it was the same and could be used as the same, I thought better of it.

Q16. How was Coco-Quinine dispensed in your store?

Objected to as not rebuttal and as irrelevant.

A. On physicians' prescriptions; also sold at retail in small bottles.

Q17. Did you ever receive a prescription written for Quin-Coco?

Objected to as not rebuttal and as irrelevant.

A. I never did.

Q18. Did you ever have a customer ask for Quin-Coco?

A. Not by that name.

Q19. Did you fill prescriptions written for Coco-Quinine with Quin-Coco?

Objected to as not rebuttal and because the unauthorized acts of the witness is not evidence against the defendant for any purpose.

A. I have.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ20. When Kelton called on you at that time, had you previously had Quin-Coco in stock?

A. I had not.

XQ21. For how many years previous to that had Kelton been soliciting your trade, approximately?

A. I purchased goods from Mr. Kelton from the very beginning when I went into business.

XQ22. What year was that?

A. I went into business January 1, 1905.

XQ23. About how often each year did Kelton used to call on you for orders?

A. About three or four times perhaps, approximately, I am not certain. About three or four times.

XQ24. About how many drug salesmen used to call on you at that time in each week?

Objected to as immaterial and irrelevant.

A. I don't know.

XQ25. State about how many approximately. I mean how many drug salesmen called in and solicited your trade?

Same objection.

A. Two or three or more, perhaps.

XQ26. At that call by Kelton do you remember about how long he stayed and talked to you?

Same objection.

A. I should say about an hour or something like that.

XQ27. Did he go over his entire line with you?

Same objection.

A. He usually did.

XQ28. In going over his line did he have a blank book with the labels of his line pasted in it and go through that book with you?

Same objection.

A. He had a book showing the various labels of his perfume line; also a sample case containing the cartons of his non-secret line.

XQ29. Were not the cartons of his non-secret line also pasted in his book?

Same objection.

A. They were; he had a book of such.

XQ30. And either he or you turned over the leaves of that book. Is that correct?

Same objection.

A. Yes, sir.

XQ31. Do you say that it was the next day that Kelton brought in Henry Pfeiffer to see you?

A. To the best of my knowledge and belief it was the next afternoon.

XQ32. And I understood you to testify above that Mr. Henry Pfeiffer told you that Quin-Coco was the same as Coco-Quinine and you could use it for Coco-Quinine in any way that Coco-Quinine was used, and that it was the same thing and much cheaper. Is that correct?

A. It is.

XQ33. Is that what Kelton had told you the day before?

A. It is.

XQ34. Can you give the language of Mr. Pfeiffer in the words in which he spoke?

A. I do not know that I could give his exact words. I know that he told me it was the same as Coco-Quinine, identically the same, and the difference could not be told, and that it could be used in any way that Coco-Quinine was used.

XQ35. That is, that they were the same preparations, pharmaceutically. Is that correct?

A. That they were the same preparation in every way.

XQ36. And his was cheaper?

A. And cheaper; yes, sir.

XQ37. And that is the substance of what they both told you?

A. It is.

XQ38. When Kelton was trying to sell you "Florita" did he say that it was substantially the same perfume as "Janice"?

A. He did, yes.

XQ30. Smelt just like it?

A. Yes, sir.

XQ40. Made of the same ingredients?

A. I don't know about that, I don't know what either one of them was made of.

XQ41. But he said it was the same or a similar perfume, is that correct, as "Janice"?

A. Yes, sir.

XQ42. And that is the substance of what he said to you about "Florita"?

A. Yes, sir.

XQ43. And after you bought "Florita" you sometimes sold it in "Janice" bottles. Is that correct?

A. I have done so; yes, sir.

XQ44. Did you do this frequently?

A. Occasionally I did it.

XQ45. Name some other drugs or preparations as to which you sold one for another, like you sold "Florita" for "Janice"?

A. None that I remember in particular, except Quin-Coco, which I have sold for Coco-Quinine.

XQ46. Then you swear that as to every other drug or preparation you invariably gave the customer or the physician's patient who brought in a prescription, the exact drug or preparation which the customer or the prescription called for?

A. I did.

XQ47. Did you carry Listerine?

A. I did.

XQ48. What other similar preparation did you carry that is just like Listerine?

A. The U. S. P. preparation Liquid Antiseptic.

XQ49. What other?

A. None that I remember.

XQ50. And if there was a call for Listerine and you were out of it, did you furnish the other?

A. I did not.

XQ51. Who first talked to you about testifying in this case?

A. Mr. Bradford.

XQ52. When and where?

A. In Memphis some time last winter.

XQ53. Who was with him?

A. Mr. Kelton.

XQ54. Had not Kelton talked to you about the case before?

A. He had not.

XQ55. Have you talked to Kelton about the case since then?

A. I have not.

XQ56. Have you come from Memphis to Indianapolis to testify in this case, and for no other purpose?

A. Yes.

XQ57. Under what arrangements?

Objected to as immaterial.

A. Mr. Bradford asked me if I could come up here and make this statement and I told him I could, if they would pay my expenses.

XQ58. Have you talked to any Lilly salesmen about the case?

A. No one save Mr. Winchester whom I came up here with, and only as above stated.

XQ59. Did Mr. Winchester arrange for your coming before you started?

A. We came from Memphis together.

XQ60. Have you been in the habit of buying goods from Winchester?

A. I have.

XQ61. Had you not ever talked about this case with Winchester?

A. I have not, until I got ready to come up here.

XQ62. And then did you tell him what you were going to testify to?

A. I never went into details with Mr. Winchester. He knew that I was coming up here and for what purpose.

XQ63. Didn't you tell him anything about what you were going to testify to?

Objected to as absolutely immaterial and irrelevant.

A. I have told Mr. Winchester just what I have stated here.

XQ64. When you were in business for yourself and a certain drug or preparation was called for over the counter and you did not have any of it, what did you do?

Objected to as immaterial and irrelevant.

A. Either sent out for it or did not make the sale.

XQ65. Do you state that that is absolutely true in every case?

A. I have stated there that I substituted Quin-Coco for Coco-Quinine, for the reason that both Mr. Kelton and Mr. Pfeiffer said that I could do so as they were one and the same thing, and that is the reason that I did so in that case. I did not do so in any other case that I can remember. And I did this because they told me so positively that it was all right to do so.

XQ66. Don't you know that there have been a great many drugs or preparations in your store made by different drug houses which are similar and one of which could be used for the other?

Objected to as irrelevant, immaterial and not cross-examination.

A. I do know that the manufacturer claims that to be a fact. However, I did not take their word for it.

XQ67. Did you carry Lacto Peptin and Elixir Lactated Pepsin?

Objection repeated.

A. I did.

XQ68. Are they not the same preparation pharmaceutically?

Same objection.

A. Perhaps they are, but I had prescriptions which called for Elixir Lactated Pepsin and I used Elixir Lactated Pepsin to fill them with.

XQ69. If you had a prescription for Lacto Peptin and you had none, what would you do if you had then in stock Elixir Lactated Pepsin?

Same objection.

A. Lacto Peptin and Elixir Lactated Pepsin are different preparations, one being a powder and one a liquid. Therefore, I could not use Elixir Lactated Pepsin for Lacto Peptin, even if I wished to do so.

XQ70. Don't you know that they both come in both powders and liquids?

Same objection.

A. Lacto Peptin is a powder and Elixir Lacto Pepsin is a liquid.

XQ71. Did you carry Elixir Lacto Pepsin?

Same objection and because the witness has already answered the same question.

A. I did.

XQ72. Did you carry Elixir Lactated Pepsin?

Same objection.

A. I did.

XQ73. If you had a prescription or a call for one of those and you were out of it, what did you do?

Objected to as immaterial, irrelevant and not cross-examination.

A. I either got it or did not fill it.

XQ74. Did you keep on hand Iodide Potassium Mercke?

Same objection.

A. I did.

XQ75. Did you keep any other make of it?

Same objection.

A. I did not specify on my orders for Iodide of Potassium, Mercke's, or any other special manufacturer.

XQ76. I asked you if you carried iodide of potassium made by any other house than Mercke?

Same objection.

A. I have had iodide of potassium in stock made by Mercke, also several other manufacturers.

XQ77. If you had a prescription specifying iodide of potassium with the name of the particular house and you were out of it, what did you do?

By Mr. Bradford: Objection repeated and protest made and surprise expressed that counsel will persist in this line of examination under the pretense of cross-examination when no foundation whatever was laid in the direct-examination for such questions.

By Mr. Rawle: Mr. Rawle states that the cross-examination is, in his opinion, quite justified.

A. I never saw a prescription where the physician specified any certain make of iodide of potassium. Iodide of potassium is the same chemical whether made by Mercke, or Mallancrock or any other manufacturer of chemicals.

XQ78. You have said before that you used Quin-Coco for Coco-Quinine because you were told that they were the same. Why then if a straight chemical drug

and the maker's name is specified and you do not have it, shouldn't you use the same drug of another make?

Objection repeated.

A. All chemicals, whether made by one manufacturer or another are the same, while pharmaceuticals differ.

XQ79. Then if a chemical of one house is specified and you don't have it you use the chemical of another house; is that correct?

Objected to as immaterial and not justified by anything the witness has said.

A. I never saw a chemical of the make of any certain house specified.

XQ80. But suppose that you did have a chemical specified with the name of the maker, and you were out of it, but you had an identical chemical of another house, what do you believe that you could properly do as a druggist?

Objected to as immaterial, incompetent and irrelevant, and not cross-examination.

A. I believe that I could properly use a chemical such as iodine of potash or similar chemical made by any reputable house.

XQ81. I think you said that you were now a prescription clerk. Is that right?

A. Yes, sir.

Cross-examination Closed.

Deposition Closed.

GUS. A. LAVISON.

Adjourned until tomorrow, October 24th, 1916, at 9 a. m.

928 John E. McCambridge.

Indianapolis, Indiana,
October 24, 1916—9 a. m.

Met pursuant to adjournment.

Parties present as before.

JOHN E. MCCAMBRIDGE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. John E. McCambridge; age 58; Chicago, Illinois; Chemist with G. D. Searle & Co., of Chicago, Illinois, manufacturers of physicians' supplies and pharmaceuticals.

Q2. Please state your experience as a pharmaceutical chemist and where you have been previously employed, and in what capacity?

A. I entered the service of Wm. R. Warner & Co., March 8, 1877, as bottle washer. In the fall of the same year the foreman retiring I got advanced to assistant laboratory man; I graduated from the Philadelphia College of Pharmacy, class of '79 and '80. In about May, 1880, I was given entire charge of the laboratory, which continued on up to the time of my severance with them in August, 1908, when the Pfeiffer Chemical Company took hold of the business. Since then I have been with the Standard Drug & Chemical Company, of Philadelphia, Pa., for a short time, and in December, 1908, came to Chicago, Ill., with the A. E. Remick Pharmacal Company. In September, 1911, I was then employed by G. D. Searle & Co., where I am at the present time.

Q3. Were you in charge of the laboratories of Wm. R. Warner & Co., in Philadelphia, during the year 1907

and during the year 1908, up to the time when your connection with that company was severed?

A. I was.

Q4. How long after the Pfeiffer Chemical Company took over the Wm. R. Warner & Co. was it before you severed your connection with them?

By Mr. Rawle: Mr. Rawle thinks it better to object here that the fact is not correctly stated in the question, but correctly appears elsewhere in this record.

A. About three weeks.

Q5. And up until that time, as I understand it, you were the superintendent and in charge of the laboratories having to do with the manufacture and experimenting on pharmaceuticals?

A. I was.

Q6. Do you know Mr. Harry Fritsch?

A. I do.

Q7. What position did Mr. Fritsch occupy during the two years prior to the severance of your connection with Wm. R. Warner & Co.?

The question is objected to and all other like questions relating to a period before the incorporation of Wm. R. Warner & Co., defendant.

A. In the manufacture of special formulæ and other liquid preparations of the house. He was a part of my force engaged as a workman under me.

Q8. Was he in charge of any part of the laboratory?

A. He simply had to make the preparations that were called upon to fill the stock.

Q9. Were you personally aware of the work done by Mr. Fritsch day by day and was it done under your superintendence?

A. I was and it was.

Q10. Mr. Fritsch when called as a witness for defendant in this case, testified that he experimented on

a tasteless syrup of chocolate quinine, trying to make a preparation similar to Coco-Quinine, Lilly, and that these experiments were conducted in the early part of 1908 and also in 1907. I refer to Mr. Fritsch's testimony beginning with XQ58, on page 466 of Defendant's Record. I ask you whether or not any such experiments were conducted in the laboratories of Wm. R. Warner & Co., in Philadelphia, during the early part of 1908 or during the year 1907?

By Mr. Rawle: Objected to as irrelevant and as antedating the formation of the defendant corporation at the time the Pfeiffer Chemical Company's interests became affiliated with the Wm. R. Warner & Co. business in Philadelphia, which the witness has stated to be August, 1908.

A. No such experiments were conducted.

Q11. Would it have been likely or possible that Mr. Fritsch could have carried on such experiments in the laboratory without your knowledge?

Same objection and as leading.

A. It would not.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ12. Fritsch has testified that he was an educated pharmacist, a graduate of the Philadelphia College of Pharmacy. You have testified that Fritsch was employed under you in the manufacture of special formulæ. Is all this correct?

A. It is.

XQ13. Was he a trained man?

A. He was.

XQ14. Do you remember Robert J. Groves in that concern at that time?

By Mr. Bradford: The question is objected to as not cross-examination.

A. I do.

XQ15. When you were superintendent of the laboratory in the old Warner firm in 1908 and 1907, were there not a number of experiments going on constantly?

A. There were not.

XQ16. Were there some?

A. No, none. In speaking now we are speaking of the laboratory department, known as the liquid department, not the pill department at all.

XQ17. Then you were not aware of any experiments in 1908 and 1907 in the laboratory department?

A. There were none.

XQ18. Were you not in 1908 and 1907, in the laboratory making up lots of different products of the Warner firm? I mean preparing lots or batches of their products for sale?

Objected to as immaterial and irrelevant.

A. We were, but not experimenting with new preparations.

XQ19. And there was a considerable number of these different products that you were thus making up for sale, were there not?

Same objection.

A. There were.

XQ20. Several hundred?

Same objection.

A. Part of my duty was to keep a record of all preparations made in the liquid department. Therefore, I knew exactly what was being done in that department.

XQ21. Are you not speaking now of turning out Warner products for sale?

Same objection.

A. I am.

XQ22. And what you call the laboratory of the

Warner concern was in fact a factory for the manufacture of its products, was it not?

Same objection.

A. It was.

Cross-examination Closed.

Deposition Closed.

JOHN E. McCAMBRIDGE.

Adjourned until tomorrow, October 25th, 1916, at 10 a. m., at Jefferson Hotel, St. Louis, Missouri.

By MR. RAWLE: Notice of motion to strike out the deposition taken at the last two sessions is given, for the reason set up in the various objections.

St. Louis, Missouri,
Hotel Jefferson,
October 25th, 1916—10 a. m.

Met pursuant to adjournment.

Parties present as before.

WILLIAM S. GARVIN, appearing in answer to a writ of subpoena issued on petition of plaintiff, as a witness on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. William S. Garvin; age 45; Webster Grove, a suburb of St. Louis, Missouri; Chemist with Wm. R. Warner & Co.

Mr. Rawle states that no notice has been given to him of the name of this witness and the witness

was subpoenaed from his place of business in St. Louis, within an hour past, and objects to the examination of this witness on behalf of the plaintiff. He also gives notice of a motion at the proper time to strike out any deposition he may give.

Mr. Bradford replies that his failure to notify counsel for defendant of the name of this witness was, first, because of the uncertainty surrounding the call of the witness, and further because the witness is an employee and part of the defendant organization, and he did not and does not believe that any notice was necessary or required.

Q2. What are your duties?

A. I am in charge of the laboratory of Wm. R. Warner & Co.

Q3. How long have you had charge of the laboratory?

A. Perhaps for—I will have to say that I really don't know.

Q4. Can you approximate?

A. I think eight years.

Q5. In your capacity as chemist in charge of the laboratories you superintend the experiments and other work in bringing out new preparations, I presume?

A. Yes, sir.

Q6. Mr. Garvin, your name has been used quite frequently in the testimony that has been given in this case both by witnesses for plaintiff and by witnesses for defendant. From the testimony in the case I judge that you were in charge of the work of bringing out a preparation for the Pfeiffer Chemical Company, an affiliated concern of the Wm. R. Warner & Co., known as Quin-Coco. I have had you subpoenaed as a witness merely that I might have the privilege of asking you to give your own statement respecting the history of this preparation, and for no other purpose. Will you tell us if you did the work incident to bringing out this

preparation and, if so, under whose direction it was done, and when?

By Mr. Rawle: The question is objected to so far as it is intended to bring out any facts occurring before the incorporation of the defendant company, Wm. R. Warner & Co., in Pennsylvania, which took place about July 28th, 1908. Any evidence in response to the question of any fact or transaction prior to that date is objected to.

A. I did that work. I am uncertain as to the time the work was done, and did the work by the direction of the company.

Q7. Who spoke for the company in giving you these directions?

A. Mr. Merner, I believe.

By Mr. Rawle: The questions and the answers are objected to and for the same reason, and unless the time of the transaction is fixed.

Q8. Did any one beside Mr. Merner ever talk with you about the matter on behalf of the company?

By Mr. Rawle: Objected to because "any one", and what any one said or may have said is not evidence, and because the statement to the witness in this connection by any person than an officer of the company is not evidence against the company. The only question that is proper in any case would be as to what a general officer of the company instructed the witness to do.

A. What do you mean by talking to me about the matter in behalf of the company?

Q9. I mean that either before you started on the work or during the progress of the work, did any one else, beside Mr. Merner, on behalf of the company, talk with you respecting this work?

By Mr. Rawle: Objected to unless the date of the talk was subsequent to the incorporation of

the defendant and because it appears by this record that Mr. Merner was the only general officer of the company resident in this Western Department of the business in St. Louis, after such incorporation.

A. Not to my recollection.

Q10. Did Mr. Henry Pfeiffer ever discuss the subject of Quin-Coco with you?

A. Not to my recollection.

Q11. Did Mr. G. A. Pfeiffer ever discuss the subject of Quin-Coco with you?

A. Not to my recollection.

Q12. When did Mr. Merner first bring up the subject and give you instructions?

A. I don't remember.

Q13. Do you remember ever seeing Mr. Henry Pfeiffer in the St. Louis laboratories?

A. Yes, sir.

Q14. Do you remember ever seeing Mr. G. A. Pfeiffer in the St. Louis laboratories?

A. Yes, sir.

Q15. You are personally acquainted with these gentlemen, I presume?

A. Yes, sir.

Q16. Was this work done after you became in charge of the laboratory?

A. Yes, sir.

Q17. What did Mr. Merner say to you on the subject when he first talked with you about it?

Objected to unless the date is fixed and it is shown to be after July 28th, 1908.

A. I don't know.

Q18. Do you remember anything that Mr. Merner said to you about it?

A. I could not attempt to quote Mr. Merner verbatim of course.

Q19. You are referring now I presume of course to Mr. G. D. Merner, who is present in this room?

A. Yes, sir.

Q20. Mr. Merner is your superior officer in the organization?

A. Yes, sir.

Q21. Can you tell me the substance of what Mr. Merner said?

Same objection.

A. Mr. Merner said to me that we would like to have a preparation generally known as a chocolate syrup of quinine.

Q22. Is that all that he said?

A. I could not answer further than that. He may have said more, I don't know.

Q23. Was Mr. Merner in charge of the St. Louis plant at that time?

A. Yes, sir.

Q24. Was anything said about the Lilly preparation known as Coco-Quinine?

Same objection.

A. I don't remember.

Q25. Did you have a bottle of the Lilly preparation in the laboratory while you were conducting your experiments?

Same objection and as irrelevant.

A. Later on; yes, sir.

Q26. What do you mean by "later on"?

A. You know you are asking me some questions that you have not coached me on, and hence I am answering only approximately, and to the best of my recollection and I take it that some time in the future after the first request it was gotten.

Q27. What use did you make of it, I mean the Lilly preparation?

Same objection.

A. Looked at it to see if the physical appearance of the sample on which I was working was somewhat similar to Lilly's.

Q28. Who assisted you in the work, if any one?

A. No one.

Q29. Where did you get the formula from which the preparation was made?

Same objection as to time of the transaction.

A. The formula is one which we—I would just like to state that differently—as first made, the formula was supplied to me by Mr. Merner.

Q30. Where was it obtained by Mr. Merner and from whom?

Same objection and because it does not appear that the witness had knowledge of the fact, if there be such a fact.

Mr. Bradford objects to the objection, it being improper for counsel to suggest answers to witness, particularly when witness is antagonistic to plaintiff and a part of the defendant organization.

Mr. Rawle replies that he is objecting and not suggesting.

By Mr. Bradford: Mr. Rawle's objection speaks for itself.

A. I don't know.

Q31. Did you ever hear it stated by any one where the formula was obtained?

By Mr. Rawle: Objected to as calling for bald hearsay and for the other reasons above given.

The Examiner is requested to instruct the witness that he can not give hearsay evidence, or testify to what somebody has told him unless it being an officer of the corporation.

By Mr. Bradford: The Examiner is without authority to instruct the witnes in any particular, as counsel should know, if he does not, and his presumption in asking the Examiner to do this is inexcusable. These questions are questions for the

determination of the court and the court only. The Examiner has no authority to assume the functions of the court. Moreover the question does not call for hearsay, but for the witness' own knowledge of a fact, if it be a fact.

A. No, sir.

Q32. It has been stated by some witnesses that representatives of Wm. R. Warner & Co. have solicited their orders for Quin-Coco on the assurance that it was the same thing as Coco-Quinine, and must be the same thing as Coco-Quinine, because it was made from the original Lilly formula, either by a chemist or obtained from a chemist formerly employed in the Lilly laboratories. Do you know anything as to this, and, if you do, please state what you know?

By Mr. Rawle: Objected to because the preliminary statements made by counsel in the question are irregular and improper; because the statements are erroneous in fact; because the question calls for a statement by the witness of mere hearsay, and because the time inquired of is not subsequent to the formation of the defendant corporation. Also because the question is irrelevant and immaterial and inadmissible.

A. I do not.

Q33. In your answers where you have said that you do not remember and can not say, such as your answer to the question as to whether Mr. G. A. Pfeiffer ever talked with you on this subject, do you wish to be understood as denying that he ever talked with you on the subject, or merely that you do not care to answer?

A. I mean that to the best of my recollection Mr. Pfeiffer never talked with me in regard to the manipulation of this product.

Q34. Mr. G. A. Pfeiffer was frequently in the St. Louis laboratories, was he not?

A. Yes, sir.

Q35. And knew what was going on in the laboratories?

The question is objected to for the same element of time.

A. Yes, sir.

Q36. As a matter of fact did not Mr. G. A. Pfeiffer take a good deal of interest in the work of the laboratories, particuraly on new preparations?

A. Yes, sir.

Q37. He undoubtedly then knew that this work was progressing in the laboratories?

A. Yes, sir.

Q38. I presume the same is true of Mr. Henry Pfeiffer, is it not?

A. No, sir.

Q39. He would not be in the laboratories so much?

A. Not so much.

Q40. Some of the witnesses have given your name as Garwin and some as Garvin. The correct spelling is Garvin, is it not?

A. Yes, sir.

Direct-examination Closed.

No cross-examination.

Q41. Do you remember the date when you went to Philadelphia to advise with Mr. Fritsch and instruct him how to make this preparation? If so, when was it?

A. I don't.

Deposition Closed.

WILLIAM S. GARVIN.

ARDIE ODELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Ardie Odell; age 32; Union, Missouri; retail druggist. I have been a retail druggist at Union, five years in February. Prior to that time I was a traveling salesman for Meyer Brothers Drug Company, the Norwich Pharmacal Company and Wm. R. Warner & Co. I worked for Meyer Brothers about four years, for Wm. R. Warner & Co., I think it was about a year, and for the Norwich Pharmacal Company about six months.

Q2. Do you remember the year that you worked for Wm. R. Warner & Co.?

A. I don't remember the year; no, sir.

Q3. About how long ago?

A. About six years ago.

Q4. As traveling salesman for Wm. R. Warner & Co., did you handle their entire line?

A. Their line at that time.

Q5. Did you have a preparation in the line, known as Quin-Coco?

A. Yes, sir.

Q6. On what representations did you solicit orders for this item Quin-Coco, and by whose instructions?

By Mr. Rawle: Objected to as not rebuttal.

A. I sold it Quin-Coco for Coco-Quinine, but it was nobody's instructions.

Q7. Did any one from the house ever travel with you or give you any instructions or information in reference to this item, and how you could sell it?

By Mr. Rawle: Same objection.

A. Mr. Henry Ritayik traveled with me for, I think it was one week or two weeks, during the time I was with them. I think it was one week, and read to me instructions that he had in the book about selling pharmaceuticals, and rules of the house.

Q8. Did Mr. Ritayik ever say anything to you about selling Quin-Coco as a substitute for Lilly's Coco-Quinine?

By Mr. Rawle: Objected to as not rebuttal and as leading.

A. He said that we have a preparation of Quin-Coco which is to take the place of Coco-Quinine.

Q9. I show you a written statement and ask you if this is by you?

A. That is my signature; yes, sir. That has never been sworn to before a Notary Public and Mr. Kahre told me that he wanted to get something about like that and I told him at the time just what I have testified here, that he mentioned Quin-Coco in place of Coco-Quinine. That has never been sworn to before a Notary Public.

Q10. This statement reads as follows:

"Union, Mo., July 24th, 1916.

I, Ardie Odell while in the employ of Pfeiffer Chemical Co. (Wm. R. Warner) of St. Louis, as salesman, was instructed by Henry Retighe, General Specialty man, to sell Quin-Coco as a substitute for Lilly's Coco-Quinine. It was Mr. Retighe's duty to travel with and instruct the road men, one selling the entire line.

These instructions were given on one of these trips.

Yours very truly,

Ardie Odell."

And I ask you if any part of this statement is not true? If so, what is it?

By Mr. Rawle: I object to any use of the written statement either for the purpose of supporting the testimony of the witness or for impeaching his testimony already given, or for any other purpose. I object to placing the witness' statement on the record, which objection I sought to make before it had been so placed, but was refused, by opposing counsel until it has been written in the record. The question is also objected to as not rebuttal.

By Mr. Bradford: Mr. Bradford did refuse to have his question interrupted and an objection

interposed in the midst of it, an unheard-of procedure so far as he is aware in this method of taking testimony. The objection is of the same force and effect following the completed question as it could have been or would have been in the middle of the question. Mr. Rawle could not properly object to the question until the question was asked.

By Mr. Rawle: I sought to interpose my objection before any question was put.

By Mr. Bradford: Mr. Rawle is mistaken for I had begun my question and reached the point where I handed the Examiner the letter to be copied into the question, before Mr. Rawle opened his mouth to interpose his objection.

A. He merely made the statement to me this, to sell Quin-Coco against Coco-Quinine, Lilly. That was all it was.

Q11. In what particular is the letter of July 24th, 1916, inconsistent with what Mr. Ritayik actually told you, if in any?

By Mr. Rawle: The same objections are repeated; also because the witness has fully answered the question, and his further examination on this writing is doubly objected to.

A. Mr. Kahre put this down here and said this is about something like it and at the time Mr. Kahre told me if it was anything about like that this testimony would, the chances were, not be used, if it was anything like it, and informed me that I did not have to go before a Notary Public and swear to it, and I told him that to the best of my knowledge that he did not instruct me that but talked Quin-Coco and Coco-Quinine.

Q12. In selling Quin-Coco did you follow Mr. Ritayik's instructions as you understood them?

Objected to as not rebuttal.

A. No, I was out after orders and sold quinine, and talked Coco-Quinine, chocolate quinine.

Q13. How did Mr. Ritayik talk the subject with the druggists?

Objected to as not rebuttal.

A. The time he was with me Mr. Ritayik worked very little on pharmaceuticals, his line was on non-secret lines. He would work the druggists more and I would very seldom hear him talk to the druggists on Quin-Coco or Coco-Quinine. His line was on the Hobson line and the non-secrets the Pfeiffer Chemical Company put up at that time. He had the line at that time of non-secrets and worked druggists mostly.

Q14. When he did mention Quin-Coco or Coco-Quinine, what did he say about them?

By Mr. Rawle: Objected to as not rebuttal.

A. I don't remember of ever hearing him mentioning Quin-Coco, while he was with me. He was with me one week or two weeks, I am not positive, but I think it was one week one trip.

Q15. You have already stated in answer to a previous question that he told you to sell Quin-Coco against Coco-Quinine.

By Mr. Rawle: Objected to as not rebuttal, and because the question attempts to induce the witness to change his answers already given and to impeach the witness.

By Mr. Bradford: The objection is unjustified, for the reason that the question is not for any such purpose as that stated, but merely to give the witness an opportunity to make his testimony consistent. It is presumed that the witness in his last answer meant that he can not remember of Mr. Ritayik mentioning this particular item in his talk with retail druggists and since counsel has by his objection raised this point this explanation is made of the last question propounded to witness.

It is simply to give him an opportunity to explain what might be considered an inconsistency between two of his answers.

A. He informed me that we make Quin-Coco and Lilly makes Coco-Quinine and he said we sell Quin-Coco against Lilly's Coco-Quinine. We call it Quin-Coco not chocolate quinine, are the words I believe he said to me on the trip.

Q16. Then I assume that in your answer where you said you did not remember of hearing Mr. Ritayik mention Quin-Coco that you had in mind his conversations with retail druggists and not his conversations with you personally. Is this so?

By Mr. Rawle: Objected to as not rebuttal, as leading, as an effort to impeach the plaintiff's own witness, and as in all respects entirely inadmissible, in the examination of a witness not shown to be hostile.

A. No, sir.

Q17. Explain then what you did mean when you said you did not remember ever hearing him mention Quin-Coco?

Same objection.

A. I don't remember hearing him say anything to retail druggists about Quin-Coco.

Q18. But you do remember that he mentioned it to you as above stated?

Same objections.

A. Yes, sir.

Q19. Do you know Mr. G. D. Merner, who is sitting near you in the room?

A. Yes, sir.

Q20. How long have you known Mr. Merner?

A. About six years and a half.

Q21. What are your relations to Mr. Merner?

A. Nothing whatever, only friends.

Q22. You were not aware that Mr. Merner was to be present during this examination, when you talked with me about this case in the lobby of the hotel just prior to testifying, were you?

By Mr. Rawle: The last two questions are objected to as inadmissible.

A. I did not care. No, sir.

Q23. As a retail druggist do you have dealings with Mr. Merner's house?

Same objections.

A. Yes, sir.

Q24. What is the condition of your account with them at this time?

Same objection and because the question tends to impeach the plaintiff's own witness, and being inadmissible.

A. I do not think that I owe them anything for goods that the bill has yet become due.

Q25. What is the reason that your answers to my questions have not been as frank and full as they were during the few moments we talked about the matter before you were brought into the room to testify, if there is any reason?

Objected to as inadmissible and irregular.

A. No reason whatever.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

By Mr. Rawle: Notice is given of motion to strike out parts of the deposition which have been objected to as not proper for rebuttal.

XQ26. Who is Mr. Kahre, whose name has been mentioned?

A. He is the manager of the Eli Lilly branch here in St. Louis.

Re-direct-examination.

By MR. BRADFORD:

RDQ27. How long have you known Mr. Kahre?

A. About twelve years.

RDQ28. How did this subject come up between you and Mr. Kahre?

By MR. RAWLE: Objected to as not proper rebuttal and as not re-direct-examination and as inadmissible.

A. I was talking to Mr. Nowl, a representative of Eli Lilly, traveling salesman, who calls at my store, and I asked him how the suit had come out and he told me to write to Kahre and ask him, and I did

ARDIE ODELL.

By MR. BRADFORD: The letter of July 24th, 1916, referred to by the witness, is offered in evidence and marked "Plaintiff's Exhibit, Odell Letter".

By MR. RAWLE: The offer is objected to as inadmissible and as an attempt to impeach the plaintiff's own witness, who is not shown to be hostile.

Deposition Closed.

JOHN VAN DALE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. John Van Dale; age 48; 5353A Minerva Avenue, St. Louis, Missouri; salesman of Meyer & Van Dale's perfumes. I have been associated with the firm

of Meyer & Van Dale for four years last September, since September 1st, 1912; prior to that time I was employed as traveling salesman for the Pfeiffer Chemical Company and Wm. R. Warner & Co., for five years, handling their general line of drugs and pharmaceuticals and perfumes. I covered St. Louis and East St. Louis.

Q2. Did you have in your line a preparation known as Quin-Coco?

A. Yes, sir.

Q3. When did you first become acquainted with this preparation and under what circumstances?

A. I was selling Quin-Coco from the first day I was employed by the Pfeiffer Chemical Company. I was speaking to Mr. Thurman one day when we were on a little bridge between the three different buildings of the Pfeiffer Chemical Company, along about quarter of twelve. Mr. Thurman seemed to be dissatisfied with his position. I don't remember what transaction it was on the bridge about what his general business was with the Pfeiffer Chemical Company. Then we walked up stairs in the third story. Mr. Thurman and I and Mr. Garvin were standing at the table and there were two pieces of white paper on the table with two different preparations and I was asked if I could tell the difference between the two, and I said yes, one preparation looked a little bit thinner than the other and the color was a little bit different. That was all that was said to me.

By Mr. Rawle: Objected to as not rebuttal, as irrelevant and as hearsay.

Q4. Who asked you this question?

Same objection.

A. Mr. Garvin.

Q5. What were the two preparations?

A. I suppose one was Quin-Coco and the other was Coco-Quinine.

Q6. What did Mr. Garvin say about them?

By Mr. Rawle: Same objections and because what Mr. Garvin said is not relevant or admissible.

A. He says, are there any difference.

Q7. And you examined them with a critical eye for the purpose of detecting a difference, if you could, did you?

By Mr. Rawle: Same objection and as leading.

A. Yes.

Q8. Did Mr. Garvin tell you that one preparation was Coco-Quinine and the other Quin-Coco?

Same objections.

A. I don't remember that.

Q9. Were the bottles of the two preparations present?

A. I don't think there were.

Q10. How did Mr. Garvin happen to introduce the subject, or did you introduce it?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant and because what Garvin did is not evidence.

A. Mr. Garvin had it on the paper and we were passing by and we happened to notice this. I can't remember the conversation, but I don't know who said Quin-Coco or Coco-Quinine, but I looked at the preparation and Thurman and I commenced talking about Coco-Quinine and Quin-Coco. And I said to him that there was a difference in consistency and in the color.

Q11. Do you remember what Mr. Garvin said in response to this, if anything?

By Mr. Rawle: Objected to as irrelevant and inadmissible.

A. I do not.

Q12. Did he at any time contend that they were the same?

By Mr. Rawle: Same objections and as leading.

A. He did not decide one way or the other.

Q13. He merely asked your opinion?

Same objection.

A. I told him there was a difference in the two preparations and that is all.

Q14. I show you a card and ask you if you recognize it, and, if you do, what it is?

By Mr. Rawle: Objected to because the card has not been shown to opposing counsel.

A. I do recognize it. It is a perfume card.

By Mr. Bradford: Counsel for plaintiff invites counsel for defendant to inspect the card which he now hands to him.

Q15. What kind of a perfume card?

A. That is the price list of different manufacturer's makes, and the name of the different odors to replace with, the facsimile odors.

Q16. Do you know what house issued this card?

By Mr. Rawle: This question and the preceding questions relating to this card are objected to as irrelevant, inadmissible and not rebuttal.

A. I got one with my price list with the different preparations that I sold for the Pfeiffer Chemical Company.

Q17. Get it from the Pfeiffer Chemical Company?

Same objections.

A. With my price list from the Pfeiffer Chemical Company.

Q18. What is the significance of the numbers corresponding to each other on opposite sides of the card?

By Mr. Rawle: Same objections.

A. The number "Florita" is an odor facsimile to "Janice", and so on throughout the list, like "Vogue" is for "Jickey".

Q19. Then if I understand you correctly No. 1 on the side of the card with "Vogue" at the top is a facsimile of No. 1, on the opposite side, and the same is true of each of the other numbers on the "Vogue" side when compared with corresponding numbers on the "Jickey" side?

A. Yes, sir.

By Mr. Bradford: The card just referred to is offered in evidence and marked "Plaintiff's Exhibit, Defendant's Perfume Card".

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ20. That day you were on the bridge with Thurman, was that in 1907 soon after you went to the Pfeiffer Chemical Company?

A. No, I don't know what year; it was either in 1908 or 1909.

XQ21. How long had you been with the Pfeiffer Chemical Company when that happened?

A. It was a year or may be two years, I am not quite sure. I think it was in 1909.

XQ22. Before that talk with Thurman had you been selling Quin-Coco?

A. Yes, sir.

XQ23. From a salesman's demonstration book?

By Mr. Bradford: Objected to as not cross-examination.

A. No, sir; from a vial case.

XQ24. I mean did you as a Pfeiffer Chemical Company salesman and as part of your outfit carry with you a blank book having labels of your various products pasted into the book?

Same objection.

A. Yes, sir.

XQ25. Who first talked to you about testifying in this case?

A. I was called up over the 'phone and asked if I would not come down to the Jefferson Hotel and asked if I worked for the Pfeiffer Chemical Company. I was asked to come and meet Mr. Bradford. This was last December.

XQ26. Have you since talked with any Lilly salesman about the case?

A. No, sir.

Deposition Closed.

JOHN VAN DALE.

RUDOLPH A. MEYER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Rudolph Meyer; age 49; St. Louis, Mo.; perfume manufacturer, a member of the firm of Meyer & Van Dale. We have been in this business since the first of September, 1912. Prior to that time I was the perfume manufacturer for Wm. R. Warner & Co., and the Pfeiffer Chemical Company, up to about May 10th, 1912, and since 12th of November, 1904, when I started my services for the Pfeiffer Chemical Company.

Q2. I show you a card marked "Plaintiff's Exhibit, Defendant's Perfume Card", and ask you if you recognize the same and what it is?

A. Sure, I recognize it, I know that card all right. It is a card issued by my former employers, the Wm. R. Warner & Co., and the Pfeiffer Chemical Company. It shows on one side their perfumes and on the other side the competitive brands.

Q3. Which side represents the Warner-Pfeiffer line of perfumes?

A. The side headed by the name "Vogue".

Q4. Which perfumes do you recognize as the first or original? Those on the "Vogue" side of the card or those on the side of the card headed "Jickey"?

By Mr. Rawle: Mr. Rawle objects to the question and to the preceding questions as not rebuttal and as irrelevant and inadmissible.

A. Yes, the one on the side headed "Guerlain's Jickey". That is the "Jickey" made by the original. Guerlain is the original Paris house.

Q5. Were these several perfumes on the side of the card headed "Vogue" all made by you?

A. Yes, sir.

Q6. And while you were in the employ of Wm. R. Warner & Co. and the Pfeiffer Chemical Company?

A. Yes, sir.

Q7. By whose instructions were these perfumes made?

By Mr. Rawle: Objected to as not rebuttal, as irrelevant and inadmissible.

A. By my employers.

Q8. What individual or individuals, if you recall?

Same objections.

A. Some of those perfumes I was directed to make when I was still with the Mellier Drug Company, the former owners of Mellier's perfumes, and others were made by the then owners, Messrs. Pfeiffer and their successors and present owners of Mellier's perfumes. That is what I was paid for.

Q9. What would one of the Messrs. Pfeiffer, or either of your other employers, say to you when asking you to make a perfume, such as any one of these listed on this card?

By Mr. Rawle: Same objections.

A. They would bring me the report of some of their salesmen, to the effect that such and such an odor has a good sale; such and such an odor from another concern would have a very good sale, and that it would help our perfume business by reproducing it as faithfully as possible in a competitive article, meaning, of course, substitute our perfume with a somewhat similar name or may be a different name (as the name "Vogue" is entirely different from "Jickey") for the original perfume.

Q10. Would they bring you a sample of the original perfume to work from?

A. They would bring an original package or sample of the competitive brand, or original brand.

Q11. I show you another card and ask you if you know what it is?

A. Yes, this is another one; the same thing, except it may have a few more items on it; probably issued later.

By Mr. Rawle: The question and answer is objected to for the same reason.

Q12. Did the Warner salesmen obtain from you any information or instructions respecting these perfumes that you made?

A. They did.

Q13. What instructions would you give them?

Same objections.

A. I would point out to them that here is an article, a perfume, fully equal, if not superior to the genuine, and offer it as such to the trade.

Q14. Did you instruct them or give them any means of remembering which of your perfumes corresponded to the originals? If so, what?

Same objections.

A. To some of the older salesmen we would simply give the aforesaid cards, and as I remember, often I would personally take out price lists and mark the competitive brand in writing behind the name of our brand.

Q15. Were your brands usually sold for lower prices than the originals?

Same objections.

A. Yes, sir. The cards aforesaid show this very plainly.

The card referred to in Q11 is offered in evidence and marked "Plaintiff's Exhibit, Defendant's Perfume Card B."

Direct-examination closed.

Notice of motion to strike out is here given by Mr. Rawle.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ16. How long did you say you worked for Mellier?

A. Eight years. Then the Pfeiffer Chemical Company took over the perfume department of the Mellier Drug Company and I went with the Pfeiffer Chemical Company at that time.

XQ17. Look at the yellow list, "Plaintiff's Exhibit, Defendant's Perfume Card B," and state which items were put out on the market by the Mellier Drug Company before it passed over into the Pfeiffer Chemical Company?

A. To the best of my recollection they are three on this list put out by the Pfeiffer's, namely, "Oriana," "Forest Roses" and "Locust Bloom." "Locust Bloom," I believe, was originated when Pfeiffer took succession. As to Locust Bloom, I am a little uncertain as to whether it was put out before or after.

XQ18. And all the others on the list except those three were originally put out by the Mellier Drug Company before the Pfeiffers took it over?

A. Yes.

XQ19. And perhaps "Locust Bloom" was?

A. Yes.

XQ20. I have always understood that Frangipanni and Jockey Club were common names of perfumes used by a number of perfumers. Is that right?

A. So they were, and still are.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ21. Do you have——

By Mr. Rawle (interrupting):

XQ21. Do you market Frangipanni and Jockey Club now?

A. Yes.

By Mr. Rawle: That is all.

Re-direct-examination.

By Mr. Bradford:

RDQ22. I started to ask do you have any records that will show what perfumes in this list were made by you after the Mellier line was taken over by the Pfeiffer Chemical Company?

A. I have records, but they are generally written so I only can read them, in my formula book.

RDQ23. The answers given above, as I understand it, are wholly from memory. I mean in respect of the two perfumes "Oriana" and "Forest Roses" being probably the only ones you made after the Pfeiffers took over the Mellier line.

A. I can prove it, not only by memory, but my formula books that I started to make them on such and such a date.

RDQ24. Will you examine your formula books after you go home and check up the matter and see if there were any other items on this list made by you after the Pfeiffers took control.

A. I will.

By Mr. Bradford: I ask counsel for defendant if he will consent that witness may correct his deposition if when he examines his records he finds his memory has been at fault without the necessity of recalling him.

By Mr. Rawle: Mr. Rawle prefers that the matter should take its regular course. The witness has expressed no doubt as to his full recollection except as to "Locust Bloom."

Deposition closed.

Rudolph A. Meyer.

Adjourned to meet at Bancroft Hotel, Saginaw, Michigan, October 26th, 1916.

Saginaw, Michigan,
Bancroft Hotel,
October 26th, 1916, 10 P. M.

Met pursuant to adjournment, and by agreement of counsel.

Parties present as before.

William Heim, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. William Heim; aged 55; Saginaw, Michigan; pharmacist and analytical chemist, proprietor of a retail drug store at 101 Janes Avenue, Saginaw, Michigan, successor to H. & W. Heim. I have been in the pharmaceutical business since 1884.

Q2. Do you know Mr. H. E. Starring, a traveling salesman for Wm. R. Warner & Co.?

A. Yes, sir.

Q3. Has Mr. Starring solicited orders from you for the Warner line of Pharmaceuticals, and among other items for an item called Quin-Coco?

By Mr. Rawle: Objected to as not rebuttal.

A. Yes, sir.

Q4. What representations did Mr. Starring make about this item in soliciting your order for the same?

Same objection, and because the only proper question is as to what was said.

A. He stated that it was the same as Coco-Quinine, that the price was less, that it flowed better, being a slightly thinner liquid, and that most of the boys were buying it and selling it in place of Coco-Quinine.

Q5. Do you handle Coco-Quinine at your store?

A. Yes, sir.

Q6. Have you ever had a prescription written for Quin-Coco?

Objected to as not rebuttal.

A. No, sir.

Q7. Have you ever had a customer call for Quin-Coco?

Same objection.

A. No, sir.

Q8. By what name is this character of preparation prescribed and called for, so far as your personal experience goes?

A. It is always called for as "Coco-Quinine".

Q9. Mr. Starring, in a deposition, stated that it was called for as "Baby Tonic" and as "Chocolate Quinine" in this territory. What have you to say as to this?

A. We never had anybody call for it under those names.

Q10. Did Mr. Starring make any statement to you

as to how you could dispense his preparation, Quin-Coco, and if so, what did he say?

By Mr. Rawle: Objected to as not rebuttal, as leading, and as already asked of the witness in Q4.

A. He simply said that it was the same; that it flowed a little better, and that the boys were all using it; that most of the boys were using it.

Q11. For what?

Objected to for the same reasons, and because the witness has already answered the question in answer to Q4, where he stated "In place of Coco-Quinine."

A. For Coco-Quinine.

Q12. Did Mr. Starring interview you more than once on this subject?

Objected to as not rebuttal.

A. Yes, sir.

Q13. About how many times?

Same objection.

A. During 1915 every time he came. I don't know whether he comes up three times or whether he comes four times.

Q14. Did he make the same representations each time?

Objected to as not proper for rebuttal, as leading, and because the only proper question is as to what was said by the person in question.

A. Yes, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ15. With whom did you first talk about testifying in this case, and when?

A. With Mr. Martin, about April or May last. Mr. Martin is a Lilly salesman. I think he is now in this hotel. I had a talk with him in Mr. Bradford's room within the last half hour.

XQ16. Testimony was taken in Saginaw, on behalf of plaintiff, early in the spring of 1915. Were you asked to testify at that time, or did any person connected with the Lilly Company speak to you about the case or about what Starring had said to you?

A. The time that Mr. Martin saw me he asked me about it; that, of course, was not in 1915; that was this summer, the only time he ever said anything to me about the case.

XQ17. For how many years has Martin, as a Lilly salesman, been calling on you at your drug store and soliciting your trade?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I should say for the last five or six years.

XQ18. About how often each year?

Same objection.

A. I should say about four times during the year.

XQ19. Have you been in the habit of buying any of Starring's line of preparations?

A. Only so-called proprietary medicines, which they bought from other firms; they bought out these firms, these so-called proprietary medicines.

XQ20. Have you found him square in his dealings?

Previous objection repeated.

A. Yes, sir.

XQ21. Do you remember that when he was soliciting your trade he had a blank book with various labels of his line pasted in it, and that you turned over the leaves in that blank book as he talked to you?

Same objection, and as not cross-examination.

A. He had a book with the proprietary labels

pasted in, the medicines that they put up and others that they bought. That is the book that I looked over.

XQ22. Have you had calls for this character of preparation by other names, such as "Chocolate Syrup of Quinine" or "Chocolate Quinine" or "Sweet Quinine"?

A. No, sir.

Deposition closed.

WILLIAM HEIM.

By MR. RAWLE: Notice is given of motion to strike out this deposition for the reasons given in objections.

MARTIN A. KESSEL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Martin A. Kessel; age 26; Saginaw, Michigan; pharmacist, proprietor of retail drug store, located at 2346 South Michigan Avenue, Saginaw, Michigan. I have had this store about four years and a half. Prior to that time I worked in the drug store of Fowly & Co., at Bay City, Michigan, for one year; prior to that I worked in a drug store at Saginaw, Michigan, for Mr. Richter, for four years; prior to that I was with the Michigan Drug Company, in Saginaw, Mich., for nine months; before that I worked in a few other drug stores. I have been in the retail drug business about thirteen years.

Q2. Did you ever know a man by the name of Charles S. Rogers, a traveling salesman for Wm. R. Warner & Co.? If so, when did you know him?

A. Yes, I did, about three years ago, about that time.

Q3. Did Mr. Rogers call on you and solicit your orders for his line of goods?

A. Yes, he did.

By Mr. Rawle: Objected to as not proper for rebuttal.

Q4. Among other items, did Mr. Rogers solicit your order for an item called "Quin-Coco", and if he did what did he say to you about this preparation?

Same objection.

A. Yes, he did. He said that it was very similar to Coco-Quinine and had the same amount of quinine in it, two grains to the teaspoonful, and that it could be sold as Coco-Quinine; that the price of it being much lower than Coco-Quinine it would be more profitable to use it.

Q5. About when was this, or if the same representations were made at different interviews, how many were there and when did they occur, approximately?

Same objection.

A. The first time about three years ago, and at intervals of four months. On each occasion he would make the same remarks about Coco-Quinine and Quin-Coco.

Q6. Did you buy Quin-Coco?

A. That is the only preparation of that kind that I have bought since that time.

Q7. How have you been selling it?

Same objection, and as irrelevant and because the acts of the witness do not affect the rights of the defendant.

A. I have been selling it over the counter and also by prescriptions.

Q8. Under what kind of a label have you sold it over the counter?

Same objections.

A. Coco-Quinine.

Q9. On what kind of prescriptions have you sold it?

Same objections.

A. On prescriptions for Coco-Quinine.

Q10. Do you know Mr. H. E. Starring, another traveling salesman for Wm. R. Warner & Co., and if so, how long have you known him?

A. Yes, sir; about two years.

Q11. Has Mr. Starring ever solicited your order for Quin-Coco, and if so, what did he say to you about this preparation?

Objected to as not proper for rebuttal.

A. Yes, he did. He said the same thing that Mr. Rogers did.

Q12. And have you continued buying it from Starring since he has been in this territory?

A. Yes, I have.

Q13. Did you ever have a call for Quin-Coco at your store?

Objected to as not rebuttal and as irrelevant.

A. No, I did not.

Q14. Have you ever seen a prescription written for Quin-Coco?

Same objection.

A. No, I have not.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ15. What person connected with Eli Lilly & Co. first spoke to you on this subject about Starring or Rogers, or about testifying in this case?

A. Mr. Martin, a representative of Eli Lilly & Co.

XQ16. When first?

A. I think it was last fall, a year ago.

XQ17. For how many years has Martin as a Lilly salesman been soliciting your drug trade in Saginaw?

A. Four years that I know of. He comes about every two months.

XQ18. Have you seen him in Saginaw today?

A. Not until tonight at the hotel here, within the last half hour.

XQ19. Since Starring began to solicit your trade for the Warner line how many times has he called on you?

A. About four times.

XQ20. How many times did Rogers call on you?

A. About six times.

XQ21. Had you bought Quin-Coco from Rogers?

A. Yes, sir.

XQ22. At his first call?

A. No, I think I did not take it the first time but did on his next trip.

XQ23. And you have carried it in stock ever since then until now?

A. Yes, sir; I have.

XQ24. Are you quite sure that Martin did not talk to you about your buying Quin-Coco and about how you sold it, as early as April of 1915?

A. Yes, he did.

XQ25. In the early part of 1915?

A. Yes.

XQ26. Did you tell him then that you had been carrying Quin-Coco and selling it for Coco-Quinine.

A. Yes, I did.

XQ27. Do you think this is honest or ethical as a druggist?

By Mr. Bradford: Objected to as immaterial.

A. I think it is all right, because the Warner salesman said it contained the same amount of quinine, and that is the active principle in the preparation.

XQ28. Have you any other drugs or preparations

on your shelves of which you carry two different makes but both containing the same active principles?

By Mr. Bradford: Objected to as immaterial, irrelevant and not cross-examination.

A. Yes, a few, such as lactated pepsin and essence of pepsin.

XQ29. Mention others.

Same objection.

A. Hayden's viburdum compound. That is all I can remember now.

XQ30. Have you some drugs or preparations on your shelves made by one house as to which there are drugs made by other houses with the same active principle but which you do not carry in stock?

Same objection.

A. Oh yes, there are so many of them that we could not carry them all.

XQ31. In such case if there is a call for one of these but of a make which you don't carry, do you use in its place the one which you do carry?

Same objection.

A. We generally use the original one but we substitute if we think it is reasonable.

XQ32. When Rogers asked you to buy Quin-Coco did he say that it was similar to Coco-Quinine, contained the same amount of quinine—two grains to the teaspoonful—and that the price was lower, and is that the substance of what he said?

By Mr. Bradford: Objected to as an inaccurate statement of what the witness has already testified to, and as an improper question for this reason.

A. Yes, sir.

XQ33. And is that the substance of what Starring afterwards said?

Same objection.

A. Yes, sir.

XQ34. Under what different names do you have calls for a chocolate or a sweet chocolate preparation of quinine?

A. Most of them were Coco-Quinine and chocolate quinine.

XQ35. Any others?

A. That is all.

XQ36. What proportion of them were for chocolate quinine?

A. Very few.

XQ37. About how many drug stores are there in Saginaw?

Objected to as immaterial.

A. Between twenty and twenty-five.

XQ38. When Rogers solicited your trade did he have a blank book with the labels of his line pasted in it and go through it with you, turning over the leaves?

Objected to as immaterial, incompetent and irrelevant, and as not cross-examination.

A. Yes, he did.

XQ39. And Starring the same?

Same objection.

A. Yes.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ40. About how long ago was it that Mr. Martin first asked you if you would testify in this case?

A. About six or seven months ago.

RDQ41. That would be some time last Spring?

A. Yes, sir.

RDQ42. How long prior to that time had Mr. Martin talked with you about using Quin-Coco?

By Mr. Rawle: Objected to as not proper for re-direct, the matter having been fully gone into.

A. About four months before that.

RDQ43. Was that the first time Mr. Martin spoke to you about it?

A. It might have been before that. I don't remember.

RDQ44. When Mr. Rawle asked you in XQ16 when Mr. Martin first spoke to you about it you answered "I think it was last Fall, a year ago." Then in XQ24 he asked you if Mr. Martin did not talk to you about it as early as April of 1915, which would be a year ago last Spring, you answered that he did. Is this correct or did you make a mistake in the year?

Objected to as not proper re-direct-examination and as leading.

A. There have been so many dates referred to that I might have made a mistake in the time.

RDQ45. What is your best recollection as to the date when he first talked with you about the subject and then as to the date when he spoke to you about testifying?

Objected to as not re-direct-examination.

A. The first time he talked to me about the subject was about October or November, a year ago. Then he asked me if I would testify in this case some time the latter part of April, 1916.

RDQ46. In selling Quin-Coco as Coco-Quinine and labeled Coco-Quinine were you or were you not following the teachings and instructions of Mr. Rogers in this respect?

Objected to as not rebuttal, as leading and because the question calls for an inference instead of for a statement of fact, as not proper for re-direct-

examination, and as entirely irregular and inadmissible from every point of view.

A. I might say yes.

Deposition closed.

M. A. KESSEL.

Adjourned until tomorrow, October 27th, 1916, at 10 A. M., at same place.

Saginaw, Michigan.
Bancroft Hotel,
October 27th, 1916, 10 A. M.

Met pursuant to adjournment.

Parties present as before.

MR. BRADFORD states to Mr. Rawle that he will call no other witnesses in Saginaw today and further taking of testimony is therefore adjourned to Detroit, Michigan, at the Ponchartrain Hotel, at such time as will be agreed upon between counsel.

Detroit, Michigan,
Ponchartrain Hotel,
October 27th, 1916, 4 P. M.

Met pursuant to adjournment and agreement of counsel.

Parties present as before.

JAMES E. BARTLETT, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. James E. Bartlett, age 49; Detroit, Michigan; Assistant Secretary and Treasurer of Parke-Davis & Company, and in charge of the sales department of that concern. I direct all sales and promotion, including sales and detail staff. Parke-Davis & Co. are pharmaceutical and biological manufacturers.

Q2. In this case witnesses both for plaintiff and defendant have referred to "detail" work. Will you please explain what is meant by this expression?

By Mr. Rawle: Objected to as not rebuttal and as already fully explained in the previous record.

A. By "detail" work we understand the method by which we introduce our specialties with physicians, dentists, veterinarians, hospitals, etc., through the personal solicitation of employees whom we style as "detail" men.

Q3. Is, or is not, this character of work important in introducing specialties and creating a demand for them?

Objected to as not rebuttal.

A. We consider it indispensable.

Q4. It has been stated by certain witnesses for the defendant in this case that this character of work is on the decrease among pharmaceutical houses and not considered of as much importance as formerly. What do you know as to this?

Objected to as not rebuttal and irrelevant.

A. Parke-Davis & Co. are constantly increasing the amount of detail work being done and the number of men employed in that character of work.

Q5. What are the reasons which actuate your concern in pursuing this policy?

Same objections.

A. We are actuated by the belief that that method is the best that we can employ to increase the business. We look upon "detail" work as a form of advertising.

Q6. Do you have any knowledge as to what the general practice is among pharmaceutical manufacturers at this time in respect to this class of work, or I might say as to the amount of this class of work being done generally by pharmaceutical manufacturers as compared with what was done formerly?

Objected to as not rebuttal and irrelevant.

A. I believe that all the leading pharmaceutical houses employ detail work to a greater or less extent, but I am not competent to state definitely whether or not other houses are increasing or decreasing the work. I can only state what we do definitely.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ7. Do your "detail" men call upon doctors who buy and dispense their own medicines?

A. No, sir.

XQ8. Do you mean that your "detail" men do not call on dispensing doctors and that you do not sell direct to dispensing doctors?

A. Our "detail" men do not call upon dispensing physicians with a view to selling them. If they call on them at all it is with a view to introducing some of our specialties. We do not sell dispensing physicians direct.

XQ9. Do you mean that your "detail" men never take an order from dispensing doctors directly?

A. I am unable to say positively that a detail man never takes an order from a dispensing physician, but he never takes it directly. I mean by that, to be billed directly.

XQ10. If a "detail" man takes an order directly, to whom do you bill the goods?

A. I am unable to state that he ever does take an order from a dispensing physician, but any order taken in that way is billed through a druggist or physicians'

supply house. Our detail men are employed exclusively for the purpose of creating a demand for our specialties and are not expected to take any orders whatever.

XQ11. You have said that the "detail" system is "indispensable." I assume that you mean by that that the experience of your house is that it is a useful and valuable method of advertising and that you have found it to be the best?

A. In an experience of fifty years in the pharmaceutical business we have always considered "detail" work as the most important single factor in our success.

Deposition closed.

JAMES E. BARTLETT.

Adjourned until tomorrow, Saturday, October 28th, 1916, at 9 A. M., at same place.

Detroit, Michigan,
Ponchartrain Hotel,
October 28th, 1916, 9 A. M.

Met pursuant to adjournment.

Parties present as before.

JOSHUA E. BOLENBAUGH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

Q1. Please state your name, age, residence and occupation.

A. Joshua E. Bolenbaugh, age 52; Lancaster, Ohio; traveling salesman for Frederick Stearns & Co., of Detroit, Michigan, pharmaceutical manufacturers. I have been a pharmaceutical salesman for about twelve years and among other houses formerly worked for Wm. R. Warner & Co. for a period of three years, beginning on January 1st, 1912.

Q2. Do you know S. J. Hagaman, and if so, who is he and when did you know him?

A. Yes, I know Mr. Hagaman. He was assistant sales manager for Wm. R. Warner & Co., from whom I took my instructions in selling their line. He traveled with me once a year for a period of three days at a time during my employment by that house. The first time he was with me a week. That was when I first began working for them. After that he usually stayed with me three days on each visit.

Q3. Did Mr. Hagaman ever say anything to you about a product in their line known as Quin-Coco, and if so, what?

By Mr. Rawle: Objected to as not rebuttal.

A. Yes, he told me it was the same formula as the Lilly Coco-Quinine.

Q4. Did Mr. Hagaman ever solicit orders for this preparation in your presence, and if so, what methods did he employ?

Same objection and because in any case the only evidence would be as to what Hagaman said.

A. Yes, his first trip with me he showed the preparation by pouring it on a piece of white paper, showing it was the same color as Coco-Quinine, Lilly, but a little thinner preparation, run easier, and authorized me to demonstrate it in the same way.

Q5. In selling Quin-Coco what representations did you make to your trade respecting the item as compared with Coco-Quinine, Lilly?

Objected to as not rebuttal and because it has not been shown how the witness was instructed to sell.

A. As being the same in formula, color, etc.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ6. Who was the first Lilly man that you ever talked with about this matter?

A. I never talked to any Lilly man.

XQ7. Have you come from Lancaster, Ohio, today or yesterday?

A. Yes.

XQ8. Just for the purpose of testifying in this case?

A. No, I had some business with the house I represent, Frederick Stearns & Co., also.

XQ9. Would you have come here at this time if it had not been for this case?

A. If Frederick Stearns & Co. would have called me in I would have come. That is for them to answer.

XQ10. But if Stearns & Co. had not called you in you would not have come at this time, would you?

A. Probably not.

XQ11. And Frederick Stearns & Co. did not call you here today did they?

A. What have you reference to here at the hotel or to Detroit?

XQ12. I mean to ask whether you are present here in Detroit today because you were called in by your employers?

By Mr. Bradford: All the questions on cross-examination are objected to as immaterial and irrelevant and not cross-examination. The matter inquired about has no bearing upon any fact in issue.

A. Frederick Stearns & Co. left it to me entirely whether or not to give testimony here, to give a deposition. There were no orders from them that I must give this deposition, or that I should give the deposition.

XQ13. Who first requested you to testify in this case and to come to Detroit for that purpose?

Same objections, and in order to satisfy counsel it is made of record that counsel for plaintiff wrote to witness and asked him if he would come here today for this purpose, after first getting the permission of his employers as we have done in each instance when we have requested a witness to testify who is in the employ of another concern.

A. Mr. Bradford.

XQ14. When did he first write you on the subject?

A. October 16th, 1916.

XQ15. Since you arrived in Detroit have you talked with any person connected with Lilly & Co., except Mr. Bradford?

A. No, sir.

XQ16. Have you met or been introduced to any Lilly representative since you came to Detroit this morning?

A. Yes, Mr. Bradford introduced me to Mr. Martin and Mr. Lynn, but we did not talk about the case.

XQ17. You understood that Mr. Martin is a Lilly salesman, did you not?

A. Not until I was introduced to him.

XQ18. Do you now understand or have you been given to understand by anybody that Mr. Martin is a Lilly salesman?

Objected to as immaterial, irrelevant, incompetent and not cross-examination.

A. Yes.

XQ19. And Mr. Lynn is the gentleman who just came into the room since you answered the last question?

A. Yes.

XQ20. Have you ever been a druggist or an educated pharmacist?

A. I am neither.

XQ21. When you said above "being the same in formula" did you mean that the two preparations had the same quinine strength per teaspoonful?

Objected to as immaterial.

A. Yes, sir.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ22. I show you a document which is marked "Plaintiff's Exhibit, Document No. 3," and which has been frequently referred to in these depositions as the "Blue List," and ask you if you recognize it and if you had one of these documents when you were in the employ of Wm. R. Warner & Co.?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant and immaterial.

A. Yes, I recognize it and I had one when I was in their employ.

RDQ23. What is this list and for what purpose was it used?

Same objection.

A. We referred to it where we had a preparation corresponding to a preparation of other manufacturers and under a different name.

Re-cross-examination.

By Mr. Rawle:

RXQ24. Give an instance?

A. Listerine, for instance, our antiseptic solution. The antiseptic solution of Wm. R. Warner & Co. was the same as Listerine.

RXQ25. That is you understood your antiseptic solution to have the same medicinal effect as Listerine. Is that right?

A. I understood it to be the same formula.

RXQ26. And you were selling your antiseptic solution in competition with Listerine, is that right?

A. No. I sold antiseptic solution as I suppose all pharmaceutical houses sold it, but we understood it to be the same as Listerine as an antiseptic.

RXQ27. Were all the other drug manufacturing houses selling a preparation of the same formula as Listerine?

Objected to as irrelevant and immaterial and not cross-examination.

A. I don't know that.

RXQ28. Did a considerable number of other drug houses market a preparation of substantially the same formula as Listerine and in competition with Listerine?

Same objection.

A. Well, I don't know that, but I would suppose that all first-class pharmaceutical houses would manufacture an antiseptic solution.

RXQ29. Similar to Listerine, do you mean?

Same objection.

A. I don't know.

RXQ30. You said above "I sold antiseptic solution as all pharmaceutical houses sold it." Don't you understand that all or most of the leading pharmaceutical houses market a preparation which you understood to be the same as Listerine, as an antiseptic?

Same objection.

A. I suppose so.

RXQ31. As a Warner salesman and as part of your outfit as such did you carry with you a blank book having the labels of various items of the Warner line pasted in it and did you use such book in making your sales?

By Mr. Bradford: Objected to as grossly

improper, the question being in no sense cross-examination but an attempt to make witness a witness for defendant, and as wholly immaterial and irrelevant.

By Mr. Rawle: The question is withdrawn.

Deposition closed.

Joshua E. Bolenbaugh.

Joseph A. Grimaldi, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. Joseph A. Grimaldi, age 37, Detroit, Michigan; sales manager R. A. Carmichael & Company, of Detroit, Michigan. I have been with this house for about two and a half years. I was employed as a traveling salesman for Wm. R. Warner & Co., for about eighteen months, from May, 1911, until November, 1912.

Q2. While you were acting as a salesman for Wm. R. Warner & Co., what were your duties?

A. My duties were to represent them in Eastern Michigan in the sale of their line of pharmaceuticals and non-secrets. That territory embraced Detroit and vicinity and as far West and North as Grand Rapids, Michigan; Grand Rapids being the boundary line.

Q3. Do you know Mr. Charles E. McNulty, and if so, who is he and in what capacity have you known him?

A. I have known Mr. Charles E. McNulty as the assistant sales manager of the Wm. R. Warner & Co., and he was the man by whom I was employed.

Q4. Did Mr. McNulty ever make any trips with you in selling goods?

A. Mr. McNulty visited the local trade in the city of Detroit, with me, on several occasions.

Q5. Among other items in the Warner line did you have a preparation known as Quin-Coco?

A. Yes, sir.

Q6. Did you ever observe Mr. McNulty in his methods of soliciting orders for Quin-Coco?

By Mr. Rawle: Objected to as not rebuttal.

A. I did.

Q7. Please explain what you have ever heard Mr. McNulty say to a retail druggist when endeavoring to sell him Quin-Coco.

Objected to as not rebuttal.

A. I have heard the following dialogue take place between Mr. McNulty and the retail druggists:

(McNulty) "Have you any sale for Coco-Quinine?"

(Druggist) "Yes, some."

(McNulty) "Do you sell very much of it?"

(Druggist) "Well, some physicians prescribe it quite frequently."

(McNulty) "'Well, we have a preparation that is very similar, Quin-Coco."

(Druggist) "No, I don't believe you have. There is only one product made that does the work and that is Coco-Quinine."

(McNulty) "Well, if you will allow me to show you, I will prove to you that there is a great similarity between the two. Have you any Coco-Quinine on hand?"

(Druggist) "Yes, I have."

(McNulty) "Well, produce two graduates and pour a small amount in one graduate of the Coco-Quinine and I will pour a similar quantity of Quin-Coco in another graduate. Now compare them for color and taste. Are they not practically identical?"

(Druggist) "Yes, there is a great similarity."

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(McNulty) "Now, you admit that frankly. The only difference is in the cost."

Q8. As I understand your last answer it is stated as a dialogue between Mr. McNulty and the retail druggist?

A. Absolutely.

Q9. Did you ever hear Mr. McNulty go through this method or dialogue with the retail druggists more than once?

A. I did.

Same objection to last two questions.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ10. When Mr. McNulty visited a druggist with you did he solicit his trade for the entire Wm. R. Warner line?

A. The combined lines, yes, sir.

XQ11. How long would a call on these druggists last?

A. It all depended. Sometimes, well, from fifteen minutes to an hour.

XQ12. Could you go through the entire line in that time?

A. In an hour's time, yes.

XQ13. Did you and he have with you a blank book in which were pasted labels of the Warner line or most of it?

By Mr. Bradford: Objected to as not cross-examination, as immaterial and irrelevant.

A. We had both label book and samples.

XQ14. And the label book enabled you to get through the line quickly, did it not?

Same objection.

A. No, sir; it did not. We would work one in

conjunction with the other. We would show the label and if the man was interested would at the same time show the sample thereof, bringing forth all the sales talk that was necessary to put over the sale of said merchandise.

XQ15. The Warner line had several thousand items did it not?

Same objection.

A. Yes.

XQ16. And you did not carry over about sixty or seventy different samples in your sample case, did you?

Same objection.

A. When you speak of the Warner line do you mean the Wm. R. Warner line or the combined lines?

XQ17. I mean the combined lines.

Same objection.

A. I presume about one hundred different items, at least.

XQ18. Did you or the druggist usually turn over the pages of the label book as you took up successively the items?

Same objection.

A. It varied. Sometimes I did it personally, and sometimes the druggist.

XQ19. Who first of the Lilly Company spoke to you about this case and about your testifying as a witness or wrote to you on the subject?

A. I was never written to at all. I was called upon personally at the office by Dr. Martin, local representative of Eli Lilly & Company. It was way back last Spring.

XQ20. How often have you seen him on the subject?

A. Just the one time.

XQ21. Who arranged with you to come here today?

A. Both himself and Mr. Bradford.

Cross-examination closed.

Deposition closed.

J. A. GRIMALDI.

Recess until 7.30 P. M. today.

After recess, 7.30 P. M.

CHARLES F. ALLEN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Charles F. Allen, age 50, 4622 Lake Park Avenue, Chicago, Ill., representative of McKesson & Robbins, New York, N. Y., manufacturing chemists and wholesale druggists. I was traveling salesman and assistant sales manager for Wm. R. Warner & Co., and the Pfeiffer Chemical Company for about five years prior to July 1st, 1913. I have been in the pharmaceutical business and drug line for twenty-five years.

Q2. Mr. Allen, I called to see you in Cleveland on Sunday morning last and asked if you would appear as a witness for us here at this time. You appeared reluctant and stated that you did not wish to do so and it was only after I had stated that we could compel you to appear by a writ of subpoena at some other time and place that you finally consented in order, as you expressed it, to save the trouble and annoyance. Is this correct?

A. It is.

Q3. Has any one else besides myself ever talked with you about appearing as a witness in this case?

A. Yes, the Chicago representative of Lilly & Co., Mr. R. A. Whidden, and this was one evening about two and a half weeks ago.

Q4. When you were with the Warner-Pfeiffer Company did you specialize on any particular line or lines, and if so, what?

A. I specialized on the Hobson line and perfumes.

Q5. I show you a card marked "Plaintiff's Exhibit, Defendant's Perfume Card A" and ask you if you recognize the same and what it is?

By Mr. Rawle: Objected to as not proper for rebuttal and as irrelevant.

A. It is very similar to cards that were carried by myself and the other salesmen of Warner and Pfeiffer in selling perfumes, the idea being that the perfumes corresponding to the numbers on both sides were similar in order, or analogous.

Q6. By whom were these cards given out or issued to the salesmen?

Same objection. .

A. As I recall it they were put into the sample cases and furnished by the employees of the house.

Q7. Was this card ever explained to you by any one, that is, as to the significance of the respective sides of the card?

Same objection and because "any one" cannot bind the defendant.

A. I can't recall that it was specifically explained, the inference being that the salesman would know from examining it.

Q8. On one side of this card I note No. 1 is "Guerlains Jickey" 8 oz. $4.77, and on the reverse side No. 1 is "Vogue," 9 oz. $3. 20 oz. $6. Please explain what is the significance of this information as to these two items.

Same objections.

A. The significance was that the two odors were very similar and that "Vogue" could be purchased for considerably less money.

Q9. Is there anything on the card itself to indicate that "Vogue" is a similar odor to "Jickey"?

Same objections.

A. Only the number as understood by the representatives.

Q10. From whom did the representatives get this information?

Same objections.

A. They must have gotten it from some one in the house.

Q11. As to these two odors last referred to, which is the original and which the Pfeiffer item?

Same objections and because the witness is not shown to have any knowledge of what "original" means in this connection.

A. The "Vogue" was the Pfeiffer or Mellier item and the "Jickey" was Guerlain's.

Q12. I show you another card marked "Plaintiff's Exhibit, Defendant's Perfume Card B" and ask you if you recognize the same and if what you have said in reference to card A also applies to Card B?

Objected to as not rebuttal and as irrelevant.

A. I do recognize it and it does apply.

Q13. I also show you a document marked "Complainant's Exhibit, Document No. 3" and ask you if you recognize this and what it is?

Same objections.

A. It appears to be a list of comparative prices of pharmaceutical products as furnished the salesmen of Pfeiffer Chemical Company and Warner. It was termed a "replacer list."

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ14. Where did you see R. A. Whidden, the Lilly representative?

A. At my home in Chicago.

XQ15. Did he call on you at your home?

A. He did, unexpectedly.

XQ16. Have you seen him more than once in this matter?

A. No.

XQ17. Have you seen any other Lilly representative except Mr. Bradford and Whidden?

A. No, except that I met a Dr. Martin since my arrival in Detroit this evening, just a moment.

Deposition closed.

Charles F. Allen.

Adjourned to meet Monday, October 30th, 1916, at 11 A. M., at Hotel Bellevue-Stratford, Philadelphia, Pa.

Philadelphia, Pa., Oct. 30th, 1916, 11 A. M.
Bellevue-Stratford Hotel.

Met pursuant to adjournment.

Parties present as before.

Earl R. Peabody, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Are you the same Earl R. Peabody who has heretofore testified as a witness on behalf of the plaintiff in this case?

A. I am.

Q2. When you were on the stand before I neglected to question you on one point that I had intended to question you about and you have been recalled for the purpose of asking the questions which were then omitted.

In the testimony of Mr. G. A. Pfeiffer, who is here present, when he appeared as a witness for plaintiff he stated as a part of his answer to Q98:

> "As regards our firm, we have never authorized or suggested any one to use any products we make in place of the products specified. In all our instructions to the travelers this point is not only discussed but emphasized. Further, we point out the objections to such a practice. We consider it not only unethical, but a violation of confidence on the part of the dispenser."

In any instructions given to you by any one representing the Wm. R. Warner & Co., was this point discussed and the objections to such a practice pointed out?

A. This point was not discussed and nothing was mentioned in regard to this practice.

Q3. You visited the house, spent some time in each of the departments, and received instructions on such visits did you not?

A. I did.

Q4. In answer to Q143, page 34, of defendant's record, witness G. A. Pfeiffer, among other things, said:

> "I also talked about the question of substitution, and pointed out to him that this is dishonest, no matter who did it, bringing out the point that the drug business was rightly ethical, that confidence must exist, that health and life depended thereon."

Did Mr. G. A. Pfeiffer or any one else connected

with the Wm. R. Warner & Co., ever make any such statement or explanation to you?

By Mr. Rawle: Objected to as leading.

A. As I remember there was no such statement or explanation made about this.

Q5. Are you reasonably certain as to this?

Objected to as inadmissible.

A. Yes, I feel reasonably certain.

Q6. How many times did you visit the Philadelphia house?

A. Once.

Q7. This was during the early part of your employment?

A. Yes, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ8. I understand that you were first employed by Wm. R. Warner & Co., in February, 1911?

A. Yes, sir.

XQ9. Therefore you have now been testifying to something that happened more than five and a half years ago?

A. I should say about that time, yes, sir.

XQ10. And who was it who gave you your instructions as to how to sell, about February, 1911?

A. Mr. Hagaman.

XQ11. Do you distinctly remember now, after so long a period, exactly what Hagaman told you?

A. I can remember some of the things very well, because it was the first traveling job I ever had and it impressed me more than perhaps some things would now.

XQ12. Perhaps some of the things he told you you have forgotten?

A. Some of them, yes.

XQ13. Where was he when he instructed you?

A. In the Essex Hotel, Boston, Mass., and also while I was going around with him calling on the retail trade. I traveled with him three or four days the first time; I can't remember exactly.

Re-direct-examination.

By Mr. Bradford:

RDQ14. Who gave you any instructions when you visited the house in Philadelphia?

A. I talked with Mr. G. A. Pfeiffer and also I think with Mr. H. Pfeiffer.

RDQ15. About when was this in respect to the time when you took employment with them?

A. I can't tell exactly how long I had been employed when I was over there. I should say it was a month or six weeks after I took employment with them. I can't tell exactly without looking at the records.

Re-cross-examination.

By Mr. Rawle:

RXQ16. On this occasion how long did you talk with Mr. G. A. Pfeiffer?

A. I talked with him several times, perhaps two or three during my visit there. The length of my conversations I cannot state.

RXQ17. Can't you remember what time of the year it was that you came to Philadelphia?

A. I should think it was some time in March. I remember very distinctly the weather was cold.

RXQ18. Were these two or three talks with Mr. G. A. Pfeiffer for more than a few minutes duration each?

A. No, they were not.

RXQ19. Have you come from Boston, Mass., to testify this morning?

A. Yes, sir.

Re-re-direct-examination.

By Mr. Bradford:

RRDQ20. Were the teachings of Mr. Hagaman when he was with you in Boston consistent with this statement by Mr. Pfeiffer in his testimony as to their teachings to their salesmen?

By Mr. Rawle: Objected to because the witness has already been interrogated as to Hagaman's teachings and because the question tends to lead the witness and because the only proper question is as to what Hagaman said.

A. No, I don't think they were.

RRDQ21. Mention anything that Mr. Hagaman said to you or that he did in your presence not consistent with this statement?

Objected to because the witness has been interrogated on this point before.

A. In regard to substitution I have seen him attempt to sell one of their preparations as a substitute for an advertised article. Instances of this you will find in my previous testimony.

Re-re-cross-examination.

By Mr. Rawlæ (without waiver of objections):

RRXQ22. You have just used the word "substitute" in your last answer. In your answer to Q11 of your original deposition you used the word "replacer." Do you intend to use those two words in the same sense?

A. As I understand it they both mean the same.

RRXQ23. I understand that you are a salesman for "Pluto" water at the present time. Mention one or two laxative waters that are largely marketed and with which you are in competition?

By Mr. Bradford: Objected to as immaterial, irrelevant and not cross-examination.

A. Hunyadi, Abilena and Apenta.

RRXQ24. And you are selling "Pluto" water in competition with those waters, are you?

Same objection.

A. No, I am not selling it in competition to any one. I am selling it on its own merits. You might say that they are "competitors." But we do not use the names of these waters as a means of making a sale.

RRXQ25. And if any druggist has been stocking Hunyadi water and you persuade him to buy your Pluto water is that what you mean by a "replacer"?

Same objection.

A. When I go in to sell a customer I don't know whether he is stocking Hunyadi or not and I don't mention the fact. I am simply looking for Pluto water business, if I can sell him Pluto water. I don't figure that it is replacing it at all.

RRXQ26. And if the druggist replies that he is keeping Hunyadi water for sale do you at once cease your efforts to sell him Pluto water?

Same objection, and further because this line of questioning is unjustified. Everyone knows that Pluto water is an extensively advertised water and has a market of its own.

A. No, I do not.

RRXQ27. And you would be pleased if you could persuade the druggist to drop Hunyadi and substitute or replace it with Pluto and keep it for sale, would you not?

Objection repeated.

A. It would not make any difference to me whether he dropped Hunyadi or not, and in making our sales for Pluto water it is the policy of our house not to mention any other water of similar properties when trying to make a sale.

RRXQ28. That is, it is the policy of your house, in soliciting a sale, not to mention competitive goods?

Same objection.

A. Not to influence a sale.

RRXQ29. If a druggist whom you were soliciting should say to you that he would give up the sale of Hunyadi and thereafter stock Pluto water would he be replacing Hunyadi with Pluto?

Same objection.

A. I never took that into consideration, because I never knew of a druggist giving up or stop stocking an article that there was a demand for, and I believe there is a demand for both of these.

RRXQ30. Suppose such a case to exist and then answer my question upon that supposition.

Objected to as immaterial, irrelevant and not cross-examination, and incompetent and inadmissible.

A. I cannot even stretch my imagination far enough to suppose that such a case could exist, because each article had been well advertised and so far as I know the demand for these has been created through those channels.

Deposition closed.

E. R. Peabody.

By Mr. Bradford:

Harry Fritsch, a witness who formerly testified for defendant, appears and his appearance is at the request of counsel for plaintiff and through the courtesy of counsel for defendant, responding to the request of counsel for plaintiff that Mr. Fritsch might be called in order that he might ask him a few questions in the nature of continuing the cross-examination of his original testimony in the case.

By Mr. Rawle: I produce the witness at the request of counsel who in calling him makes him his own witness.

By Mr. Bradford:

Q1. You are the same Harry Fritsch who has heretofore testified as a witness for defendant in this case?

A. I am.

Q2. In your original testimony you stated that you made certain experiments in an attempt to make a preparation like Coco-Quinine and that these experiments were made in 1907 and the spring of 1908, before the Wm. R. Warner & Co. became affiliated with the Pfeiffer Chemical Company. Is this correct?

A. Yes, sir.

Q3. In answer to RDQ111, page 471, you stated "It was the early part of 1908, because I went away on a little vacation, and I know there were no experiments made after that." In answer to RDQ112 you stated that you went to Atlantic City on this vacation. What time of the year were you in Atlantic City?

A. That is something hard for me to tell at this time, I could not tell you at the present time.

Q4. You are certain, however, that it was after these experiments were made?

A. On different occasions I made experiments and just now I cannot recall the time it was.

By Mr. Rawle: Objected to because the dates mentioned were prior to the incorporation and organization of Wm. R. Warner & Co., which took place in July, 1908.

Q5. Who was with you on your Atlantic City trip on vacation?

A. My wife.

Q6. Any one else; children?

A. No, sir.

Q7. Where did you stop in Atlantic City?

A. I cannot say at the present time.

Q8. Was it at a hotel?

A. No, sir.

Q9. At a boarding house?

A. Yes, sir.

Q10. How long were you there?

A. I may have been gone about two or three days and my wife the balance of the time.

Q11. Don't you remember the name of the proprietor of the boarding house?

A. I do not.

Q12. Don't you remember where it was located?

A. Not at the present time, without I should consult Mrs. Fritsch.

Q13. You are certain, however, that it was in the fall of 1908 after the Wm. R. Warner & Co. was taken over by the Pfeiffer Chemical Co.?

A. It was the summer of that year that I went to Atlantic City.

Q14. Where did you spend your vacation in the summer of 1907?

A. I don't know, sir.

Q15. Was that not in Atlantic City, too?

A. I could not say at this time, I am not sure.

Q16. Why are you sure as to 1908 and not sure as to 1907?

A. I spoke to my wife on the occasion prior to the time that I came here.

Q17. You mean that you spoke to your wife prior to the time you testified before?

A. Yes, sir.

Q18. And the dates you gave then were the dates as stated to you by your wife?

A. It was that year that I went to Atlantic City.

Q19. You depended wholly upon your wife's recollection in giving your deposition before?

A. Passing conversation, that's all.

Q20. Then of your own knowledge you don't know when it was?

A. I do, in that summer, I could not give you the exact date, but it was that year I was there.

Q21. Who was in charge of the Wm. R. Warner & Co. when you took that vacation?

A. I would have to look that up. We made several changes.

Q22. Who was the General Manager of the company at that time?

A. Mr. Kallenbach.

Q23. Was Mr. G. A. Pfeiffer at the plant at that time in any capacity?

A. We considered Mr. Pfeiffer as the general head. Mr. Kallenbach was the man who went through the factory; he was superintendent, who instructed our work.

Q24. And when do you say that was?

A. That was when the Pfeiffer Chemical Company first bought over from Wm. R. Warner & Co.

Q25. I asked you who was in charge of the plant when you took your trip to Atlantic City. And I ask you again was Mr. G. A. Pfeiffer in charge of the plant when you took your trip to Atlantic City?

A. My trip to Atlantic City was the summer of the year that Mr. Pfeiffer came to Wm. R. Warner & Co.

Q26. Have you been to Atlantic City since.

A. Yes, sir.

Q27. How many times?

A. Every year since, took a trip down and back again.

Q28. Was that your first trip to Atlantic City with Mrs. Fritsch? I mean the visit you have mentioned?

A. No, she has been going with me every year.

Q29. Since when?

A. Ever since I married. Every year since I married we have had a trip up and down.

Q30. Then what do you mean when you say "I know there were no experiments after that."

A. Because they had a formula for a chocolate quinine preparation and I did not consider it worth while to waste my time after that.

Q31. When did you take charge of the laboratory work?

A. Twenty years ago.

Q32. You have been in charge of the laboratories of Wm. R. Warner & Co. for the last twenty years?

A. The liquid department for the past twenty years.

Q33. What were your duties; what did you do in the liquid department?

A. Manufacture all liquid preparations.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

XQ34. You have just said that you knew that the Pfeiffer's "had a formula for a chocolate quinine preparation" and that "you did not consider it worth while to waste any time after that." Please state whether or not all your experiments on a chocolate quinine preparation took place before the Pfeiffers came to Philadelphia?

A. A lot of experiments I made before Pfeiffer Chemical Company came to Philadelphia.

XQ35. Did you make any such experiments after Pfeiffer came to Philadelphia?

A. No, sir.

Re-direct-examination.

By Mr. Bradford:

RDQ36. Who told you to make the experiments that you did make?

Objected to as it refers to a period before the incorporation of the defendant.

A. Mr. George Martin.

RDQ35. Who was Mr. George Martin?

A. An employee of Wm. R. Warner & Co. who had charge of the office work on special formulae.

RDQ36. Where is Mr. George Martin now?

A. I cannot tell.

RDQ37. Did you ever have any conversation of any kind with Mr. G. A. Pfeiffer about making a preparation of this kind?

A. Yes, sir.

RDQ38. When was this?

A. After the Pfeiffer Chemical Company came to Philadelphia.

RDQ39. How long after?

A. I could not say now, the exact time.

RDQ40. A month?

A. I do not know at this time.

RDQ41. Can you give it approximately within a month or two?

A. It may have been two months, I can not say positively.

Re-cross-examination.

By Mr. Rawle:

RXQ42. You have just spoken of Wm. R. Warner & Co. as existing before the Pfeiffers came to Philadelphia. Please state whether or not that was the business of Wm. R. Warner, Junior, trading as Wm. R. Warner & Co. I mean the old concern that existed and employed you before the Pfeiffers came to Philadelphia?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

RXQ43. And after the Pfeiffers came to Philadelphia a corporation was organized called Wm. R. Warner & Co., is that correct?

Same objection.

A. I do not know anything about a corporation organized. I was still employed under the old name of Wm. R. Warner & Co.

Deposition closed.

Harry Fritsch.

Recess until 2.30.

After Recess.

FRANK M. RAMSEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Frank M. Ramsey, age 64, Glenside, Pa.; manufacturing pharmacist.

Q2. Were you formerly connected with the house of Wm. R. Warner & Co., and if so, when in what capacity?

A. I was, from September, 1871, until I think it was November, 1908, I began as errand boy and served in different capacities, assuming some of the managing duties as early as 1879, and for the last ten years of my service was general manager of the concern, except that I never had anything to do with the financial end of it.

Q3. Do you know Mr. John E. McCambridge, and if you do, what position did he hold in the Wm. R. Warner & Co.?

A. We knew him as superintendent of the wet laboratory; that is the way we designated it. He was in this position a number of years prior to the time I went out as general manager, and was connected with the concern for a long time. I cannot say just the number of years.

Q4. What was the position of Mr. Harry Fritsch in the concern in respect to Mr. McCambridge?

A. I knew him as an assistant to Mr. McCambridge.

Q5. And did this relation continue up to the time of Mr. McCambridge leaving the concern or his discharge?

A. Yes, I can't explain the situation, matters changed somewhat. I should say he was up to the time I left.

Q6. In any event this was so up to the time you ceased to be general manager?

A. I don't remember whether he went away before I did or not, but up to the time he severed his connection with the concern, provided it was prior to the time of my severance.

Q7. Prior to the severance of your relations with Wm. R. Warner & Co., as its general manager, did you have any knowledge of any experiments made in the laboratories during 1908 or 1907, for the purpose of making a chocolate quinine preparation similar to Lilly's Coco-Quinine?

A. I did not.

Q8. Did you authorize or request any one to make any such experiments?

A. I did not.

Q9. Who would have been the man who would naturally have had charge of such experiments had they been made?

A. If the instructions had gone from myself, Mr. McCambridge.

Q10. Who was Mr. George Martin and what was his position in the concern?

A. Originally a clerk in the drug department. After closing that department his duties were general.

Q11. Was he under you in authority?

A. Yes.

Q12. Did he have authority to direct the preparation of new formulæ or new preparations?

A. Not from me.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

XQ13. Who owned the Warner business in those days before the Messrs. Pfeiffer came to Philadelphia?

Objected to as incompetent, irrelevant and immaterial.

A. Wm. R. Warner, up to the time of his decease, which was in 1901. The presumption on my part is that his son, William R. Warner, Jr., after that.

XQ14. During the ownership of the son did he not act as the director of the business of the company?

Same objection.

A. Superficially.

XQ15. And you really ran it?

A. That question is a very broad one. I have already said I had nothing to do with the finance. I had to do with almost every other detail.

XQ16. Did he not give whatever orders he pleased without consulting you?

A. He may have in some instances.

XQ17. Was he not the real boss?

A. He was the owner.

XQ18. And were there not a great many things he did without your knowledge, or without consulting you?

A. If he did things without my knowledge I could not know of them. I was usually consulted on all important matters, except finance.

XQ19. Is it not true that that house got up special formulæs and put up special packages? I mean Wm. R. Warner & Co., prior to the advent of the Messrs. Pfeiffer.

By Mr. Bradford: Objected to as immaterial, irrelevant and not cross-examination.

A. Yes.

XQ20. And did not Martin have charge of that part of the business?

A. The custody of all private formulæs was with me. Orders for same were sent from my office.

XQ21. Can you tell anything about Martin?

A. In what regard?

XQ22. Did you not just say "I can't say anything about Martin." What did you mean?

Objected to as improper as it does not appear that the witness made any such statement.

A. That is not my testimony.

XQ23. Are you willing to swear that Mr. Warner himself could not have given an order to Martin or Fritsch or either of them to experiment with the chocolate quinine preparation, without his telling you?

A. I would not swear to that.

XQ24. Then it is perfectly possible he may have done so, is it not?

A. It would have been his privilege to do so.

XQ25. Are you or have you ever been a chemist?

A. It depends upon the definition of a chemist.

XQ26. Define it your way and then say whether you have been one?

Objected to as immaterial, irrelevant and not cross-examination.

A. A self-made, but not a graduate of any school.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ27. From your knowledge of Mr. Wm. R. Warner, Jr.'s, methods and his habits in connection with the business, do you think it probable that he would give instructions to people in the laboratories to prepare special formulas or imitate preparations of other houses without first consulting you?

By Mr. Rawle: Objected to as immaterial and inadmissible.

A. I don't think it at all probable that Mr. Warner would have issued any orders in person for imitating preparations of other houses. It was possible that he could issue an order for making special preparations without consulting me.

RDQ28. Do you recall any preparations originated by your house by the direction of Mr. Wm. R. Warner, Jr.?

A. I do not.

Re-cross-examination.

By Mr. Rawle:

RXQ29. Do you mean to swear that there were no original preparations originated by your house by the direction of Mr. Warner, Jr.

A. None that I recollect.

RXQ30. Do you mean that you don't recollect the names of them, or do you deny that there were any?

A. I don't recollect the fact.

RXQ31. Do you deny that there were any such?

Objected to as the witness has already answered as fully as he can according to his recollection.

A. I neither deny nor affirm.

Deposition closed.

Frank M. Ramsey.

It is stipulated by and between counsel for the respective parties that Maurice W. Watson, a druggist of 595 Bath Street, Bristol, Pa., would identify a partly filled bottle of Coco-Quinine, bearing the Lilly label, and here produced, as having been in his drug store and on the shelves thereof for a period of five years or more, and that its contents as now turned over to counsel are the same as when it was originally purchased except for the portion that has been used.

Said bottle is introduced in evidence and marked "Plaintiff's Exhibit, Watson Bottle of Coco-Quinine," and it is agreed that it may have the same force and effect as evidence as if Mr. Watson were present in person and identified the same, counsel for defendant having talked with Mr. Watson on the subject by telephone.

It is noted that on the back of the bottle is a label containing a Serial Number, which is presumed to identify the date of manufacture, and counsel for plaintiff agrees to send this number to plaintiff with the request that they ascertain from their records the date of manufacture of this package of Coco-Quinine and that he will communicate their reply to counsel for defendant.

By Mr. Rawle: The evidence and the exhibit are objected to as irrelevant and immaterial.

Robert J. Groves, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Are you the same Robert J. Groves, who has heretofore testified as a witness on behalf of plaintiff in this case?

A. I am.

Q2. Mr. Groves when you were on the stand before you testified concerning certain experiments that were made by Mr. Harry Fritsch in the laboratories of Wm. R. Warner & Co., the purpose being to produce a chocolate quinine preparation in imitation of Coco-Quinine, Lilly.

You gave the date in answer to Q20, page 559, plaintiff's record, as the latter part of 1908.

Since that time Mr. Fritsch as a witness for defendant has testified that such experiments as he made

on this preparation were in the early part of 1908, and in 1907.

Please state whether or not you have any reason to change your mind as to the dates given in your original deposition, or if you have not, if you have any additional facts or circumstances which tend to fix the dates as originally given by you?

By Mr. Rawle: Objected to as not proper for rebuttal, the witness having been examined on the subject in the prima facie case, and Fritsch having been examined thereon for the defendant. Objected to also as inadmissible as a question under any circumstances.

A. I have no reason whatever to change my mind as to the probable date being the fall or latter part of 1908 when the Quin-Coco experimenting was done by Mr. Harry Fritsch. Mr. John E. McCambridge, prior to the fall of 1908, was general superintendent of the plant of Wm. R. Warner & Co. and no experimenting could have been done on any preparation without the knowledge of Mr. McCambridge and with his sanction, Mr. Fritsch at that time being a subordinate to Mr. John E. McCambridge, and Mr. McCambridge was not in the employment of Wm. R. Warner & Co., when the experiments were made.

Q3. In what particular part of the laboratory or plant were these experiments carried on and what were used as the means of experimenting?

By Mr. Rawle: Objected to as not rebuttal.

A. The experiments were carried on on the sixth floor of the building, known as the wet room department. The means employed were a small gas plate as a heating apparatus and fluid extract of yerba santa and cocoa butter being used with other ingredients.

Q4. Mr. Fritsch also stated that he was positive that it was in the early part of 1908 because he went away on a little vacation and he stated that he knew no

experiments were made after that. I ask you what your recollection is about Mr. Fritsch being away on a vacation in the fall of 1908, or any time during 1908, after Mr. G. A. Pfeiffer took charge of the plant?

Objected to as not rebuttal and as inadmissible and irrelevant.

A. I do not think that Mr. Fritsch had any vacation during 1908, but I do know for a certainty that he had a vacation in August, 1907, for he sent me a postcard dated from Atlantic City August, 1907, with his whole family on the card. During 1908, so far as I can recollect, there were no vacations, as each man did not know where he stood under the new management.

Q5. Mr. Fritsch also testified that he received the formula from St. Louis by which Quin-Coco had been manufactured in the laboratories there, about the month of February, 1909, and that he knew it could not be as early as December, 1908, because he got a cabinet which was not delivered to him until the first of the year, January, in which he kept his cards. He stated that it was after the first of the year when this cabinet was received. What is your recollection as to this?

Objected to as not rebuttal and as irrelevant under any circumstances.

A. The formulas were sent from St. Louis to Wm. R. Warner & Co., at intervals, and were kept by Mr. G. A. Pfeiffer on the first floor of the building. And when Mr. Fritsch wanted a formula for making any preparation he sent to Mr. Pfeiffer for it. As to the cabinet, it was on the sixth floor of the building prior to January 1st, 1909. As I left the laboratories on December 31st, 1908, and went on the road January 1st, 1909, and the cabinet was there then, prior to that date, and was kept in a vault in the fireproof stairway of the sixth floor which was prepared for the storing of private formulas, etc.

Q6. Did you personally have anything to do with this cabinet in any way?

Same objection.

A. On one or two occasions I assisted in putting it in the vault. That was prior to December 31st, 1908. It was pulled out and in to Mr. Fritsch's desk and then put back into the vault at night.

Q7. Were the formulas finally transferred from Mr. Pfeiffer's office to the cabinet?

A. The formulas were transferred to the cabinet after it was received on the sixth floor.

Q8. Who instructed you in your duties as a salesman before you went out on the road as a salesman for Wm. R. Warner & Co.?

Objected to as not rebuttal and because the witness has been fully interrogated on this subject in his former examination.

A. I received my general instructions from Mr. H. Pfeiffer and instructions in detail from Mr. Hagaman who visited several towns with me in January, 1909.

Q9. When you received your general instructions from Mr. H. Pfeiffer were you told that it was a reprehensible act and dishonest to advise druggists that they could substitute your preparations for preparations of other houses and that it was unethical and a violation of confidence?

Same objections and as inadmissible.

A. I was not.

Q10. Mr. S. J. Hagaman when testifying as a witness for defendant stated that while you were traveling for Wm. R. Warner & Co. the town of Bristol was not included in your territory. What about this?

A. In the early part of 1911 my territory was changed to part of the territory suburban to Philadelphia, Pa., in which Bristol, Pa., was included, and Mr. Hagaman as assistant sales manager should know this, as it was he who arranged my map, and Bristol, Pa., was in my territory from that time up to the time I left Wm. R. Warner & Co.

Q11. Mr. Hagaman also stated that he remembered working with you in Reading, Pa., and Pottsville, Pa. What have you to say as to this?

A. Mr. Hagaman worked with me in Reading, Pa., on two occasions, but he never was with me in Pottsville, Pa.

Q12. Mr. Hagaman in his testimony stated that in his opinion it is dishonest to suggest to a retail druggist that one product can be sold when the product of another house is called for. What have you to say as to this?

Objected to as not rebuttal.

A. Mr. Hagaman when as assistant sales manager and when on the road as a traveling salesman was selling goods every day in the week as a substitute or as he generally called it, a "replacer" for highly advertised goods of other houses, and it was from Mr. Hagaman, the latter part of January, 1909, I got my first lesson on substituting or "replacing" which was Mr. Hagaman's favorite word.

Direct-examination closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ13. Are you still in the employ of Eli Lilly & Co.?

A. Yes, sir.

XQ14. You have testified that "it was in the latter part of 1908 the firm of Wm. R. Warner & Co. was taken over by the Pfeiffer Chemical Co." Don't you know perfectly well that the Messrs. Pfeiffer took charge of the Warner business in June, 1908?

By Mr. Bradford: Objected to as not a fair statement of the witness's former deposition on this point.

A. As to the exact date I am not quite sure. The deal may have been consummated in June but it was

in July so far as my memory serves that they took possession.

XQ15. Then you made a mistake in saying that it was in the latter part of 1908, did you?

Objected to for July is the latter part of 1908.

A. I did not state that it was the latter part of 1908.

XQ16. You have testified that prior to the last month of 1908 Quin-Coco was "being supplied from the laboratories in St. Louis." Do you mean by that that prior to the last month of 1908 Quin-Coco was being manufactured at St. Louis?

A. Prior to January 1st, 1909, Quin-Coco was manufactured and shipped from St. Louis to Wm. R. Warner & Co., for distribution in the eastern markets, under the name of the Searle & Hereth Company, with a slip pasted on the bottom of each bottle "Distributed by Wm. R. Warner & Co."

XQ17. You understood that the Messrs. Pfeiffer were the owners of the Searle & Hereth Company, did you not? And that the St. Louis laboratories were used in connection with their business as the Searle & Hereth Company and the Pfeiffer Chemical Company?

A. Yes.

XQ18. Fritsch has testified that there were no experiments on this chocolate quinine preparation at the Philadelphia laboratories after the Pfeiffers came here, because it would have been a waste of time to have experimented on it in Philadelphia, when there was a formula at St. Louis and it was being manufactured there under that formula. What do you think about this statement?

A. Mr. Fritsch no doubt was aware of the formula at St. Louis, but for some unexplainable reason he did not get them, and Mr. Fritsch had no authority to make experiments of Coco-Quinine in the spring of 1908, which he has testified, without the knowledge of John E. McCambridge, who was general superintendent of

the entire building, and no formula could have been made or experimented on without his consent, Mr. Fritsch being a subordinate to Mr. McCambridge.

XQ19. I thought Ramsey was the General Manager. He said he was?

A. I did not say that Mr. McCambridge was general manager.

XQ20. But you said McCambridge was general superintendent of the entire building. What about that?

A. Being superintendent and general manager are two entirely different positions.

XQ21. Then Ramsey was over McCambridge and Wm. R. Warner was over both of them. Is that correct?

A. Yes.

XQ22. And both of them could have given orders to Fritsch over the head of McCambridge. Is that correct?

A. No doubt they could, but I do not think in any case it was ever done. Mr. McCambridge was responsible for the conducting of the laboratories and the help employed in the laboratories.

XQ23. If there was a formula at St. Louis and if this product was being manufactured there, why should Fritsch waste his time and the company's money experimenting with this product at that time?

By Mr. Bradford: Objected to as immaterial and irrelevant, the witness' opinion on this point can have no bearing upon the facts.

A. I do not know why Mr. Fritsch should have wasted the firm's time and money, but it was done and at the same time he was trying to imitate a product manufactured by Parke-Davis & Co., known as Syrup of Phenolthalein Comp., and had a bottle of Parke-Davis & Company's preparation there.

By Mr. Rawle: The last part of the answer is objected to as showing the bias of the witness, being the plaintiff's employee.

XQ24. Then you would have us believe that Wm. R. Warner & Co., in the latter part of 1908 was spending money in experiments on a chocolate quinine preparation when all they had to do was to send to the St. Louis laboratory and get a working formula there under which another corporation, the Pfeiffer Chemical Company, had been making up this product. Is that correct?

Objection repeated.

A. It is a matter of indifference to me whether Wm. R. Warner & Co. had a working formula with the Pfeiffer Chemical Company in St. Louis or not. The experimenting was done; and the Quin-Coco was shipped to Philadelphia from St. Louis, before the working formula came from St. Louis to Philadelphia.

XQ25. Can you give any reason for such unbusiness-like foolishness?

Objected to as incompetent, immaterial and irrelevant.

A. It was not my business to do so. That rested with the general manager.

XQ26. No, but I am asking you whether you can now give any reason for such foolishness?

Same objections.

A. No.

XQ27. Prior to the latter part of 1908 for how many years had you been working in that same laboratory?

A. From December, 1905, until December 31st, 1908.

XQ28. Fritsch said that he went to Atlantic City after making these experiments in the early part of 1908. Don't you believe that he might have slipped off there over Sunday, which so many people do, without your knowing it?

A. Undoubtedly, but over Sunday is not a week's vacation, or, as he terms it, a little vacation.

XQ29. Did you know of experiments of Warner in 1907 on a chocolate quinine preparation?

A. No.

XQ30. What other helpers besides you were there in the laboratory under Fritsch?

A. There were no helpers in the laboratory directly under Fritsch. Mr. McCambridge had complete charge of the help in the laboratories.

XQ31. And just you and Fritsch ran the laboratories. Is that right?

A. I did not say that.

XQ32. Fritsch said there were three helpers. Is that correct?

A. Yes, he had three helpers.

XQ33. Have you any doubt about that?

A. No.

Cross-examination Closed.

Re-direct-examination.

By Mr. Bradford:

RDQ34. Who were these helpers besides yourself?

A. Walter Cline, and I can't remember the name of the other young fellow.

RDQ35. Were these helpers in the laboratory with Fritsch while McCambridge was in charge?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant and as cross-examination of the plaintiff's own witness.

A. Mr. Fritsch had no direct helpers during the time Mr. McCambridge was superintendent of the laboratory, each helper being under the control of Mr. McCambridge.

RDQ36. But were these men in the laboratory? I am referring to Mr. Cline and the other helper, while Mr. McCambridge was there?

A. Yes.

RDQ37. And did they all remain after Mr. McCambridge left?

A. Yes.

RDQ38. Was Mr. Cline and the other fellow in the laboratory when you left the laboratories to go on the road December 31, 1908?

A. Mr. Cline only was in the laboratory when I left, December 31, 1908, as Mr. Fritsch's helper.

RDQ39. Counsel for defendant asked you if you are still in the employ of Eli Lilly & Co. You answered that you are. Have you been offered employment by any other concern since you last testified in this case? If so, by whom?

A. Not directly.

RDQ40. Have you been indirectly?

A. Yes.

RDQ41. By whom?

A. I would rather not answer.

Deposition Closed.

ROBERT J. GROVES.

By MR. RAWLE: Notice of a motion to strike out all of the depositions taken from October 3rd to October 30th, on seven consecutive days, so far as they are not proper for rebuttal.

By MR. RAWLE: Mr. Rawle desires to place upon the record two notices from plaintiff's counsel as follows:

Washington, D. C.,
October 12, 1916.

Francis Rawle, Esq.,
West End Trust Bldg.,
Philadelphia, Pa.

Dear Mr. Rawle:

In re Lilly v. Warner;

I hope to begin the examination of witnesses in Detroit, at 10 A. M., Wednesday the 18th instant, before Special Examiner Riordon. Among the witnesses

to be examined in Detroit are: J. Frank Hinton; J. A. Grimaldi; Mr. Bartlett of the Park, Davis Company (I do not have his initials); O. J. Berkley, of Ann Arbor; and perhaps one or two others whose names I do not at this time have.

We will then proceed to Saginaw, Michigan. The names of the witnesses, as furnished to me, at Saginaw, are: Mr. Martin Kessel; Mr. J. L. Bannister; Mr. William Heim; and we may possibly recall the witnesses who testified for us before in this city.

We will then go to St. Louis, where I will take the depositions of Mr. Myers and Mr. Van Dale, of Myers & Van Dale, perfume manufacturers; also Mr. Myers, of the Myers Drug Company; and Ardie Odell, of Union City, Mo.

We will then go to Indianapolis, where we will take the depositions of Mr. J. K. Lilly; Mr. Charles J. Lynn; Mr. Bivins (I do not have Mr. Bivins' initials, but he is a chemist employed in the Lilly laboratories); Mr. G. A. Lavison, of Memphis, Tenn.; Mr. John E. McCambridge, of Chicago, Ill.; possibly Mr. John E. McCambridge, Jr., of Des Moines, Iowa; and possibly Mr. Charles C. Crater, of Chicago; also Mr. W. J. Tomlinson, of Peoria, Ill.

It may be that several of these witnesses will not be called for the reason that I have been unable to have any conference with them and am not certain as to whether the evidence they can give will be rebuttal or not. It is also possible that we may have to call some witnesses whose names are not given, because I do not have them, in order to save another trip.

I do not know the conditions of the health of Mr. Edward Collins, of Memphis, Tenn., at this time. If he has sufficiently recovered from his illness to come to Indianapolis, I shall ask him to come there and give his deposition.

After the Indianapolis depositions are closed, I will have three or four witnesses to examine in the East, either here or in Philadelphia. These will prob-

ably be Mr. Frank M. Ramsey; Mr. Watson, of Bristol, Pa.; and Mr. Groves.

Should anything occur to change my plans between now and Saturday night, I will wire you; but if you do not get a wire before Saturday afternoon, you may know that we will be in Detroit ready to start Wednesday morning.

Yours very truly,

EWB/McB E. W. BRADFORD.

Washington, D. C.,
October 20, 1916.

Francis Rawle, Esq.,
West End Trust Bldg.,
Philadelphia, Pa.

Dear Mr. Rawle:

Your telegram received, and shortly after it came, I received a telegram from Mr. Winchester, in Memphis, that Mr. Lavison would be in Indianapolis Monday for the purpose of testifying, but that Mr. Edward Collins is still unable to come.

I feel that I am obliged to proceed with the taking of Mr. Lavison's deposition Monday afternoon. The fast train from the East arrives in Indianapolis, via Pennsylvania, at 12:10. I will wait until 2 o'clock for you, and this will enable you to leave Philadelphia late Sunday evening.

I also expect to examine Mr. John E. McCambridge, of Chicago, in Indianapolis, and hope to have Mr. William J. Tomlinson of Peoria, Ill., and Mr. Frank Green of Atlanta, Ill. I have as yet, however, no assurance that either of these gentlemen will be present, but I am hoping that one or both of them will come.

The name of Mr. Frank Green is one that was not included in my letter of the 12th.

I am also hoping to have Mr. C. F. Allen, of Chicago, but have been unable to get in touch with him and do not know where he is or whether we will be able

to have him either in Indianapolis or in Detroit next week. He is also a prospective witness whose name I did not have when I wrote you on the 12th.

Another possible witness is Mr. J. E. Bolenbaugh, of Columbus, Ohio, but I do not know anything about him, or whether he will be called, as I have only been given his name and have no report on whether or not he will testify or whether or not he knows anything that we desire to put in the record.

I am merely giving you these names so that you will have the names so far as I can give them to you.

You understand that this is purely informal and only to acquaint you with the names of possible witnesses in order that I may keep faith with you in every respect to the full limit of my ability.

I have this suggestion to make in reference to Monday. If it is not convenient for you to be in Indianapolis Monday, I will examine Mr. Lavison and Mr. McCambridge in direct-examination, and hold them over for you to cross-examine Tuesday morning. Mr. Riordon will take these depositions on his machine, so that they will be written out in full and you will have an opportunity to read them over.

Mr. Lavison's deposition will be in the nature of corroborating some of the statements by Mr. Kelton. Mr. McCambridge's deposition will be in the nature of rebutting the deposition of Mr. Harry Fritsch. If you are not present Monday afternoon, I will note that your absence is unavoidable and that the right to object and to cross-examine is reserved to you, the same as if you were present.

Yours very truly,

EWB/McB E. W. Bradford.

Defendant's counsel desires further to state upon the record that six of the persons noticed as witnesses were not called are former employees of defendant company, viz: J. E. McCambridge, Jr.,

Charles C. Crater, Frank Green, J. Frank Hinton, A. J. Berkeley. This is in addition to six other witnesses called during the last seven days who are all former employees of the defendant company.

By Mr. Bradford: The notices given to counsel for defendant were of an informal character, and in this form, because of the understanding between counsel that formal notices would not be required. Notice is made of the fact that during the taking of testimony for defendant no formal notice was ever given by counsel for defendant to counsel for plaintiff of the examination of any witnesses, no names of witnesses were given in advance of the time of their examination, with the exception of one expert and the principals, that is, the two Messrs. Pfeiffer, in defendant's case, and these were given in an oral interview and in answer to a request by counsel for plaintiff for the names of witnesses. Counsel for plaintiff is therefore unable to place of record the names of all of the parties counsel for defendant may have at some time or other have had in his mind as possible witnesses. The letters above placed of record state plainly that several of the names given are the names of possible witnesses, and that all of them might not be called and that others not named might be called. All these names were given counsel for defendant because of his insistent and persistent demands for the names of plaintiff's witnesses, both orally and by letters, and his statement that he would not agree to go on with the case until the names were furnished him. No point is seen in placing this matter of record and particularly emphasizing the fact that some of our witnesses were formerly in the employ of the defendant, as their depositions of record already show this fact. It is not supposed that counsel by this notice intends to intimate that because men have

formerly been employed by defendant they are thereby disqualified to act as competent and truthful witnesses in this case.

It is further noted of record that our failure to proceed on the date stated in any original letter was at the urgent request of counsel for defendant, solely for his accommodation, and at considerable inconvenience, trouble and expense to plaintiff and its counsel.

By Mr. Rawle: Mr. Rawle raises no technical question as to sufficiency of notice or informality thereof. He desires to place the notice on the record solely for the reasons just mentioned by him.

By Mr. Bradford: Mr. Bradford desires to add that he has verbally stated to counsel more than once that in giving him these names he has given him the names of all persons suggested to him who might possibly be called, many of whom he had never seen or had an opportunity to interview, and no information as to what, if anything, they might be able to testify, but in abundance of caution the names were included in order that counsel might have fair notice in the event they were called. The placing of this notice of record is therefore believed to be unfair and uncalled for.

Adjourned subject to notice and agreement of counsel.

Washington, D. C., Nov. 5, 1916—11 a. m.

Met pursuant to notice and agreement of counsel.

Present:

MR. E. W. BRADFORD, on behalf of plaintiff; and
MR. FRANCIS RAWLE, on behalf of defendant.

H. D. ASHTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. H. D. Ashton; age 64; Alexandria, Virginia; retail druggist. I have been in the retail drug business in Alexandria, for myself, nine years. I have been in the retail drug business altogether approximately thirty-five years.

Q2. Do you know a traveling salesman for Wm. R. Warner & Co., by the name of Victor J. Moon?

A. I have known Mr. Moon probably three or four years, about four years. He calls at my store and solicits my trade for Wm. R. Warner & Company's goods.

Q3. Among other items has Mr. Moon ever solicited your order for an item called Quin-Coco, and if so, what did he say to you about this item?

A. Yes, he solicited my order for Quin-Coco on several occasions. The first time he introduced the subject by saying, "You sell Coco-Quinine, don't you," and I answered "Yes". He said I have Quin-Coco, that is a cheaper preparation, that the druggists all use and sell a great deal of it, and it costs you less money than Coco-Quinine.

Q4. Did you ever receive a prescription for Quin-Coco?

A. No, sir; I never did.

Q5. Did you ever have a customer ask for Quin-Coco?

A. No, sir.

Q6. How do the doctors write the prescriptions that come to your store, for this preparation?

A. Coco-Quinine.

Q7. How do your customers ask for this preparation in calling for it over the counter?

A. They always ask for "Coco-Quinine".

Direct-examination Closed.

By Mr. Rawle: The entire deposition is objected to as not proper for rebuttal, the objection being by consent of counsel entered at the end of the examination-in-chief.

No cross-examination.

Deposition Closed.

H. D. Ashton.

George Martin, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. George Martin; age, 60th year; 1709 Jefferson St., Philadelphia, Pa.; Manager of the Girard Company, manufacturers of pharmaceuticals.

Q2. Are you the same George Martin who was formerly connected with the Wm. R. Warner & Co., and if so, when and in what capacity were you connected with that firm?

A. I am the same George Martin. I was with them

for about seven years and left them in January, 1909. I was assistant to the manager, Mr. Frank Ramsey.

Q3. Who was the custodian of the formulas while you were with that house?

A. Mr. Ramsey.

Q4. Do you have any recollection of instructing Mr. Harry Fritsch, the gentleman who is here present, during the spring of 1908, or the year 1907, to make experiments in an effort to reproduce Lilly's preparation Coco-Quinine?

By Mr. Rawle: Objected to as not proper for rebuttal; because it does not appear that it was any part of the witness' duties to give such instructions, and, therefore, the evidence is purely of negative value.

A. No, I have not.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (without waiver of objections):

XQ5. Were not your sole duties to take charge of orders and send them up to the laboratories to be filled? I am referring to 1907 and 1908.

A. That was part of my duties.

XQ6. Did not orders consist of ordinary orders for articles of the lines that the concern was selling; also buyers' name orders which were orders specially made out for given concerns, with their name on the package or label, and special orders on your own formula or on the particular person's private formula, which last orders were filled for the particular person sending them in?

By Mr. Bradford: Objected to as not cross-examination and as irrelevant and immaterial.

A. That was part of my work, but I want to say that my end of the private formula business consisted

of private formulas for compressed tablets, liquids, and buyers' named goods. Mr. Ramsey made and kept all pill formulas, either private or those belonging to the firm.

XQ7. And what other department of the business did you attend to in those two years?

A. Well, I had charge of the complaint department, complaints in reference to the goods, reference to a miscarriage of shipments, the finishing off of the goods, looking after the printing for special formulas, employing some of the help and a little of everything as assistant to Mr. Ramsey.

XQ8. But the chief bulk of your work was in the order department, was it not, that is, taking in orders and sending them up to the sixth floor to be filled, to be attended to?

A. Yes, we might call that the principle part of it.

XQ9. If Mr. Warner had seen fit to direct Fritsch to experiment on a chocolate quinine preparation, would it have been done?

A. Sure.

XQ10. And such an order might have gone from Ramsey and would have been obeyed?

A. Yes.

XQ11. McCambridge's duties lay all over the building, did they not?

A. Yes.

XQ12. And the laboratory occupied the entire sixth floor with about forty feet front on Broad Street and one hundred and twenty feet back to a rear street, did it not?

Objected to as not cross-examination, as immaterial and irrelevant.

A. About that.

XQ13. And there were about twenty to twenty-five employees working in this big room, were they not?

Same objection.

A. Yes, I guess there were.

XQ14. And Fritsch could easily have experimented on some preparation without McCambridge knowing it if Fritsch had had his orders from headquarters?

Same objection.

A. Yes, that could be done.

XQ15. And is it not true that the organization was not very systematic but that the duties of different officials were changed and varied and interlaced, more or less, from time to time?

Objected to as not cross-examination, an effort by counsel for defendant to make witness his own, and as immaterial and irrelevant.

A. I will say this, there was considerable conflict between the heads of the departments throughout the laboratory.

XQ16. You have said that part of your work was to receive the orders and send them upstairs. After Messrs. Pfeiffer came to Philadelphia in 1908 did orders come in for Searle & Hereth items?

Same objection.

A. I imagine they did. I would not say positively. There were some of them later on. It was some little time before they stocked up and brought the stuff on from St. Louis.

XQ17. That is it may have taken a month or two?

Same objection.

A. Yes.

XQ18. But is it not true that as soon as Messrs. Pfeiffer came to Philadelphia they were practically distributors of Searle & Hereth goods?

Same objection.

A. Yes.

XQ19. I hand you a Searle & Hereth price list, 1908-9. Please state whether or not you saw a copy of

this S. & H. price list about the time that the Messrs. Pfeiffer came to Philadelphia or soon thereafter?

Same objection and protest made against further examination along this line, being an attempt to examine witness as a witness for defendant and in plaintiff's time and at plaintiff's expense.

A. Yes.

XQ20. And as being in charge of the order business of the concern at that time you were ready to take orders for items in this price list, were you not?

Same objection.

A. Yes, orders were received for these goods.

XQ21. Does this catalogue include the preparation called Quin-Coco, Searle & Hereth?

A. Yes, it does.

The book shown the witness is "Complainant's Exhibit, Pfeiffer, Searle & Hereth Catalogue, 1908, 1909".

Cross-examination Closed.

Deposition Closed.

GEORGE MARTIN.

Adjourned subject to agreement of counsel.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN EQUITY.

No. 1355.

THE ELI LILLY AND COMPANY, a corporation,
Plaintiff,

vs.

WM. R. WARNER & COMPANY, a corporation,
Defendant.

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } *ss.*

I, Charles E. Riordon, a Notary Public, within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the plaintiff in the above entitled cause, were taken before me pursuant to notice and agreement of counsel as follows:

At Indianapolis, Indiana, Oct. 23rd and 24th, 1916,
G. A. Lavison
John E. McCambridge.

At St. Louis, Missouri, Oct. 25th, 1916,
Wm. S. Garvin
Ardie Odell
John Van Dale
Rudolph A. Meyer

At Saginaw, Michigan, Oct. 26th, 1916,
Wm. Heim
Martin A. Kessel.

1022 Certificate of Special Examiner.

At Detroit, Michigan, Oct 27th and 28th, 1916,
James E. Bartlett
Joshua E. Bolenbaugh
Joseph A. Grimaldi
Chas. F. Allen.

At Philadelphia, Pa., October 30th, 1916,
Earl R. Peabody (Recalled)
Harry Fritsch
Frank M. Ramsey
Maurice W. Watson
Robert J. Groves.

At Washington, D. C., November 6, 1916,
H. D. Ashton
George Martin.

That each of said witnesses was by me first duly sworn in accordance with the law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and Mr. Francis Rawle, attorney for defendant, as appears in the record; that the deposition of each of said witnesses was read over by or to him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit.

I further certify that the exhibits placed in evidence before me in the course of the examination of said witnesses were duly marked by me and in accordance with stipulation of counsel retained by the plaintiff who introduced same.

In testimony whereof I have hereunto set my hand and seal this 6th day of November, 1916.

CHARLES E. RIORDON,
(Seal) *Special Examiner.*

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN EQUITY.

No. 1355.

THE ELI LILLY AND COMPANY, a corporation,

vs.

WM. R. WARNER & COMPANY, a corporation.

Testimony taken on behalf of complainant in the above entitled cause pursuant to notice to counsel for defendant and also pursuant to agreement by and between counsel for the respective parties, before A. C. Rice, a Notary Public, at the office of Bradford & Doolittle, Rooms 1104-5 Fletcher Trust Building, Indianapolis, Indiana, beginning at 11 o'clock A. M. Monday, November 27, 1916.

Present:

MR. E. W. BRADFORD, for complainant.

MR. FRANCIS RAWLE, for defendant.

MR. FRANK E. GREEN, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford testifies as follows:

Q1. Please state your name, age, residence and occupation?

A. Frank E. Green; residence, Atlanta, Illinois; age, 37; occupation, retail druggist.

Q2. How long have you been in the retail drug bus-

iness and what was your occupation prior to the time you entered the retail trade?

A. I have been in the retail business at Atlanta, Ill., since a year ago today. Before that I was on the road as a traveling salesman for Wm. R. Warner & Company. I worked for them in this capacity from about June 23rd of 1913, until September of 1915.

Q3. Prior to the time you went to work for them what were you doing?

A. Prior to the time I went with Wm. R. Warner & Company I was employed by the United States Pharmaceutical Co. of Chicago, as a traveling salesman for about two years.

Q4. Prior to the time you were with the United States Pharmaceutical Company, what were you doing?

A. I had been in the retail business prior to that time.

Q5. When you were employed by the Wm. R. Warner & Company, from whom did you receive your preliminary instructions?

MR. RAWLE: The examination having gone so far before Mr. Rawle's arrival from the train and without any objection on his part, Mr. Rawle objects to the question as not proper for rebuttal, the subject matter having been fully gone into on the plaintiff's *prima facie* case and gives notice of the motion to strike out so much of the testimony of this witness as he shall object to on the ground that it is not proper for rebuttal.

A. From Mr. McNulty.

Q6. How were these instructions conveyed to you?

A. Verbally. Mr. McNulty met me and traveled with me three days, in the meantime giving me his instructions along with his selling the trade and showing me how to sell, first going over the line in the hotel before we started and giving me general information.

Q7. Did you have a list similar to the list I hand

you, which is marked "Complainant's Exhibit, Document No. 3"?

A. Yes, sir.

Q8. What was this list known as by you and what use was made of it?

MR. RAWLE: Objected to by Mr. Rawle, unless the name was made known to him by some authorized person.

A. It was commonly spoken of as "The Replacer List".

Q9. How was it used?

A. It was used as showing comparative prices of the products of Warner manufacture and Searle & Hereth, with the prices of similar products of other manufacturers.

Q10. What do you mean by the term "replacer"?

A. Well, my conception of the definition of the word "replacer" is: an item that is similar in character to any item of another house but sold to the retailer under the individual firm's own title or name.

Q11. Referring to the item near the bottom of page 1 of this list, called Coco-Quinine, what do you find on the list as the replacer for Coco-Quinine?

A. Quin-Coco, Part 3 S. & H.

Q12. What information does this list give to you respecting these two items?

A. It gives the comparative price, the Lilly price and the price of Quin-Coco in like quantities.

Q13. What else, if anything, does it indicate?

MR. RAWLE: Objected to, together with all preceding questions in reference to this exhibit as not proper for rebuttal and as irrelevant.

A. One would be that they are similar products and can be used one in place of the other.

Q14. Mr. McNulty, when called as a witness for defendant in this case, testified, beginning with his answer to Q9, on page 95, particularly in answer to Q11,

that if any salesman should suggest to a retail druggist that he could supply one of the Warner articles in the place of a similar article supplied by another house, when the other was called for, by prescription or a customer, that he would not be an honest salesman and in answer to Q12 that if any salesman followed this practice and it was called to his attention, he would inform him that it was not the policy of the house to continue practices of that kind and warn him against repetition with the penalty of being dismissed. Is, or is not, this testimony of Mr. McNulty consistent with his practices in teaching you the proper methods of selling their goods?

MR. RAWLE: Objected to as not proper for rebuttal and because the only proper question is to ask what Mr. McNulty said to him.

A. Well, I would say not all together. That it was the inference, if not his direct suggestion, that certain items be sold as replacers for other certain items of other manufacture.

Q15. From what did you draw such inference?

MR. RAWLE: Same objection.

A. His showing of the items; sometimes comparing its general appearance, and the formula in many instances, as compared with other formula; as being the same in medicinal consistency and therapeutic value, and more profitable to the retailer or dispenser.

Q16. You mean that this was Mr. McNulty's practice in selling the Warner line in your presence?

MR. RAWLE: Same objections.

A. Yes, in many instances.

Direct-examination Closed.

Cross-examination.

MR. RAWLE (not waiving objections):

XQ17. How far is your residence, Atlanta, Illinois, from Indianapolis?

A. It is about 200 miles via Bloomington.

XQ18. Who first spoke to you about testifying in this case?

A. Mr. West, the Eli Lilly and Company salesman. He travels Central Illinois.

XQ19. When did he speak to you about it and how often?

A. He has spoken to me about it on two occasions. Once before your sitting in St. Louis he asked me to go there and I asked to be excused. I told Mr. West that the discontinuance of my relations with the Pfeiffer people, Warner people, wasn't particularly pleasant and while that was true, I declined to go, more for the reason that I didn't want to appear to be getting petty revenge for any mistreatment that I might have received at their hands. And then some two or three weeks ago he instructed me that testimony would be taken in Indianapolis soon and wanted me to come here to tell what I knew in the case.

XQ20. What motive led you to take so much trouble?

MR. BRADFORD: Objected to as immaterial and irrelevant.

A. I had no motive to take the trouble. It was a matter of wanting to get at the facts as Mr. West told me in regard to the case in hand and what they wanted was the facts and that the testimony, if wanted, could be had, and they would prefer to have me come here. I might add that it has bearing on the subject that I declined to go to St. Louis for a reason, a reason directly opposite to what might be inferred from the question, namely that I declined to go because I didn't wish to have the William R. Warner Company feel that I wanted to give testimony against them.

XQ21. Then I understand you to say that you have consented to travel some 400 miles and spend at least two nights and a day from business without any other motive than to get at the facts in the case between two

concerns with whom you have nothing to do? Is that correct?

MR. BRADFORD: Same objection.

A. I have absolutely no motive of my own.

XQ22. When you left the employ of Warner & Co. did you resign or were your services dispensed with?

MR. BRADFORD: Same objection.

A. They were dispensed with.

XQ23. And you had some little trouble with them on settling your account and threatened to sue?

MR. BRADFORD: Same objection and as immaterial, irrelevant and not cross-examination.

A. I did.

XQ24. And the account was settled, without suit?

MR. BRADFORD: Same objection.

A. It was settled.

XQ25. Did you receive from McNulty a copy of the "Salesman Confidential"?

MR. BRADFORD: Same objection.

A. I do not know whether I received it from McNulty or received it from the office, before I left the office.

XQ26. What I want to know is, did you have a copy?

MR. BRADFORD: Same objection.

A. I did.

XQ27. At the start, and did you have it continuously throughout your service?

MR. BRADFORD: Same objection.

A. I did.

XQ28. Did you carry it around with you all the time as part of your equipment?

MR. BRADFORD: Same objection.

A. I did.

XQ29. Did you read it pretty carefully?

MR. BRADFORD: Same objection.

A. I read it as carefully as I knew how to read it.

XQ30. I call your attention to the matter printed on pages 86 and 87 of this particular copy relating to "What a salesman should know" and "The Salesman's Creed" and ask you whether you read that printed matter?

MR. BRADFORD: Same objection.

A. I did.

XQ31. What was your territory at the start?

MR. BRADFORD: Same objection.

A. Northwestern Nebraska.

XQ32. Was that all through the same territory?

MR. BRADFORD: Same objection.

A. I continued until practically the first of October of 1913.

XQ33. To what territory did you change?

MR. BRADFORD: Same objection.

A. To central Illinois.

XQ34. And continued there to the end?

MR. BRADFORD: Same objection.

A. Yes, sir.

XQ35. How many drug stores are there in your town?

MR. BRADFORD: Same objection.

A. There are two.

XQ36. What population?

MR. BRADFORD: Same objection.

A. Fifteen hundred, approximately.

XQ37. By the word mistreatment, which you used in giving your reason for not going to St. Louis, I take it that you mean nothing more than that there was some

final controversy at the settlement as to whether you were entitled to your commissions for the coming year. Was that correct?

MR. BRADFORD: Same objection.

A. No, sir; that isn't correct. There was more. The mistreatment, if I may use the word, consisted more in the summary dismissal, without notice and without apparent cause.

XQ38. Doesn't your contract with the house, which was in writing, provide that either party had the right to terminate it at any time by written notice?

MR. BRADFORD: Objected to as incompetent, the contract itself being the only competent evidence on this point. It is also noted that counsel for defendant is using the contract itself for propounding the question and expecting the witness to answer without reference thereto.

MR. RAWLE: I have his contract in my hand. I am willing to produce it but it seems unnecessary to cumber this record. I am perfectly willing to show it to plaintiff's counsel.

A. Yes, sir. In that event the contract is still in force, as I have never received that notice in writing.

XQ39. But when Mr. Ritayik verbally discontinued your services for the house, you accepted the situation, did you not?

MR. BRADFORD: Objected to as immaterial and irrelevant.

A. Well, it is hard to sell goods without samples. Mr. Ritayik at the last point, namely Mason City, Illinois, took the samples and sent them in by express to the Pfeiffer Chemical Co. or Wm. R. Warner & Company.

XQ40. And on November 22, 1915, you accepted $61.28 in full settlement of all claims, did you not?

MR. BRADFORD: Same objection.

A. I did. I might add that I did so, as I thought the attorneys' fees and the trouble would be worth more than the difference between that and what I had coming to me.

XQ41. By your addition to your answer to my question, I am compelled to ask you what the difference was?

MR. BRADFORD: Same objection.

A. Well, sir, offhand, I can't tell you, but I think that it was as much as I got. My claim was for $175.00 and some cents and I found there was an error, which Mr. Ritayik and I found of some $20.00, I think, and certain amounts claimed by him not due on possible lost accounts. It is my remembrance that the total amount was somewhere around $130.00 to $140.00. I simply accepted the settlement as the best way to close an unpleasant matter.

Cross-examination Closed.

Re-direct-examination.

By MR. BRADFORD:

RDQ42. Did Mr. McNulty or any one else connected with the house of Wm. R. Warner & Co., ever call your particular attention to any particular paragraphs on pages 86 and 87 of this Salesman's Confidential?

A. No, sir; not to my remembrance.

RDQ43. Has your testimony in direct-examination been influenced in any degree one way or the other by your recollection of this unpleasant occurrence, which counsel for defendant has insisted on having made of record and if it has been influenced, in which direction?

By MR. RAWLE: Objected to as entirely improper. It is for the Court to weigh the evidence and not the witness himself.

A. The evidence given has not been influenced in any way. The position I took with Mr. West in regard to going to St. Louis, as well as coming here, is evidence

of the fact that I treated the former relations and circumstances and feelings as closed, which fact is further evidenced by the purchase of certain goods at sundry times from the Warner Company, also by the fact that I have absolutely had no relation with the Lilly Co.

RDQ44. Did Mr. West or anyone else in behalf of the Eli Lilly & Co. ask you or suggest to you that in giving testimony you should state anything but actual facts?

A. No, sir; they did not.

Deposition Closed.

FRANK E. GREEN.

C. J. THURMAN, being recalled, as a witness, on behalf of plaintiff, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q1. You are the same C. J. Thurman who has testified heretofore in this case?

A. Yes, sir.

Q2. In your former testimony you testified that Mr. Henry Pfeiffer traveled with you at different times, when you were on the road selling goods and that he participated in the efforts to sell goods to many customers. Is this correct?

A. Yes, sir.

Q3. Mr. Henry Pfeiffer when testifying as a witness for plaintiff stated in answer to Q24 (page 72) that if any salesman had suggested to retail druggists that he should buy Quin-Coco and supply it on prescriptions or sales when Coco-Quinine was called for, that it would have been contrary to his orders and his teachings and in violation of the selling rules of the house. Please state whether in your experience, when traveling with Mr. Pfeiffer, anything occurred in your presence inconsistent with the statement thus made by Mr. Pfeiffer?

A. Mr. Pfeiffer did participate with me in selling several different items which might be sold as replacers and substitutes for different items, namely Vogue Perfume, which could be sold as a replacer for Jickey and another item which I remember very distinctly we sold a great deal of was Pitcher's Castoria to be sold on calls for Castoria (Fletcher) as a replacer for "Castoria".

MR. RAWLE: I object to the answer as not a statement of a fact but as a statement of an inference.

Q4. What did Mr. Pfeiffer ever say in your presence to any retailer, when soliciting an order for the perfume, Vogue?

A. Well, I remember in one instance Mr. Pfeiffer and I sold the Bennett Co. in Omaha, to a Mr. Snyder, who was the buyer for this company, one gallon of Vogue. He recommended to Mr. Snyder (he and I together), that this odor was exactly like Jickey and could not be told from the Jickey odor. Mr. Snyder had quite a trade on Jickey and through the efforts of Mr. Pfeiffer and myself he bought one gallon of Vogue, which was a very unusual order for Vogue.

Q5. What is the "Bennett Company" you have referred to?

A. The Bennett Company was a department store. It had a drug or toilet department. Mr. Snyder was the buyer for this department.

Q6. Why do you remember this incident?

A. Well, because I had called on Mr. Snyder frequently and had tried on several occasions to sell him this Vogue odor, but never was able to sell him until Mr. Pfeiffer made the trip with me and called on him with me and through the combined efforts of Mr. Pfeiffer and myself, we succeeded in selling him one gallon of this Vogue odor.

Q7. Do you remember how long ago this was?

A. No, I don't remember how long ago it was. The

Bennett Co. have been out of business quite a few years and they were succeeded by the Orkin Bros. and later succeeded by the Burgess-Nash Co. I have no way of remembering just when it was. I remember the occurrence very distinctly. Don't remember anything about the date.

Q8. Do you remember any specific statements made by Mr. Pfeiffer to Mr. Snyder?

A. Yes, sir.

Q9. Please repeat them.

A. Well, as near as I can remember, Mr. Pfeiffer stated to Mr. Snyder, inasmuch as he was selling lots of Jickey, which was a very high priced odor, he could use Vogue successfully as a replacer for Jickey and our price at that time being $36.00 a gallon, we figured out to him how much money could be saved selling Vogue at the price Jickey was sold for per ounce.

Q10. Do you know whether or not the gallon of Vogue was sold, for Jickey, in Mr. Snyder's department?

MR. RAWLE: Objected to as calling for hearsay as the witness cannot possibly testify as to his own knowledge as to what became of that gallon of Vogue.

A. The Vogue was disposed of, because I had a conversation with Mr. Snyder the past year in regard to the sale of this Vogue and he informed me that after so long a time the Vogue was disposed of.

Q11. Did he ever speak to you about it on succeeding trips, when you called on him?

MR. RAWLE: Objected to as calling for hearsay.

A. Yes, sir.

Q12. What did he say to you about it on those trips?

MR. RAWLE: Same objection.

A. He stated that he was having trouble disposing

of it as Jickey. That it did not seem to be exactly the same thing as Jickey. He spoke about it on several occasions.

Q13. Was it a frequent or an infrequent occurrence for Mr. Pfeiffer to follow such practices as you have just suggested in his endeavor to sell goods?

MR. RAWLE: Objected to as inadmissible. The only question proper to ask the witness is as to what Mr. Pfeiffer said or did. Evidence must be retail not wholesale.

A. Well, I would say that it was rather a frequent occurrence, especially on those two particular items mentioned, Castoria and Vogue.

Q14. In the testimony of Mr. Garfield D. Merner, Mr. Merner testified in answer to Q104 (p. 154) that he had no information except by the testimony in this case of a retail druggist selling Quin-Coco on physician's prescriptions or calls over the counter when Coco-Quinine was called for. Have you knowledge of any incident or conversation with Mr. Merner inconsistent with this statement? If so, please relate it.

A. I remember one instance in the offices in St. Louis, the subject of Quin-Coco was brought up and Mr. Merner spoke of an instance where some druggist, I can't recall who it was, had dispensed so much Quin-Coco from a Coco-Quinine bottle, Lilly, that the label on the bottle had become so dirty and illegible that he asked the Lilly salesman if he could not send him a label to place upon this bottle; and he was laughing about it. This is as Mr. Merner related it to me.

Q15. Mr. Merner testified in answer to Q89 that he canceled your contract for the reason that they were not satisfied with results you were getting and that you had been for some time more or less out of harmony with them. What have you to say as to this?

A. He never told me any such thing as that. His letter to me discharging me said nothing to this effect.

Q16. What is the correct story of the severance of your relations with the Wm. R. Warner house?

MR. RAWLE: This question and the preceding question and answer are objected to as inadmissible and counsel cannot help the witness by showing friendly relations with the witness' former employer or impeach his own witness by showing that the relations were otherwise.

MR. BRADFORD: The witness is not asked to impeach himself but to explain his recollection of the facts respecting this incident insofar as they may differ from the statements made by Mr. Merner.

A. In November, 1912, I was called to Whitehall, Illinois, on account of the death of my brother. I stopped in St. Louis on my way back to Omaha. I had a conversation with Mr. Merner in regard to a raise in my salary for 1913. Mr. Merner told me at that time that they were going to hold a conference of the Board of Directors of the company in St. Louis about December 1st, that he would take this matter up with the Board of Directors and let me know, December 1st. I hadn't heard anything from Mr. Merner in regard to this proposition up to the second week in December. I wrote to him asking him what they were going to do in regard to a raise in my salary for 1913. I received a letter dated December the 13th, 1912, dictated by Mr. Merner, discharging me. As near as I can remember, the letter stated: "The matter of raise in your salary was taken up with the Board of Directors and we decided that we were not in a position to raise your salary. After going over the matter thoroughly, we have decided to make a change in your territory. Please forward your sample case and what merchandise you have to St. Louis, by freight or express and we will mail you a check to balance your salary up to January 1st, but not your expenses. We trust that you will be

able to connect yourself with some other house," (something to that effect). (Signed G. D. Merner.) This is as near as I can remember. I would like to state further that Mr. Merner never said anything to me during my visit in St. Louis in November 1912 about my services not being satisfactory to the company.

Q17. What reasons had you, if any, for expecting a raise in salary?

MR. RAWLE: Objected to as irrelevant and as needlessly cumbering the record.

A. Well, I had shown an increase in my business each year since I had been with the company and had not had a raise in salary for about five or six years and I felt that I had a raise coming to me, as I only asked for a $10.00 raise per month.

Q18. In answer to XQ118 (page 156) Mr. Merner gave as an illustration of your disposition to be out of harmony with the house a statement that you had made in a conversation at luncheon about a competitor at the St. Louis Lunch Room on the third floor of the building on the northeast corner of 4th and Locust Sts., in St. Louis. Do you recollect this incident and if so, what is your recollection of it?

MR. RAWLE: Objected to as irrelevant and improper for rebuttal.

A. I remember this very distinctly. At the time I was in St. Louis, in November, 1912, I met Mr. Johnie Van Dale, who was also with the Pfeiffer Chemical Co. at that time. Mr. Van Dale and I walked across a run-way between two of the Pfeiffer Chemical Co. buildings and we stopped about midway between these two buildings on this run-way talking and Mr. Ritayik came out where we were and stopped. Mr. Van Dale in the presence of Mr. Ritayik asked me what I thought of the Nyal line. I stated to him that I considered it the best line of its kind on the market and I was directing my conversation to Mr. Van Dale, in the presence of Mr.

Ritayik. Ritayik took no part in the conversation at that time. We talked of the Nyal, Mr. Van Dale and I, to some little extent and when we went to lunch, with Mr. Merner and Mr. Ritayik, Mr. Merner said to me at the table, "Thurman, what do you think of the Nyal line?" Of course, I knew that Mr. Ritayik had told Mr. Merner what I had said to Mr. Van Dale about the Nyal line. When Mr. Merner put this question to me, I answered it without hesitation stating to him that I considered it the best line of the kind on the market. Mr. Merner answered me by saying, "Well, if I thought that, I would sell the Nyal line." I answered Mr. Merner by saying that I could sell the Nyal line, if he felt that way about it. That was about all that was said at the table. After returning to the office this subject was brought up again by Mr. Merner. Mr. Merner said, "Thurman, I don't like the way you talked to me at lunch." And he said, "If I felt the way you do, I certainly would be selling the Nyal line." And I said, "Mr. Merner, I don't like the way you talk to me and I can sell the Nyal line," but when I left the house that same evening for Omaha, we were, as usual, good friends.

MR. RAWLE: The answer is objected to in addition to any other objection above as irrelevant and inadmissible and as needlessly cumbering the record with irrelevant matter.

Direct-examination Closed.

Cross-examination.

By MR. RAWLE (not waiving objections):

XQ19. What relation in date did the incident you have just mentioned at the lunch table and afterwards on the run-way bear to your final laying off by the company?

A. This conversation on the run-way happened before the conversation at the lunch table and I never

knew that it ever had anything to do with my discharge by the company, until it was brought up here.

XQ20. How long before you were laid off by the company did this interview at the luncheon and the run-way take place? That is what I am trying to get from you.

A. About the middle of November, 1912.

XQ21. And your final laying off by the company was on December 13, the same year?

A. The letter was dictated about December 13th, and received by me about the 15th, as near as I can remember. I tore the letter up immediately and haven't seen it since.

XQ22. In whose employ are you now and where do you work?

A. Nelson, Baker & Co., Detroit, Michigan, are my employers. My territory is a small part of Nebraska, the western half of Iowa and a part of South Dakota.

XQ23. For what other firms, if any, have you worked and in what capacity since you separated from the Warner Company?

A. I have been with the Nelson, Baker Co. ever since leaving the employ of the Warner Company.

XQ24. Your connection with the Warner Company ceased four years ago, less a month. The Messrs. Pfeiffer moved from St. Louis to Philadelphia and organized the Warner Company, as appears here, in the early summer of 1908. Do you remember that fact?

A. I remember the fact. I would not be sure of the date. I remember the fact that he moved to Philadelphia.

XQ25. Where were you working at that time?

A. Covering the entire State of Nebraska.

XQ26. How long before the Messrs. Pfeiffer moved to Philadelphia did this incident take place, as you have testified, in regard to Snyder and the department store at Omaha?

A. I don't remember.

XQ27. Could it have been a year before?

A. It could have been a year. I don't remember anything about that date.

XQ28. Could it have been two years before? Can't you give me any idea?

A. No, sir; I have no way of knowing the date.

XQ29. You are very minute in regard to your memory of everything that you said in that interview with Mr. Snyder. Why is it that you cannot give any idea of the date, even approximately?

A. The reason of my remembering this so thoroughly was from the fact that through the efforts of Mr. Pfeiffer and myself, we sold Mr. Snyder for the Bennett Department Store, in Omaha, one gallon of Vogue which was the only one gallon order that I ever placed for this odor. Naturally I remember this instance as I had tried on several occasions myself to land Mr. Snyder for this one gallon of Vogue, but had never been able to do so, until Mr. Pfeiffer assisted me in getting this order.

XQ30. The perfume called Vogue was a Mellier product, was it not?

MR. BRADFORD: Objected to as immaterial and irrelevant.

A. As far as I know, it was.

XQ31. Do you entertain any doubt on the subject?

MR. BRADFORD: Same objection.

A. I don't think there is any doubt about it. My impression has always been that the Vogue odor was originated by the Mellier people, although I may be wrong about it.

XQ32. The Mellier Company at that time was a side company of the Pfeiffer Chemical Company, was it not?

A. It was.

XQ33. And you were traveling for the Pfeiffer Chemical Company and among your other items that

you were trying to sell were perfumes put on the market under the name of Mellier. Is that correct?

A. Yes, sir.

XQ34. Did you afterwards solicit Snyder's trade for the Bennett Company on Vogue or anything else?

A. Never on Vogue, because he didn't like the odor, said that it did not smell the same, or was not the same as the Jickey.

MR. RAWLE: The last part of the answer is objected to as volunteered.

XQ35. Doesn't this enable you to fix approximately the length of time prior to December, 1908, when you and Mr. Pfeiffer talked to Snyder?

A. No, sir; it does not.

XQ36. How far have you come today to testify in this case?

A. From Omaha, Nebraska.

XQ37. When did you start from there and when do you expect to get back?

A. Left there Saturday night at 6 o'clock and expect to get back tomorrow night.

XQ38. Who invited you to come here to testify?

A. In this instance?

XQ39. In this instance?

A. Mr. Bradford.

XQ40. By mail?

A. Yes, sir.

XQ41. What person connected with the Lilly Company saw you or wrote you about it, other than Mr. Bradford?

A. No one, this time.

XQ42. You testified in this case previously in July 1915 on behalf of the plaintiff. What person in connection with the Lilly Company saw you or wrote you in regard to your so testifying?

MR. BRADFORD: Objected to as immaterial and not cross-examination.

A. I think the first letter I received was from Mr.

C. J. Lynn, General Manager of the Eli Lilly & Co. I received some correspondence from Mr. Bradford in regard to my coming here at that time.

XQ43. Has any salesman ever called upon you in regard to your testifying either at that time or today?

A. I have not talked to any Lilly salesman, recently. I talked to Mr. Caswell, who represents the Lilly Company in Nebraska, previous to my coming here in July, 1915.

XQ44. What kind of work does Mr. Caswell do for the Lilly Company?

A. Sells their entire line of goods.

XQ45. Then you mean to say that Mr. Caswell is a Lilly salesman in your territory or in part of your territory?

A. No; Mr. Caswell lives in Omaha and I live there also.

XQ46. When did Mr. Caswell talk to you about the case or discuss it with you?

A. I don't remember the date.

XQ47. Was it previously to your testifying in the case on July 15th?

A. Yes.

XQ48. Has he spoken to you about the case since you testified in it in July, 1915?

A. He has not.

XQ49. Has any other person connected with the Eli Lilly & Co., except Mr. Lynn and Mr. Bradford, spoken to you about the case or written to you about the case?

A. No, sir.

XQ50. What brand of Castoria were you selling at the time you referred to when you were traveling with Mr. H. Pfeiffer for the Pfeiffer Chemical Company? What was the name on the bottle?

A. Pitcher's Castoria.

XQ51. Were you selling in the original bottles to the druggist or to Snyder?

A. I don't think we ever sold any Castoria to Snyder. I never sold it to him.

XQ52. I asked you whether in selling this particular Castoria to anybody or Snyder or any druggist, you were selling it in original bottles or in bulk?

A. We were selling it in packages put up under the Pitcher Castoria label, manufactured by the Pfeiffer Chemical Co.

XQ53. What kind of packages?

A. Packages that retailed at 35 cents.

XQ54. Made of paper, I suppose?

A. Glass bottles in paper cartons.

XQ55. Do you call a glass bottle a package?

A. We call the finished package a package, that is the bottle inside of the paper carton.

XQ56. And the bottle and the carton both bore both the words "Pitchers Castoria". Is that correct?

A. Yes, sir.

XQ57. What size bottles were these?

A. Well, they were paneled bottles and a very deceptive looking bottle. I never measured one and would not be in a position to state what they held.

XQ58. Did they hold 2 ounces?

A. In my opinion, they held about 2 ounces, or perhaps a trifle less. I am not in a position to state what they held.

XQ59. Will you swear that they did not hold over 4 ounces?

A. Well, they had a 50 cent size. You are referring to the 35 cent size, are you not?

XQ60. Can you tell me why you, who have been selling drugs for many years perhaps of your life, can't state to the Court what the capacity of these bottles were, with some approximation, at least, to accuracy?

A. I have just stated in my answer to the previous question that, in my opinion, the bottle held about two ounces, that is, as near as I could come to it. I might have known at that time. There were different sizes.

As I stated before, they did make two sizes, 35 and 50 cent sizes, in the Pitcher Castoria. They also made a brand of Castoria under the label of the Baby Brand, which retailed for 35 cents.

XQ61. Who do you mean by them?

A. Speaking of the Pfeiffer Chemical Company, known as the Pfeiffer Chemical Co. at that time.

XQ62. Did I understand you to say that what you were selling in the way of Castoria was about a two ounce bottle or perhaps a bottle a little larger with a carton around it, both the bottle and the carton bearing the label Pitcher's Castoria? Is that correct?

A. Yes, sir.

XQ63. When the druggist who sold this Pitcher's Castoria which you sold him, came to sell it to his customers, did he sell it in the original packages in the package and the bottle as you sold it to him?

A. He did.

XQ64. Do you know how the Fletcher Castoria was put up and sold to the druggist and sold by the druggists at that time?

A. Do I know how it was put up?

XQ65. Better say, wrapped up and sold to the druggist and sold by the druggist at that time.

A. I have never opened a bottle of Fletcher's Castoria but it is wrapped in a package, very similar to the Pitchers Castoria, put out by the Pfeiffer Chemical Co.

XQ66. Don't you know that the Fletcher Castoria is put up in a wrapper and not in a carton?

A. Didn't I just state that I had never opened a bottle or taken the wrapper off a bottle of Fletcher's Castoria? I was judging from the outside appearance of the package.

XQ67. When you say a bottle of the Pfeiffer Chemical Co. product, such as you sold to the druggist and they sold, and a bottle of the Fletcher Castoria, standing side by side on a druggist's shelf, how is the latter done up?

A. Well, if I remember correctly, Pitchers Castoria put out by the Pfeiffer Company was put up in a folding carton.

XQ68. How was the other product put up as it stood on the druggist's shelf for sale? Was it wrapped up and not in a carton?

A. I think it was.

XQ69. Then if these two brands of Castoria were so dissimilar in external appearance, could a druggist sell one when the other was called for?

A. Well, our instructions to the druggist was to show Pitchers Castoria when Castoria was called for and call the attention of the customer to the fact that they were getting a larger bottle than the Fletcher brand at the same price and as an inducement to him to push this Castoria, it paid him a great deal better profit than the Castoria under the Fletcher brand and called the attention of the customer to the fact that the Castoria was originated by old Dr. Samuel Pitcher and the formula of Dr. Samuel Pitcher on the label, it being the same thing exactly as the Castoria put out under the Fletcher label.

XQ70. When you were salesman for Pfeiffer Chemical Co. and after the summer of 1909, you added the Warner & Co. to your line, didn't you have a contract that carried with it both a salary and commission, if your sales were above a certain amount?

MR. BRADFORD: Objected to as incompetent on the ground that the contract itself is the best evidence.

MR. RAWLE: I hold the contract in my hand. I do not care to encumber the record with it. I will show it to the plaintiff's counsel and he may show it to witness. The contract is shown to witness and he answers as follows:

A. Yes, sir.

XQ71. Didn't you know, without seeing the con-

tract, that you were working on a salary and commission if your sales were above a fixed amount?

A. Yes, sir; of course I did; and I have a copy of the contract.

XQ72. And, of course, if your sales increased, you would automatically have increased your income from your work?

A. Not necessarily. As my sales increased from year to year, my sales quota was advanced on two or three occasions. The only time that I ever drew any commission was one year, quite a few years ago, I drew approximately $154.00 commission.

XQ73. But in every year, if you had exceeded your sales quota, you would have drawn a commission?

A. I would.

XQ74. And you had a contract to that effect since about January 1st, 1910?

A. About that time.

XQ75. And since this contract dated about December 21, 1910, your sales quota was not raised?

A. The sales quota was raised at the time this contract was written.

XQ76. And not after that again?

A. No, sir. I would like to state further that my last year with the Pfeiffer Chemical Co., it was the custom of the company to submit to us a statement at the close of the year showing our volume of business for that year and showing all deductions for past due accounts and bills that had been charged to profit and loss, also bills that had not been shipped and paying us a commission for any excess in the amount of our sales quota. After being discharged by the Pfeiffer Chemical Co. I wrote to them for a complete statement of my business for 1912, but never received this statement.

Cross-examination Closed.

Re-direct-examination.

By Mr. Bradford:

RDQ72. Did you ever draw a commission more than one year while working for the Pfeiffer Chemical Co., I mean in excess of your salary?

A. No, sir.

RDQ73. Was your sales quota raised in your next contract thereafter?

A. Yes, sir, it was.

RDQ74. And each time that your sales reached approximately the sales quota allowed?

A. Usually the sales quota was raised.

RDQ75. In referring now to the Castoria subject. Suppose a customer came into a drug store and merely asked for a bottle of "Castoria" and did not specify Fletcher's. Would the druggist have to make the explanation you stated you instructed him could be made in making such a sale?

Mr. Rawle: Objected to as irrelevant and inadmissible and altogether improper and as calling for hearsay.

A. It would not be necessary to make any explanation in a case of this kind.

RDQ76. What could the druggist give the customer on such a call?

Mr. Rawle: Same objections.

A. He could have given him Pitcher's Castoria, put up by the Pfeiffer Chemical people.

RDQ77. I show you complainant's exhibit "Thurman Pfeiffer Chemical Co. Catalogue" and ask you to look at page 53 and state if the packages there illustrated are the packages of Castoria you have been testifying about?

A. Yes, sir. I notice here that this Castoria put out under the Baby Brand is marked to retail at 25 cents. When this Baby Brand of Castoria was first

given us for sale, it was marked to retail at 25 cents, but later was marked to retail at 35 cents and the 25 cent brand might have been continued.

Re-direct-examination Closed.

Re-cross-examination.

By Mr. Rawle (not waiving objections):

RXQ78. Is it not true that additions of new lines to the line of goods which you were selling affected the amount of your sales quota?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. What do you mean by increase in sales quota?

RXQ79. When your employers gave you additional lines of products to sell for them, was it not natural for them to expect you to sell more goods?

Mr. Bradford: Same objection.

A. You would naturally think so. Yes, sir.

RXQ80. And was it not natural in this case for them to raise your sales quota?

Mr. Bradford: Same objection.

A. I would not think so necessarily, as long as they were keeping out of your reach all the time.

Deposition Closed.

After the witness was excused, he was recalled by counsel for plaintiff and the following questions asked:

By Mr. Bradford:

Q81. Did you ever have any discussion with Mr. G. A. Pfeiffer, who is here present respecting the similarity of the Vogue perfume and the Jickey perfume and if you did, please relate what was said by Mr. Pfeiffer and yourself at such discussion.

MR. RAWLE: I think it ought to appear that the opposing counsel and the witness talked in the adjoining room, before the witness was recalled.

MR. BRADFORD: I am perfectly willing that this shall appear and advise counsel for the defendant that a remark made by witness after leaving the witness room gave counsel information on which he bases the above question and it is information that he never had before.

MR. RAWLE: Objects to the further proceeding as irregular and objects to the question itself on its own merits as irrelevant and immaterial.

A. I remember having had a conversation with Mr. G. A. Pfeiffer who is present here this afternoon in regard to the similarity between Vogue perfume put out under the Mellier label and the original Jickey. Mr. Pfeiffer stated that they were identical and I spoke up and said there was a difference. Mr. G. A. Pfeiffer said: "Thurman, you can't tell one from another." I told him that I thought I could. He immediately sent down to the perfume department and had two demonstrating perfume bottles filled, one filled with the original Jickey and the other filled with Vogue, labeling one No. 1 and the other No. 2, brought them up to the office and placed them before me for my identification. After smelling the two odors carefully, I identified Jickey and Mr. Pfeiffer says: "Yes, that is correct, but you guessed it."

Q82. What was the occasion of this discussion?

A. Well, we were speaking about the similarity of Vogue to Jickey and I had always contended that Vogue was never exactly like the Jickey odor and naturally I was not selling as much of this odor as some of the other boys. Mr. Pfeiffer did this, I suppose, to prove to me that Vogue was exactly like Jickey and could be sold as such.

Cross-examination.

By Mr. Rawle (not waiving objections):

XQ83. When did this occur?

A. I have no way of knowing the dates. I remember the conversation very distinctly. No doubt, Mr. Pfeiffer remembers them.

XQ84. How long before the Pfeiffers moved to Philadelphia in 1908, did it occur?

A. I don't know.

XQ85. Might it have been a year before?

A. It might have been a year.

XQ86. Might it have been two years before?

A. I don't know.

XQ87. Where did it occur?

A. In the office of the Pfeiffer Chemical Co. in St. Louis.

Mr. Rawle gives notice of a motion to strike out all questions objected to in the deposition of this witness as being not proper for rebuttal and particularly to strike out the last questions asked after he had closed his deposition and left the room.

C. J. Thurman.

Francis E. Bibbins, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. State your name, age, residence and occupation?

A. Francis E. Bibbins; 4246 Cornelius Avenue, Indianapolis; thirty-three; director of pharmaceutical department, Eli Lilly & Company.

Q2. How long have you been in the employ of Eli Lilly & Company?

A. Nearly thirteen years.

Q3. What qualifications have you for testifying as an expert chemist on pharmaceutical matters?

A. I am a graduate of the School of Pharmacy of Purdue University, and I have spent nearly twelve of those thirteen years at Eli Lilly & Company in scientific work, pharmaceutical scientific work.

Q3. In the testimony given on behalf of the defendant in this case by Charles H. LaWall, respecting the preparation known as Coco-Quinine, and the preparation known as Quin-Coco, it was stated that the chocolate syrup in the preparation is an essential ingredient, inasmuch as it holds the quinine sulphate in suspension and aids in disguising the taste of the quinine. Have you experimented along lines which qualify you to testify on this question, and if so, what has been the result of your experiment?

By Mr. Rawle: Objected to, as not proper for rebuttal, the matter having been gone into in the plaintiff's *prima facie* case; and it is irrelevant.

A. I have made a great many experiments, and found that it is not necessary to use chocolate in a syrup to disguise the taste of the quinine sulphate, or to aid in suspending it in a syrupy medium.

Q4. Another eminent pharmaceutical chemist, George M. Beringer, was called as a witness for defendant, and testified in answer to Q14, page 477, Defendant's Record, that, in his opinion, the chocolate plays a very important function in the preparation, stating, "It is certainly essential to a palatable and satisfactory preparation of quinine for a liquid preparation to be successfully marketed." What have you to say in reply to Mr. Beringer's statements thus quoted?

By Mr. Rawle: Same objections.

A. The chocolate is not essential to make a palatable preparation. There are other substances that can be used equally as well.

Q5. Mr. Beringer stated in answer to Q29, page 481, that he had experimented along these lines, both because of his own business interests, and likewise because the subject had been referred to a Sub-Committee of the National Formulary, of which he was the chairman, and in answer to Q30, that he had made up various mixtures of quinine sulphate with various other vehicles or syrups. These he produced and introduced in evidence. I will ask you to refer to Mr. Beringer's answer to Q31, and read the same, and comment thereon in reply thereto.

By Mr. Rawle: Same objections.

A. In Mr. Beringer's experiments it seems that all his mixtures were made with flavored syrups, and without any attempt to bring the viscosity of the syrup to a point where it would suspend the crystaline quinine sulphate. In a number of experiments I have found that it is possible to make these various flavored syrups so as to retain the quinine sulphate in suspension.

STIPULATION.

It is stipulated by and between Mr. Bradford, counsel for plaintiff, and Mr. Rawle, counsel for defendant, that to each and every question propounded by Mr. Bradford, counsel for plaintiff, to this deponent, the same objections as noted to the previous questions may be had by Mr. Rawle, counsel for the defendant, without the same being noted in this transcript of the deposition, for the purpose of avoiding encumbering the record.

Q6. Have you made up samples of experiments corresponding in a degree to those made up by Mr. Beringer, having in mind the necessity of the advantage of making a syrup that will hold the quinine in suspension, and if you have, will you produce said samples?

A. I have made a number of experiments along this line, and can introduce these ten samples of various

flavors and colors, in which the quinine sulphate is suspended without the aid of chocolate.

Here I produce a sample syrup of quinine sulphate, flavored with ginger. In this sample you will notice the quinine is suspended throughout the mixture, and the product is of an entirely different color from a chocolate syrup, and the bitterness of the quinine is disguised in this syrup, and it has the same quinine content as Coco-Quinine. The disguising agent in this syrup of ginger is the same as that used in Coco-Quinine. In this sample flavored with ginger the addition of Mucilage of Quince Seed and Tragacanth have been added to the syrup to aid in the suspension of the quinine sulphate. (Referring to Plaintiff's Exhibit, Sample Syrup No. 1.)

Here we have a sample of syrup of quinine sulphate flavored with Tolu, in which you will notice the quinine sulphate is suspended. This contains the same disguising agent as in Coco-Quinine. There has been added to the syrup a small amount of gelatine and Mucilage of Quince Seed. This is also of a different color from Coco-Quinine. This is a different color and flavor from the first sample, and also from Coco-Quinine. (Referring to Plaintiff's Exhibit, Sample Syrup No. 2.)

Here we have a sample of syrup of quinine sulphate, flavored with Orange, in which you will note the quinine sulphate is suspended throughout the syrupy medium. In this sample a small amount of Gum Acacia has been added to the syrup as a suspending agent. This contains the same disguising agent as that used in Coco-Quinine, and it contains the same amount of quinine sulphate as Coco-Quinine. You will note it is an entirely different color from Coco-Quinine, and also from the other samples submitted. The flavor is different from the other samples. (Referring to Plaintiff's Exhibit, Sample Syrup No. 3.)

Here we have a sample of syrup of quinine sulphate, flavored with Coffee, in which you will note the quinine sulphate is suspended throughout the syrupy

medium. A small amount of Dextrin has been added to this syrup as a suspending medium. This sample contains the same amount of quinine sulphate as Coco-Quinine per ounce. It is of an entirely different color and different flavor from Coco-Quinine and the other samples submitted. (Referring to Plaintiff's Exhibit, Sample No. 4.)

Here we have a sample of syrup of quinine sulphate, flavored with peppermint, in which you will note the quinine sulphate is suspended throughout the syrupy medium. A small amount of Mucilage of Quince Seed has been added to the syrup as a suspending medium. This sample contains the same amount of quinine sulphate per ounce as Coco-Quinine, and you will also note it has a green color, entirely different from Coco-Quinine, and the other samples submitted, and also a different flavor. It contains the same disguising agent as that used in Coco-Quinine. (Referring to Plaintiff's Exhibit, Sample Syrup No. 5.)

Here we have a sample of syrup of quinine sulphate, flavored with Benzaldehyde. You will note that the quinine sulphate is suspended throughout the syrupy medium. In this sample a small amount of Mucilage of Irish Moss and Quince Seed have been added to the syrup as a suspending medium. It contains the same disguising agent as that used in Coco-Quinine. It also contains the same amount of quinine sulphate per ounce as Coco-Quinine. It is of a different color and flavor from Coco-Quinine and the other samples submitted. (Referring to Plaintiff's Exhibit, Sample Syrup No. 6.)

Here we have a sample of syrup of quinine sulphate, flavored with Peppermint and Wintergreen. You will note the quinine sulphate is suspended throughout the syrupy medium. In this sample a small amount of Mucilage of Tragacanth and Acacia have been added as a suspending medium. This sample contains the same disguising agent as used in Coco-Quinine. It also contains the same amount of quinine sulphate per ounce

as Coco-Quinine. You will note it is of a different color and flavor from Coco-Quinine and the other samples submitted. (Referring to Plaintiff's Exhibit, Sample Syrup No. 7.)

Here we have a sample of syrup of quinine sulphate, flavored with Compounded Spirit of Orange. You will note the quinine sulphate is suspended throughout the syrupy medium. In this sample a small amount of Starch and Mucilage of Tragacanth have been added as a suspending medium. This sample contains the same disguising agent as that used in Coco-Quinine. It also contains the same amount of quinine sulphate per ounce as Coco-Quinine. You will note it is of an entirely different color and flavor from Coco-Quinine and the other samples submitted. (Referring to Plaintiff's Exhibit, Sample Syrup No. 8.)

Here we have a sample of syrup of quinine sulphate, flavored with Cassia, Peppermint and Wintergreen. You will note that the quinine sulphate is suspended throughout the syrupy medium. In this sample a small amount of gelatine and Tragacanth have been added to the syrup as a suspending medium. This sample contains the same disguising agent as Coco-Quinine, and also contains the same amount of quinine sulphate per ounce as Coco-Quinine. You will note it is of an entirely different color and flavor from Coco-Quinine and the other samples submitted. (Referring to Plaintiff's Exhibit, Sample Syrup No. 9.)

Here we have a sample of syrup of quinine sulphate, flavored with Peppermint, Sassafras and Wintergreen. You will note the quinine sulphate is suspended throughout the syrup mixture. In this sample a small amount of acacia and Mucilage of Quince Seed have been added as a suspending medium. This sample contains the same disguising agent as that used in Coco-Quinine. It also contains the same amount of Quinine sulphate per fluid ounce as Coco-Quinine. You will note that it is a different color and flavor from Coco-Quinine

and the other samples submitted. (Referring to Plaintiff's Exhibit, Sample Syrup No. 10.)

Q7. Will you state whether or not, in your opinion, and from your experience, any of the ten samples that you have produced constitute a satisfactory and marketable pharmaceutical preparation?

A. I think any or all of them would make a satisfactory, marketable product.

Q8. As I understand you, these samples are in all respects the same as Coco-Quinine, except that another syrup has been substituted as the coloring and flavoring medium in the place of the chocolate syrup; is that correct?

A. That is right.

Q9. Pharmaceutically and therapeutically these preparations are identical with Coco-Quinine, as I understand you?

A. They should be the same; pharmaceutically they are the same, and therapeutically they should be the same as any preparation containing crystalized quinine sulphate in the same proportion.

Q10. What is the disguising agent or the agent used to disguise the bitterness of the quinine, not only in these samples, but in Coco-Quinine?

A. An extract prepared from Yerba Santa. In fact, I have used the Coco-Quinine formula except for the chocolate syrup.

Q11. When were these samples made?

A. These samples were made in March, 1916.

Q12. Where have they been since then?

A. In the cupboard in my office until today when I brought them to this office.

Q13. Have they been subject to the summer temperatures where they have been located?

A. They have been subject to the usual changes of temperature we have in this climate during the past eight months.

Q14. Respecting the action of temperature upon such pharmaceuticals, how has the weather during the

last eight months compared with the average summer weather?

A. I don't believe that changes of temperature would have any effect on these products.

Q15. (Q14 read to the witness.)

A. As I remember, it has been the usual climatic conditions for this section of the country.

Q16. Has any effort whatever been made to protect these samples from climatic conditions, or have they been exposed to ordinary shelf conditions?

A. They have been exposed to ordinary shelf conditions?

Q17. Do you know of any reason why any one of these samples could not be taken up and by proper detail work and advertising made a legitimate competitor of Coco-Quinine?

A. I do not.

Q18. In making up these ten samples did you, or did you not, exhaust your resources?

A. I did not.

Q19. Would it be possible to make many other samples containing the same pharmaceutical merits as Coco-Quinine, and not use chocolate either as the coloring or flavoring medium?

A. In my opinion it would be possible.

Q20. Did you exhaust your resources in the employment of suspending mediums in making up your syrups?

A. I did not.

Q21. In answer to questions 33 and 34, Mr. Beringer testified respecting his samples that he did not know of any ingredient that could be added to make them satisfactory except cocoa. Do your experiments show that Mr. Beringer was mistaken in this respect or not?

A. They do.

By Mr. Bradford: Counsel for plaintiff here offers in evidence the samples referred to, and marks them Plaintiff's Exhibit, Sample Syrup No.

1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, and No. 10, respectively.

By Mr. Rawle: The same objections are made to the exhibits as made to the questions.

Cross-examination.

By Mr. Rawle (without waiving objections):

XQ22. I understand that in each of these samples you have put in an ingredient for the purpose of giving viscosity to the sample, is that correct?

A. That is right.

XQ23. In that respect the ingredient or ingredients you have put into the respective samples play the part of cocoa in Coco-Quinine, is that right?

A. That is right, except for flavor.

XQ24. But they do play the part of the chocolate or cocoa as suspending agents?

A. That is right.

XQ25. Then, in your opinion, the cocoa in Coco-Quinine is itself a suspending agent?

A. Yes.

XQ26. Then, is it not true, in your opinion, that the cocoa in Coco-Quinine plays the three-fold part of giving color, flavor, and suspending qualities?

A. That is right.

XQ27. But in all these samples you have taken two or more ingredients to play these three parts of color, taste and suspension; is that correct?

A. That is right.

XQ28. Have you used any artificial coloring in any of these samples?

A. In some of them, yes.

XQ29. Which ones?

A. In No. 5 I used the certified color called Myrtiline Green, to get that green.

In No. 7, a mixture of certified colors called Carmaline Brown.

In No. 8, a certified color of Ponceau 3 R.

In No. 9, a certified color called Naphthol Yellow-S.

These are all colors that are permitted to be used under the Pure Food and Drugs Act of 1906.

XQ30. What preservatives have you used in these samples?

A. The same preservatives as used in Coco-Quinine.

XQ31. What is that?

By Mr. Bradford: Objected to as improper.

A. It is preserved with cane sugar, alcohol and sodium benzoate.

Cross-examination Closed.

Deposition Closed.

Francis E. Bibbins.

Adjourned until tomorrow, November 28, 1916, 11 o'clock a. m.

John E. McCambridge, Sr., being recalled as a witness for plaintiff, in answer to interrogatories by Mr. Bradford, testified as follows:

Direct-examination.

By Mr. Bradford:

Q1. You are the same John E. McCambridge who has previously testified for plaintiff in this case?

A. Yes.

Q2. Since you were examined, Mr. Fritsch has been further examined, and also Mr. George Martin, and Frank M. Ramsey. Mr. Fritsch has testified that it was Mr. George Martin from whom he received the order to make the experiments in the early part of 1908, or in 1907, for the purpose of duplicating Lilly's Coco-Quinine. The endeavor has also been made to show that the laboratory was quite a large place, employing a good many people, and that experiments by Mr. Fritsch

might have been carried on without your knowledge. How large was the department in which Mr. Fritsch was employed?

MR. RAWLE: The recalling of the witness is objected to as irregular, the witness having already been interrogated, or been under examination. If the intent is to impeach any other witness called by the plaintiff, the recalling and further examination of the witness is objected to for that reason. The recital in the question of what other witnesses have said is objected to as irregular and improper.

MR. BRADFORD: The witness is recalled for no purpose except to rebut certain statements by Mr. Fritsch, a defendant employe, and a witness for defendant.

MR. RAWLE: If plaintiff's counsel elects to call an employee of the defendant and interrogate him as to facts known to him, it is not proper for plaintiff's counsel now to call another witness to impeach the testimony of his own witness, Mr. Fritsch, who is not shown, except inferentially, to have been a hostile witness, or other than a frank and truthful person.

MR. BRADFORD: Counsel for defendant well knows that he was advised before Mr. Fritsch was called of the purpose of counsel for plaintiff to subpoena Mr. Fritsch as a hostile witness, and that in order to simplify matters and avoid the subpoena being served, he consented to have Mr. Fritsch appear as a witness without the writ being issued. The other matters are for the decision of the Court.

(Q2 read to the witness by the stenographer.)

MR. RAWLE: Upon the question being read to the witness, defendant's counsel further objects to the statement in the question that Fritsch was em-

ployed to make experiments in "duplicating Lilly's Coco-Quinine."

A. That department was forty by forty-eight.

Q3. How many people were employed in this department?

A. Four.

Q4. Do you remember the names of the persons who were employed in this department at that period, that is during the early part of 1908 or 1907?

A. Harry Fritsch and Edward Ryan, who was a helper to Mr. Fritsch, a young man named Charlie, who was helper on the floor, and Mr. Groves, who was also a helper. I might say that half of that floor space was occupied by preparations which I personally made.

Q5. Were Mr. Fritsch's duties outside of this particular space or department at any time during that period?

A. No.

Q6. Was it customary for Mr. Martin to send orders for the manufacture of new preparations, or the duplication of preparations of other houses direct to Mr. Fritsch without going through your hands?

MR. RAWLE: The form of the question is objected to as highly improper.

A. All new preparations were first referred to me, then passed to Mr. Fritsch, if found that he could handle it to make up.

Q7. Was it the custom of the Warner Laboratories prior to the taking over of the business by the Pfeiffers to undertake experiments to duplicate specialties manufactured by other houses?

MR. RAWLE: Objected to for the obvious reason the custom of a firm that existed before the incorporation of the defendant corporation is not relevant or admissible, and cannot affect any right of this defendant, and is objected to as improper in form.

A. During my entire time with William R. Warner & Company, I cannot recall where we ever secured samples of other houses' goods to imitate. If we did secure samples it was because we were making the same preparations, and only wished to convince ourselves as to the equality of our own make with theirs.

Q8. An order coming to the laboratory to reproduce a specialty of any other house, or imitate a specialty of any other house would then have been an unusual occurrence in the Warner laboratories?

MR. RAWLE: Objected to for the same reasons.

A. It certainly would have been so.

Q9. Such an incident, if it had occurred, would not have been easily forgotten by the employee, would it?

MR. RAWLE: Objected to as leading, and multiplying matters as to questions already put to the witness, and for the other reasons above given.

A. Mr. Martin, Mr. Ramsey and myself would certainly have known all about it, and it could not have been easily forgotten.

Q10. What was the policy of the William R. Warner & Company respecting the rights of its competitors in specialties, I mean what was the ethical policy of the house under the old management, or prior to its acquisition by the Pfeiffers?

MR. RAWLE: Objected to because the policy, or any acts of William R. Warner & Company, a firm that carried on its business prior to the end of July when the defendant corporation was organized and took it over, is irrelevant and inadmissible, and cannot affect the rights of this defendant, and the question is objected to for other reasons as being inadmissible and irrelevant, and as having no possible connection with the issues in this case.

A. It all stood on the same ground, the only question being the quality of the finished product.

Q11. (Q10 read to the witness.) My question contemplated asking you whether or not William R. Warner & Company, under the old management, considered it ethical to imitate specialties put out by competing houses, and manufacture substitutes for such specialties.

MR. RAWLE: The above objections to the question are repeated.

A. At no time would the house consider the manufacture of a substitute of any other firm's preparation.

Q12. Defendant's counsel in his objections, and by some witnesses, has undertaken to show that prior to a certain date in 1908 William R. Warner & Company was one concern, whereas after that date it became another concern by reason of being incorporated. Do you know anything respecting this matter, and if so, will you explain?

A. Up to the time of the death of William R. Warner, Sr., about 1901, the firm was known as William R. Warner & Company. As I recall his will, it stated that he wished the firm to continue under the name of William R. Warner & Company, but if found necessary it might incorporate, but still continue under the name of William R. Warner & Company, with William R. Warner, Jr., as head of the firm. I might say that this was due to what he had really proposed to do in 1888 when the building at Broad and Wallace was erected. The sign on that building reads, "William R. Warner Company, Chemists". That was placed on the Wallace Street building when it was erected, and in the Financier of 1888 or '89 there appeared an article in which he stated it was his intention to form a corporation giving his employes the benefit of the same. This, however, for some reason unknown to me, did not materialize.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (not waiving objections):

XQ13. How many hours a day did you usually spend in Mr. Fritsch's department?

A. About four hours a day.

XQ14. What were you doing there?

A. Making preparations, and overseeing other work that was being done.

XQ15. Would it have been possible if Fritsch had received directions from the owner of the business, Mr. Warner, to make any experiment, and keep quiet about it, that he could have made such experiment without your knowledge?

A. Mr. Warner at no time went over my head to order anything done in the laboratory. In fact he insisted on me being there at all times. During my service of over thirty-one years my vacation never was more than two days at one time, and the balance of the year one day at a time, that is in all two weeks in each year. My absence from the house in that time for sickness was one-half day. I was the first in the laboratory and the last to leave, even at night when work was conducted I was the last one to lock the door, and see that the place was in good order for the following day.

XQ16. (XQ15 repeated to the witness.)

Mr. Bradford: The repetition of the question is objected to on the ground it has been fully answered.

A. Does not my answer cover that question?

XQ17. My question is whether if Mr. Warner, the owner of the business, had directed Fritsch to perform an experiment, and to keep quiet about it, it would have been possible for Mr. Fritsch to have obeyed Mr. Warner and conducted the experiment in secret without your knowledge?

Mr. Bradford: Objected to for the reasons before given, and as immaterial and irrelevant.

A. There would have been no reason for Mr. Warner to have done this if his object was to market the article, and I feel positive that he never so instructed Mr. Fritsch, because everything was done over and above board. The special fomulas regarding the preparations of the house were in my own keeping, and if Mr. Warner had wanted this preparation made in secret he would have referred it to me, as he had done with other preparations that we manufactured.

XQ18. But suppose Mr. Warner had wanted Fritsch to experiment on a preparation, and did not want you to know about it, and had directed Fritsch to do the work in secret, and without your knowledge, would it have been possible for Fritsch to have obeyed Mr. Warner and conducted his experiment without letting you know?

MR. BRADFORD: Objection repeated, and further because the question is wholly without any basis in the evidence in the case either of plaintiff or defendant.

A. Of course there is nothing that is not possible, if you want to put it down that way, but the personal confidence that Mr. Warner had in me would not have permitted him to do an underhand trick, as I would call that, because he knew that I was not a man to stand for a thing like that. Furthermore it would have been impossible, as I said in my previous testimony, for Mr. Fritsch to do any experimenting without my knowledge, as I was in that department at least once every hour throughout the day.

XQ19. Was Ramsey over your head as an official of the company?

A. He was not. William R. Warner was the only one over me.

XQ20. If Fritsch, for his own purposes, and without any orders from you or Warner, had chosen to conduct a little experiment on side lines to please himself,

and keep it quiet from you, could he have done it without your knowing it?

MR. BRADFORD: Objection repeated.

A. He might have done that, or had it at home, as far as I know; that is, he might have done it while I was at lunch.

XQ21. About how many items were there in the Warner line in the early part of 1908 before the Pfeiffers took it over? Give an approximation.

A. I should judge five hundred in that department.

XQ22. My question is how many was there in the entire Warner line under the old firm?

A. The entire line would cover the pill department, and the general supply department, which includes almost everything with us in the pharmaceutical line, druggists' supplies, for we run a full line of them. You might as well say the entire dispensary.

XQ23. I will ask you again how many items of drug or chemical preparations were there in the entire Warner line under the old firm?

MR. BRADFORD: Objected to as irrelevant and immaterial.

XQ24. I mean either in the liquid department, pill department, or any other department, in all departments.

A. That is impossible to answer.

XQ25. Were there five thousand?

MR. BRADFORD: Same objection.

A. My answer would be guesswork at that; I could not say.

XQ26. Were there two thousand items?

MR. BRADFORD: Same objections, and further, as needlessly encumbering the record, to borrow defendant's counsel's phrase, and as wholly unjustified and improper, and further because the Warner Catalogue itself is the only best evidence.

XQ27. Whether two thousand or more?

MR. BRADFORD: Same objections.

A. There may have been two thousand, but to be safe I will say I know there was five hundred.

XQ28. Were not there more than five hundred?

MR. BRADFORD: Objections repeated.

A. My previous answer covers the question of defendant's lawyer.

XQ29. I don't want you to be "safe", but to tell the truth, and give the best approximation of the number you can. I now ask you if you are willing to swear there were not over two thousand items such as I have mentioned in the old Warner line?

MR. BRADFORD: Objections repeated. Counsel has no right to propound such questions in such a manner to the witness. It is wholly improper for many obvious reasons.

A. As I understand, this examination relates to one preparation, not a question of how many preparations were made in the Warner laboratory. I could not swear positively as to the actual number of preparations made, and therefore cannot give the answer asked for.

XQ30. I am not asking you to state the exact number of such preparations in the Warner line, but to state whether, in your belief, there were over two thousand items in that line?

MR. BRADFORD: Objection repeated.

A. I think you have asked me to swear if there were two thousand preparations in that laboratory, or over. As I am not positive of the exact number, I will not swear to the exact amount.

XQ31. You will notice I have not asked you to state the exact number, but to state whether your recollec-

tion is that there were or were not over two thousand items.

MR. BRADFORD: Objections repeated, and further objection made that witness has answered fully and frankly, as must be evident to counsel for defendant, and to the Court, giving his best answers to the questions asked.

A. If you insist on an answer to this question, I will have to take time off, and count them, as I have the entire list with me.

XQ32. You mean you have the entire list in your hand at the present moment?

MR. BRADFORD: Objections repeated.

A. I have.

XQ33. With that entire list in your hand at the present moment, and without literally counting every item, will you swear there were not over one thousand items in that list?

MR. BRADFORD: Objections repeated, and the further statement made that counsel for defendant may take this catalogue and count the items for himself, or that it may be introduced in evidence, and counsel may ask the Court to count the items, if he considers the fact sought to be shown important. There is no disposition on the part of witness or counsel for plaintiff to deprive counsel for defendant of this bit of information, and all facilities possible will be extended to him to ascertain the facts. We offer him the best evidence on this point in the catalogue itself.

MR. RAWLE: I strenuously object, as I have often before done in this case, to the interference by plaintiff's counsel in the cross-examination of his witnesses.

MR. BRADFORD: Plaintiff's counsel insists on his right to protect the witness against such glaring

and willful violation of the rules of evidence on cross-examination.

A. I again refuse to swear to the number of articles or preparations made by William R. Warner & Company, and submit their epitome in evidence.

XQ34. You have handed me the Warner list, and I observe that it contains over two hundred pages. As I glance over it rapidly it seems to me they average about twenty to the page. Is that about correct?

MR. BRADFORD: Same objection. The catalogue speaks for itself.

A. Some pages may average about two hundred. The witness asks for chance to make correction or verify his statement. If you will kindly hand me that epitome I will make the correction at once.

XQ35. In answering my last question, did you not say that some pages might average two hundred?

MR. BRADFORD: Objection repeated.

A. I have asked for the privilege of correcting or making my statement good.

XQ36. In answering my last question as to whether the pages did not average about twenty items, you replied that some of the pages might average two hundred, and the stenographer has so taken it down. Is not that what you said in answer to my question?

MR. BRADFORD: Objection is repeated.

A. If the defendant's lawyer will permit me to look at the Warner epitome I will show him why I made the statement above that there might be two hundred.

MR. BRADFORD: It is noted that counsel for defendant has taken possession of the epitome referred to, and has refused to hand it to the witness, notwithstanding the witness' request in answering the last two questions.

MR. RAWLE: I object to such statements go-

ing on the record, and I am sorry to have to say the statement is not true.

MR. BRADFORD: It is true, as every person in the room knows, including Mr. Rawle himself. The witness asked for the epitome in response to his last question, held out his hand to get it, and counsel for defendant retained it, and refused by his action at least to allow witness to have it. Since counsel for plaintiff has made this note upon the record counsel for defendant has thrown the epitome upon the table, where it can be reached by counsel for plaintiff, and handed to witness, which is now done. These are the true facts, notwithstanding any statement that counsel for defendant may make, and this statement can be verified by Mr. G. A. Pfeiffer, who is at the right elbow of his counsel, by Mr. Charles J. Lynn, General Manager of the Lilly corporation, and by the stenographer who is taking the deposition, and by Mr. John E. McCambridge, Jr., who is also in the room.

MR. RAWLE: Defendant's counsel feels compelled to state that he retained the book in his hand for the further purposes of cross-examination, as his right was, and was not aware the witness had in any way indicated his desire to have it, except insofar as his answer to questions so indicated.

XQ37. At the time inquired of, were not a very large number of the items in the Warner line being marketed in competition with similar medicinal articles or preparations put on the market by other drug houses?

MR. BRADFORD: Objected to as immaterial and irrelevant, and not cross-examination.

A. All pharmaceutical houses have what is known as a general line, manufactured by the various firms. In addition to that they have what is known as their special formulas, which are marketed specially to the

trade. While the general line is open to all, the special manufactured article in a way belongs to the party marketing the same.

XQ38. (XQ37 repeated to the witness.)

MR. BRADFORD: Objection repeated.

A. In the general line, yes.

XQ39. I understood you to say that you had been in the employ of the original William R. Warner & Company concern, father and son, for thirty-one years, is that correct?

A. That is correct.

XQ40. And about three weeks after the Messrs. Pfeiffer took over the Warners' business your services were dispensed with, is that correct?

A. My services with the William R. Warner & Company after the Pfeiffer Chemical Company took hold of it was until about the last week in August, as I remember it, 1908. I think I took my last vacation day when Mr. Pfeiffer wanted me to come and see him in the office.

XQ41. I read from your previous testimony given in this case the following:

"Q4. How long after the Pfeiffer Chemical Company took over the Wm. R. Warner & Co. was it before you severed your connection with them?

"A. About three weeks."

Was that statement correct?

MR. BRADFORD: Question is objected to as not cross-examination, and further because the time when the Pfeiffer Chemical Company took over the William R. Warner & Company has been stated at various different dates in the record, and is comparatively not a well settled date.

MR. RAWLE: Objection is made to the statement of plaintiff's counsel that the Pfeiffer Chemical Company took over the William R. Warner &

Company, the old firm. Such is not the fact, as appears on this record. Defendant's counsel states on the record in order to let the fact appear correctly for benefit of plaintiff's counsel that William R. Warner & Company was organized as a corporation and legally took over the old William R. Warner & Company business in his office on the 28th of July, 1908.

MR. BRADFORD: It has also been stated in the record by counsel for defendant on various occasions that the William R. Warner & Company was taken over by the Pfeiffer Chemical Company, or language in substance this. It has also been made to appear in the record by some witnesses that Mr. G. A. Pfeiffer was in Philadelphia in charge of the laboratories as early as June, 1908. Whether the business was "taken over" when the new corporation was organized, or prior to that date, I don't know, and apparently no one else knows definitely so far as this record shows. It seems clear, however, that Mr. Pfeiffer was in charge for some time prior to July 28, 1908.

MR. RAWLE: Notwithstanding the last remarks of plaintiff's counsel, the fact remains that the defendant company was organized July 28, 1908, and then for the first time became the owner of the business, and became a corporation under the laws of Pennsylvania. Mr. Pfeiffer's presence in Philadelphia since after some late day in June, and until July 28th is a fact. He was there to acquaint himself with the business, and be ready to assume it when the sale was closed. The contract was made in June.

XQ42. (XQ41 read to the witness.)

A. I thought I had made this time of my leaving the William R. Warner & Company definite, being the last week in August, 1908. If the firm did not change

hands until the 28th of July, then my statement of about three weeks is very near correct. However, it was the last week in August, 1908, that my services ceased with the William R. Warner & Company.

Cross-examination Closed.

Deposition Closed.

JOHN E. MCCAMBRIDGE.

STIPULATION.

It is agreed between counsel that inasmuch as the witnesses John E. McCambridge, Jr., and John E. McCambridge, Sr., are from out of the city, and desire to leave on a train before the depositions are transcribed, that the said depositions may be transcribed, and then sent to them by the notary for their signatures.

Adjourned to meet subject to notice or agreement.

JOHN E. MCCAMBRIDGE, JR., having been first duly sworn, in answer to interrogatories by Mr. Bradford, testified as follows:

Direct-examination.

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation.

A. John E. McCambridge, Jr.; 32 in January; residence, DesMoines, Iowa; occupation, superintendent of the laboratories of the Waterbury Chemical Company of DesMoines, and by profession an analytical chemist.

Q2. Were you formerly employed by the house of William R. Warner & Company of Philadelphia, and if so, when?

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A. Yes, sir; I was employed there by them from June 17, 1901, until the middle of August, 1908.

Q3. What were your duties while in the employ of William R. Warner & Company?

A. From June 17, 1901, until June 4, 1904, I was a helper in the laboratories, and from then on I had charge of the analytical department.

Q4. Do you know a gentleman by the name of Harry Fritsch?

A. Yes, sir.

Q5. Who is he?

A. He was an employe of the William R. Warner & Company, and he worked in the pharmaceutical department, or liquid department, under the direction of the superintendent, Mr. J. E. McCambridge, my father.

Q6. Mr. Fritsch, testifying as a witness for defendant in this case, has stated that he made certain experiments in the laboratories of William R. Warner & Company in an endeavor to make a duplicate of Coco-Quinine, Lilly, and that these experiments by him were in the early part of 1908 or in 1907. Do you know anything about such experiments by Mr. Fritsch during this period?

A. I have no recollection of same.

Q7. Were you in position where such experiments would have been likely to have been called to your attention, or come under your notice had they been conducted as stated by Mr. Fritsch?

A. I very likely would have seen same.

Q8. Would the experiments have been likely to have been called to your attention as the analytical chemist, if such experiments had been carried on in the laboratory at that time?

MR. RAWLE: Objected to as leading.

A. I probably would have seen same.

Q9. It has been suggested by other witnesses for defendant that the laboratory was a large place, and it would have been an easy matter for Mr. Fritsch to have

carried on these experiments without the knowledge of your father, or others who have testified. What have you to say as to this?

MR. RAWLE: Objected to as leading, and the question has already been put to the witness.

A. The laboratory, particularly the pharmaceutical department, employed about four people. The pharmaceutical department was a very small department in size, and the work was so concentrated that we practically knew what was going on amongst us at all times, and experiments made from time to time were always compared, and we always conferred with each other on the products.

Q10. Do you remember the names of those who were employed in the pharmaceutical department in the spring of 1908? If you do, please state who they were?

A. Mr. Fritsch and Mr. Groves, and there was a bottle boy, and another assistant, I couldn't say his name. I cannot remember his name.

Direct-examination Closed.

Cross-examination.

By MR. RAWLE (not waiving objections):

XQ11. When you speak of having been employed by William R. Warner & Company, I take it you mean the old firm which existed before the Pfeiffers came to Philadelphia?

A. Yes, until the Pfeiffers came to Philadelphia, and then a short time after they were there.

XQ12. Then you understood in July a corporation was formed, and you went into their employ?

A. Yes, from then on to the middle of August.

XQ13. So you worked for two or three weeks under the corporation?

A. Yes, sir.

XQ14. You were then a young man about twenty-two or twenty-three?

A. About that age.

XQ15. Was your father all over the building?

A. His duties were over the building at all times.

XQ16. The floor space or loft in which your department carried on its work covered the entire floor of the building? There were no partitions,—the whole floor of the building was one open space?

A. No, sir. The manufacturing department on the sixth floor was a space about forty by forty-eight. That was one space with no partitions except a stairway through the center leading to the seventh floor.

XQ17. It occupied the Broad Street front of about forty feet, and reached back to the alley, and also reached over to Wallace Street. Is that correct?

A. No, sir. It was probably about forty feet on Wallace Street, and about forty-eight on Watt Street. That is practically the proper dimensions.

XQ18. Were you under Fritsch or over him?

A. I was not under him or was not over him. I was entirely independent of Mr. Fritsch, but Mr. Fritsch submitted the preparations to me for examination.

XQ19. I think you said a moment ago that part of the laboratory was on the seventh floor also?

A. That was a department for the manufacture of fluid extracts, and about two specialties.

XQ20. There was a laboratory on the seventh floor, was there not?

A. That was simply strictly a manufacturing department for the manufacture of fluid extracts, as I have mentioned.

XQ21. How far is DesMoines from Chicago?

A. About three hundred and fifty miles.

XQ22. You left home last night?

A. No, sir; I left DesMoines on Monday night.

XQ23. You are returning to Chicago tonight?

A. Yes.

XQ24. Who first talked with you about this case, and suggested that you testify as a witness?

A. I received a communication from my father stating that I would probably be called to Indianapolis to testify in this case.

XQ25. Have you talked to any Lilly man about the case before you came here today?

A. I never saw a Lilly man before I met Mr. Lynn this morning, and then I did not know he was a Lilly man, and had not seen him until just this moment.

XQ26. In the days of the old firm at the Warner plant, would you say the discipline was very perfect, or perhaps a little at loose ends, considering the whole business?

MR. BRADFORD: Objected to as immaterial and irrelevant.

A. Each department was under a separate head, for which he was responsible to a superior.

XQ27. Who was the head of it all?

A. During my employment Mr. J. E. McCambridge was superintendent of the William R. Warner laboratories.

XQ28. Who was the head of the whole business?

A. Mr. William R. Warner, Jr.

XQ29. I will ask you whether the organization was carried on with severe discipline, or whether it was a little give and take, with some friction between different departments?

MR. BRADFORD: Objected to as immaterial and irrelevant.

A. The work seemed to go very smoothly to my knowledge in every particular.

XQ30. You mean so far as you know?

A. To my knowledge.

XQ31. Is that what you mean by the words "to your knowledge"?

A. As far as I know, sir.

Cross-examination Closed.

Re-direct-examination.

By Mr. Bradford:

RDQ32. As I understand it, William R. Warner, Jr., was the head of the firm, your father was superintendent of the laboratories, and there was a general manager by the name of Mr. Ramsey. Is that correct?

A. I have never understood Mr. Ramsey's position other than general manager. My father was superintendent of the manufacturing departments, and his duties were all over the plant. In the drug manufacturing business the term "laboratories" means practically the entire plant. In speaking of the Warner plant you would ordinarily speak of it as the Warner "Laboratories".

Re-direct-examination Closed.

Deposition Closed.

J. E. McCambridge, Jr.

Charles J. Lynn, being called as a witness on behalf of plaintiff, in answer to interrogatories by Mr. Bradford, testified as follows:

By Mr. Bradford:

Q1. State your name, age, residence and occupation.

A. Charles J. Lynn, Indianapolis, Indiana; forty-three; secretary and general manager of the Eli Lilly & Company, plaintiff in this suit.

Q2. Do you recall any interviews with Mr. G. A. Pfeiffer, Mr. Henry Pfeiffer, or both, respecting the manufacture and sale by them of Quin-Coco, and if you do, will you please relate when these interviews occurred, with whom, and what was said?

A. I had an interview in Atlantic City with Mr. G. A. Pfeiffer during or following a meeting of the Homilia Club there, and a few months later had an-

other interview in Philadelphia at which Mr. G. A. Pfeiffer and Mr. Henry Pfeiffer were present; the second interview was during luncheon at, I think, what they call the Manufacturers' Club, on Broad Street. The substance of what was said was practically the same at both interviews. It was to the effect that they could not give up the manufacture of Quin-Coco because it had been one of the valuable assets of the Searle & Hereth Company for which they had paid a large sum of money. That, in substance, was the statement made to me in response on both occasions to my request that they discontinue the product.

MR. RAWLE: The question and answer are objected to as not rebuttal, and the answer as not stating what was said, only in a vague, general way.

Q3. What were the reasons which led you to have these interviews with the gentlemen referred to, and to make these protests against their manufacture and sale of Quin-Coco?

MR. RAWLE: Objected to, because the motives for the interviews are not relevant.

A. The great activity of the Warner-Pfeiffer salesmen in attempting to exploit their product, Quin-Coco, as a substitute for our product, Coco-Quinine, and a desire to eliminate this unfair competition was the reason for my having these interviews with them in which I requested they discontinue their product.

MR. RAWLE: The answer is objected to as obviously improper.

Q4. During the examination of Mr. G. A. Pfeiffer as a witness for plaintiff in this case, he called attention to a number of chocolate quinine mixtures put out by other houses, enumerating them in his answer to Q112 on page 27, D. R. Will you please refer to this answer and state which of these preparations was first

called to your attention, and comparatively which has been most frequently called to your attention as an item sold against your item Coco-Quinine?

MR. RAWLE: Objected to as irrelevant.

A. There were some of these products that I never heard of until they were introduced by Mr. Pfeiffer. There were none of them that were heavily substituted or offered as substitutes for our Coco-Quinine other than, possibly, Quinico, put out by Meyer Bros. Drug Company, St. Louis, and that only in a comparatively limited territory. It would be practically impossible for me to state which one of these products I first heard of.

Q5. Did you hear of any of them before you heard of the Pfeiffer preparation called Quin-Coco?

A. Yes, I think I did, that of the Meyer Bros. Drug Company, namely Quinico, but on taking the matter up with the Meyer Bros. Drug Company and requesting them to discontinue their product, they did so, and it was off the market for some time. Other than that one product I think there were none that I heard of prior to the time that I first heard of Quin-Coco.

Q6. Is Quinico now marketed by Meyer Bros. Drug Company, and if not, please explain why?

MR. RAWLE: Objected to as irrelevant.

A. Quinico is not now marketed by Meyer Bros. Drug Company. As stated in answer to a previous question they discontinued the product some years ago and then later reinstated it. Since instituting this suit opportunity was again had to discuss the matter with Mr. C. G. F. Meyer, president of Meyer Bros. Drug Company. Our position and feelings were stated and he said that at his first opportunity he would look into the matter. This conversation was here in Indianapolis this fall during the meeting of the National Association of Retail Druggists, and on his return to St.

Louis, and after apparently looking into the matter, he wrote us that the preparation would be at once discontinued.

Q7. Thus acknowledging your proprietary rights?

MR. RAWLE: Objected to as irrelevant and inadmissible.

A. Presumably so.

Q8. Please state why, at the time this suit was brought, it was brought against the William R. Warner Company instead of some of these other concerns referred to in that answer by Mr. Pfeiffer.

MR. RAWLE: Same objections.

A. Because William R. Warner & Company had the only product on the market which successfully duplicated Coco-Quinine, the duplication being so nearly perfect that it was thought by us that they must in some way have obtained possession of our working formula, and because they were perniciously active, if I may use that term, in exploiting their product as a substitute for our product. We created the demand for Coco-Quinine by a great deal of expensive detail work, backed up by extensive advertising in medical and pharmaceutical journals, and it was irritating in the extreme to have our salesmen, one after another, and repeatedly, write us and say to us that the Warner Company, through their product, Quin-Coco, offered by their salesmen as a substitute for our product, Coco-Quinine, were reaping the demand created at our expense and effort. The makers of the other items or products named by Mr. Pfeiffer were not active in all sections of the country as were the Warner-Pfeiffer people, and indeed some of them were active in no sections, merely taking what business might come their way without special effort to get it, and, as before stated, some of these products I never heard of until they were introduced by Mr. Pfeiffer.

MR. RAWLE: The answer is further objected

to as irrelevant, as hearsay, as inadmissible, and as entirely improper evidence.

Q9. During the taking of Mr. Pfeiffer's deposition a list of preparations was introduced and marked "Defendant's Exhibit, G. A. Pfeiffer's List of Lilly Products," and which Mr. Pfeiffer testified was similar to the products of other manufacturers and marketed by Eli Lilly & Company subsequent to the introduction of those products, the evident purpose being to endeavor to persuade the Court that in the manufacture and sale of these Lilly preparations, Eli Lilly & Company is practicing the same methods complained of by it in this suit against William R. Warner & Company. I will ask you to refer to this list of products printed on page 560, Defendant's Record, and state your view respecting this question, in so far as these items have any bearing upon it.

MR. RAWLE: The question is objected to as irrelevant and immaterial and improper in every respect.

A. I would like to say that in the main these appear to be what may be termed competitive items. Some of these items in the column headed "Original" are entirely new to me. I never heard of them. The first item, Albolene, in which McKesson & Robbins are given as the manufacturer, is not, in the ordinary sense, a manufactured item at all. It is merely a colorless mineral oil, originally a Russian oil, I believe, but at times, at least, since the beginning of the European war, an American oil has been used. They have simply taken the oil as it comes from the refiner and bottled it under the name "Albolene," which I presume is a trade-marked title, and the title is the only thing about that product to which they could possibly claim any originality or exclusive rights. Petronol, Lilly, which is given as a similar product, is also simply a colorless mineral oil. We have always used the Rus-

sian oil, and when Russian oil was no longer obtainable the product was temporarily withdrawn from the market. We only claim rights in that product to our original title.

I note further down the list an Elixir Femella, Searle & Hereth, manufacturers. I have never seen or heard of this product until seeing it in this record. A product Femagen, Lilly, indicated as a similar item, is, as I recall, an original specialty of Eli Lilly & Company, gotten up by our Mr. James E. Lilly and given that coined title.

I have always felt that Lactopeptine was justly the property of the New York Pharmacal Association, and that they should have protected their rights in the product against all manufacturers. They did not, and it is now a product, not only common to perhaps hundreds of manufacturers, big and little, in this country, but has also found its way into the National Formulary, one of the books of standards made official by the Food and Drugs Act of 1906. The reason why I say I have always thought that the New York Pharmacal Association should have protected their rights to the product is that in its manufacture they colored it red to give it a distinctive appearance, and every manufacturer who afterwards made a similar product to meet the demand brought to him in one way or another, also colored their product red.

I note in this list several items made by one or another of the Warner associated houses which, since the beginning of this suit, we have taken out of our list following a conversation with Mr. G. A. Pfeiffer in which he stated that in those items he felt we were trespassing on his rights. This was the first suggestion from Mr. Pfeiffer that he felt we should withdraw these items or modify them that had come to my attention, and in withdrawing these items or modifying them to meet his views we only followed what has been our invariable custom whenever we have been advised

by other manufacturers that we have unwittingly trespassed in any way. The matter with Mr. Pfeiffer was handled by correspondence after he left Indianapolis.

At this point the taking of this deposition was continued until tomorrow morning, November 29, 1916.

November 29, 1916, 9 o'clock A. M.

The parties met pursuant to adjournment and the taking of the deposition of Charles J. Lynn was resumed as follows:

(Q9 was read to the parties by the stenographer, and the answer thereto.)

MR. RAWLE: The answer is further objected to as containing irresponsive matters, and containing matter which is irrelevant and inadmissible.

By MR. BRADFORD (resuming):

Q10. Referring again to Q9, being the last question asked you on yesterday, please state whether or not the methods of Eli Lilly & Company in marketing the preparations in this list correspond to the methods complained of by plaintiff in this case, and if not, why not?

MR. RAWLE: Objected to as calling for inferences, and not calling for facts, and as being inadmissible and irrelevant, and not proper for rebuttal, and further because the evidence which was produced by defendant was produced to establish the fact that all drug houses make a practice of imitating to a greater or less degree the products of other houses unless protected by law, and, incidentally, that this is the practice of the plaintiff.

A. They do not. The preparations named in this list under the head of "Original" are almost entirely those of what might be termed a general pharmaceutical character; I mean by that they they are mostly simple or ordinary pharmaceutical mixtures possessing no originality, many of which were known to the trade as ordinary pharmaceutical products prior to the time they were offered by these manufacturers under an original title. Often manufacturers will take an ordinary pharmaceutical combination and give it a coined title. This is done so that they may secure for themselves the results of any efforts they may put forth to promote the sale of that particular item. Perhaps the one exception is that of Lactopeptine, which I have already covered in my former answer. It is not the practice of Eli Lilly & Company to imitate or duplicate the specialties of other manufacturers, as has been stated. When we have unwittingly done so we have never hesitated to accede to requests to either discontinue or modify the product. We abhor this practice which, in the early days of my connection with the pharmaceutical business, was a somewhat common practice, and is today on the part of a certain class of pharmaceutical houses, and we object to its practice upon us just as much as we do the idea of practicing it upon others. In the present case—that is, referring to our differences with the William R. Warner & Company, when their activities in behalf of their imitation product, Quin-Coco, became noticeable, we immediately objected. At that time, and for some time afterwards, we had no knowledge of the fact that we had any redress at law, and so confined our efforts to secure relief to persuasion by letter and personal interview. Not until we were advised by counsel did we have any idea that we might have taken such a step as finally taken to secure the relief through the process of law, to which we felt we were justly entitled.

Q11. During the examination of witness, F. E.

Bibbens, on Monday certain samples of experiments made by him were introduced in evidence, and marked "Exhibits 1 to 10, inclusive." By whose direction were these experiments made and for what purpose?

MR. RAWLE: Objected to as irrelevant, both as to direction and purpose, and as not rebuttal.

A. They were made under my direction, and for the purpose of showing that other satisfactory and accessible articles of commerce could be used to hold the crystalline particles of quinine sulphate in suspension than chocolate. That was the primary object of these experiments and after the samples were made up some eight months ago they were bottled and sealed with a transparent parchment wrapper and examined only occasionally, as could readily be done through the parchment wrapper, to see if the quinine remained in suspension. It is no easy matter to develop an original pharmaceutical specialty. It frequently takes repeated experiments and often even after products of the kind are put on the market it is still necessary to further experiment in order to make them commercially successful. This was the case with Coco-Quinine itself. The samples submitted by Mr. Bibbens in so far as they were examined by us after their manufacture clearly show that in our experiments as far as made we were successful through other agents than chocolate in holding the quinine sulphate in suspension. Some of these products or samples may be, and undoubtedly are, ready now for successful exploitation as a pharmaceutical specialty. Others may possibly be found that require still further experimentation in order to properly balance all of the ingredients, and to perfect other features of the product beyond that of the suspension of the quinine sulphate.

Q12. I call your attention to a list of competitive preparations which was introduced in evidence on behalf of defendants, and at the suggestion of defendant's counsel, and ask you if you know what it is and to explain in reference thereto?

A. I have no way of identifying this particular exhibit, but it is similar at least to a list which unknown to me, and without my authority, was prepared and sent out to our salesmen perhaps a year or so after I became General Manager of the business, January 1, 1907. It had been in existence for possibly some months before I learned of it but when it was brought to my attention I immediately instructed that it be discontinued, and copies in the possession of our salesmen withdrawn, and to the best of my knowledge this was done. We do not now have such a list, nor has such a list to my knowledge been in the possession of our salesmen since I instructed that the list referred to be discontinued and withdrawn. In asking the young man who had put the list out why he did it, he said it was to save correspondence, having frequently had inquiries from travelers for the name of our item that would compete with some other item in the same field, made by some other house. He at first would send this list to a salesman in reply to such an inquiry, but shortly concluded to send a copy to each salesman, and when I reminded him that such a list was an absolute violation of the policy of Eli Lilly & Company because of the use to which an unscrupulous salesman would no doubt put such a list he replied that he felt that the statement with which he had headed the list made our position perfectly clear, and that with that statement the list would not be objectionable to the management. I could not agree with him and insisted that the list be immediately withdrawn. I recall he also further stated, and called attention to the fact that no comparison of prices was made, all of which knowledge he claimed was necessary for any salesman to have if he wished to push one product as a substitute for another, as in all such cases it was simply a question of price. I think this must have occurred during the latter part of my second year as general manager, near the close of 1908. It is of course possible that some of these lists were

not returned by the salesmen, and if the list in evidence is one of the lists sent out by us it probably is such a list.

Q13. As I understand it, then, this list was probably issued by the young man in question about a year after you became general manager, which would make it about the first of 1908, and by your orders was discontinued and withdrawn during the latter part of 1908. Is that correct?

A. That is correct.

Q14. You spoke of the fact that certain items previously listed in your price list were withdrawn following a suggestion or discussion of the subject with Mr. G. A. Pfeiffer. When and where did this discussion occur?

A. It occurred in the office of Bradford & Doolittle, then in the Lemcke Annex Building, this city, at the time we first began taking depositions in this case, on the first day.

Q15. You stated it was continued by correspondence. Have you the correspondence, or a copy thereof?

A. I have.

Mr. Bradford: Counsel for plaintiff asks counsel for defendant to produce the original letter dated May 3, 1915, from the Eli Lilly & Company, signed by Charles J. Lynn, Secretary and General Manager.

Mr. Rawle: The letter is produced.

Mr. Bradford: The letter is produced, and the examiner is asked to copy it into the record. It reads as follows:

"Indianapolis, U. S. A.
May 3, 1915.

Mr. G. A. Pfeiffer,
c/o Wm. R. Warner & Company,
Philadelphia, Pa.

Dear Mr. Pfeiffer:

I have just received from our manufacturing

department the following report of sales on the products named by you during our recent conference in this city:

	1914	To date
"Elixer Salicylic Acid Comp	5,902#	2,026#
Liquor Tritici	2,347#	360#
Guaiacol Comp.	2,836#	750#
Calomel and Bismuth Powder	26#	0
Tab. Bismuth and Calomel	14,100	7,000

"Instructions have been issued to advance our list prices on Elixir Salicylic Acid Compound to the basis of $7.50 list per gallon. At forty off to the trade this would net $4.50 which, as we understand the matter, will place our product in a position to compete with yours solely on its merits, eliminating the advantage of a better price. We do not understand that there is any other basis for your claim that we are taking any advantage, or overstepping the lines of what is entirely fair, in regard to this product.

"As to the other four items, we do not intend that any of them shall be sold as 'replacers' for the original products of your house. However, since you feel that such sale is, or may be, possible, we will discontinue, agreeable to your request, the manufacture of Liquor Tritici, Guaiacol Compound, Calomel and Bismuth Powder and Tablets Bismuth and Calomel. These four items will disappear from our next price list to be issued July 1st.

"In this connection we call this fact to your attention: We frequently have letters from physicians, quite a number of whom, for reasons good or otherwise, prefer our products, asking if we cannot supply a product of the therapeutic or medicinal value of some other product on the market. In cases where others apparently have no proprietary rights and where the situation seems

to justify it, we manufacture a product to meet the demand and offer it under a name of our own and on its own merits. We have no desire to infringe upon your rights, or the rights of others, and since you have suggested the opinion that we are poaching on your preserves in these matters, we are glad that you called the matter to our attention and are pleased to discontinue their manufacture.

"Trusting that this will show you that we have no desire to prey upon the product property rights of our friends, we remain,

Very truly yours,

ELI LILLY AND COMPANY,

CHAS. J. LYNN,

CJL—T *Sec'y and General Manager.*"

MR. BRADFORD: I also offer in evidence the original letter from Wm. R. Warner & Co., by G. A. Pfeiffer, Treas., dated May 7th, 1915, and the original letter from G. A. Pfeiffer, Treas. Wm. R. Warner & Co., dated June 3d, 1915, and ask the examiner to copy them into the record. They are as follows:

"Philadelphia, May 7th, 1915.

Messrs. Eli Lilly & Co.,
Indianapolis, Ind.
Gentlemen:

Attention Mr. Charles J. Lynn.

This will acknowledge your letter of the 3rd. After further considering same, should we have anything more to add, will write you.

Truly yours,

WM. R. WARNER & CO.,

G. A. PFEIFFER, *Treas.*"

"Philadelphia, June 3rd, 1915.

Messrs. Eli Lilly & Co.,
Indianapolis,
Indiana.

Attention of Mr. Chas. J. Lynn.

Dear Mr. Lynn:

Supplementing our letter of May 7th in reply to your letter of May 3rd, at our interview in Indianapolis when we were making an effort to adjust the pending suit, I said that certain Lilly products were similar to certain specialties in the Warner and S & H line, and had been marketed by your house after the Warner and S & H products were on the market.

Mr. Lilly then said in substance that he would be willing to discontinue such products, and the names of several of them were then mentioned, but neither Wm. R. Warner and Company, nor the Searle & Hereth Company have ever objected to those Lilly products, and have always claimed for themselves the same right as you exercised in those instances.

We would not therefore wish to be placed in the position of having 'suggested' or requested your withdrawal of the Lilly items to which your letter refers.

Truly yours,

G. A. Pfeiffer,
Treas. Wm. R. Warner & Co."

Mr. Bradford: I ask counsel for defendant if he will produce the original of a letter written by Eli Lilly & Company to William R. Warner & Company, dated July 1, 1915.

Mr. Rawle: I have it here.

Mr. Bradford: The letter is produced, and the examiner is asked to copy it into the record. It is as follows:

"Indianapolis, U. S. A.
July 1, 1915.

Wm. R. Warner & Company,
Philadelphia, Pa.

"Atten. Mr. G. A. Pfeiffer."

Gentlemen:

Your letter of June 3d in response to ours of May 3d was duly received.

A reply seems unnecessary, except that it may not be out of place to observe that your position, as expressed in this letter, differs from our understanding of your views as expressed orally at Indianapolis.

Very truly yours,
ELI LILLY AND COMPANY,
CHAS. J. LYNN,
CJL-T *Secretary and General Manager.*"

MR. BRADFORD: I also ask counsel for defendant if he will produce the original of a letter from Eli Lilly & Company to Mr. G. A. Pfeiffer, care Wm. R. Warner & Co., dated June 13, 1916.

MR. RAWLE: Mr. Pfeiffer does not find the original of this letter in the papers brought to Indianapolis. The copy may be substituted.

MR. BRADFORD: Pursuant to the consent of counsel for the defendant, a carbon copy of the letter referred to is here produced, and offered in evidence, and the examiner asked to copy it into the record. It is as follows:

"June 13, 1916.

Mr. G. A. Pfeiffer,
c/o Wm. R. Warner & Co.,
Philadelphia, Pa.

Dear Sir:

You are aware that we have discontinued the use of the word 'Hinkle' on our pill and tablet labels as well as in our price list, owing to the

representations you made to us, as you recall, during one of our conferences in Mr. Bradford's office, all of which is in line with our constant endeavor to be fair to our competitors. Our travelers are complaining that we are the only manufacturer not using the name 'Hinkle', but this is neither here nor there.

The occasion for this letter was to send you a piece of literature which has just come into our hands, advertising certain products of the Hinkle Pill & Tablet Company, Chicago. You may not be aware of the fact that there is such a concern and we are simply calling your attention to it as a kindly act. We do not know if there is a Hinkle connected with the institution and no doubt you will want to find out.

Very truly yours,"

CJL-T

Q16. Referring to the letters just offered in evidence, are they, or are they not, in line with the policy practiced by plaintiff in such cases?

MR. RAWLE: Objected to as irrelevant and immaterial, and as not effecting the issue here, and as not proper for rebuttal, and because the question is too general. If the facts are to be developed they must be brought out as facts.

A. They are strictly in line, although during my years as general manager of the business I can recall only two other similar situations. Some years ago Mr. Stauffen, the general director of Sharpe & Dohme, manufacturing chemists, Baltimore, general offices in New York, where Mr. Stauffen is located, and from where he wrote us, complained that our Pil A. S. B. & I. was too close a duplicate of their Pil Lapactic in which they claimed proprietary rights, and asked us to modify or change our pill in some way so that it could not be substituted on calls for their pill. While

at that time our pill was larger than that of Sharpe & Dohme, I immediately instructed that it be made still larger so that one could be easily distinguished from the other, so that a person used to buying and calling for Pil Lapactic, being familiar with its general appearance could not be deceived by having the Lilly pill supplied on his order for that of Sharpe & Dohme.

The other instance also occurred some years ago, and was a request from Parke Davis & Company, through their general manager, Mr. Swift, I think it was, that we discontinue entirely the manufacture of a product which we sold under the name of Solution Sanguestine Choloride, and which was a similar product to the Parke Davis & Company product known as "Adrenalin." Adrenalin is a patented product. Parke Davis & Company claimed rights both as to process and product, and while our product was made after an entirely different process from that of Parke Davis & Company, they claimed that we were nevertheless violating their rights in marketing a product of that kind made by any process. The same product was being made by several other manufacturers, presumably under the same impression as ours, that we had a right to make the product if we did not use their process, but in response to request from Parke Davis & Company we at once discontinued the manufacture and sale of our product, Solution Sanguestine Chloride. They later brought suit against another manufacturer making a similar product, who defended their right to the product made by their own process, but I understand that after several years of litigation the rights of Parke Davis & Company to both process and product were sustained.

Those were the only two instances since I became general manager of the business that I can recall where we have ever been requested by any manufacturer to change or modify or discontinue any product of ours other than the suggestion which came from

Mr. Pfeiffer after the beginning of this suit. I would like to say also that we took the first opportunity possible to make the changes and discontinuance that Mr. Pfeiffer indicated he thought should be done. We issued under date of July 1, 1915, a special edition of our price list. Owing to the state of the market we did not get out a general edition, as usual, for the entire trade, but got out this special edition for the use of the jobbing trade, and my recollection is in this edition these changes and discontinuances were made. These items do not appear also in the most recent edition of our price list, which came out about July 1st of this year. I would like to say further with reference to not all but several of these items named by Mr. Pfeiffer, that the formulas for the products were given us by Mr. Frank S. Hereth, who was in our employ as pharmacist, this being the same Mr. Hereth who was one of the founders of the Searle & Hereth Company of Chicago. His coming to us was some time after he severed his connection with the Searle & Hereth Company. I think Mr. Pfeiffer was no doubt justified in his suggestion, and certainly it was our pleasure to do what he thought, and we admitted by our action it was the right thing to do, as has always been our attitude toward all competitors.

Q17. Did Mr. Hereth make any claims respecting these formulas as to whether or not they were his, and he had a right to use them?

A. I cannot say as to that, but he certainly originated them.

At this point a recess was taken until November 29th, 1916, 2 o'clock P. M.

when a man will be upon such a familiar footing with his customer as to have entree to the prescription room or department. Then, in those cases, no doubt the order is written up back there.

XQ25. Do you think it likely a considerable number of druggists, who are customers of yours, might have stocked Quin-Coco for, say a year, without your astute salesmen finding it out, or some of them?

A. Not a considerable number, no, but many might have, and even though one of our salesmen had noticed a bottle of Quin-Coco, or three or four bottles of Quin-Coco, he might not have been alarmed or seen any reason for reporting the matter to us.

XQ26. I understand the first time you made known to the defendant that you were dissatisfied with their making their Quin-Coco product was verbally at an Atlantic City meeting of the Homilia Club, which occurred in the summer of 1909?

A. I am not sure whether the summer of 1909 or fall of 1909, but along in there somewhere.

XQ27. Are you willing to state positively, as a fact, that Quin-Coco was on the market for over two years before your company knew it?

A. No. We may have known it, and not thought much about it. We may not have had any occasion to become alarmed about it at that time.

XQ28. I will ask you to be very much more specific. Please assume that it was put on the market late in 1906. Are you willing to state as a fact you had no knowledge of its being on the market during the fall of 1908?

A. I do not know that I had no knowledge of it during that time; I have no recollection of that special knowledge of it at that time.

XQ29. Do you mean then it was so simple a matter you paid no particular attention to it?

A. It may have been. It may have been and probably was at that time. If the product was put on in

1906, as you state, that about that time it was gathering force, and that we were beginning then to worry about it, later coming to the point where we took it up with the Messrs. Pfeiffer.

XQ30. You testify that in say, 1909, you had not been aware there was any legal remedy. Was Mr. Bradford your counsel at that time?

A. I am not sure about that. He may have been, although I think not. I think that at that time our patent work was done by Arthur W. Hood, of this city, either Bradford & Hood or Arthur W. Hood.

XQ31. And the same lawyers at that time did your trade-mark work, did they?

A. Such as we had.

XQ32. You did not deem it of sufficient importance to consult your counsel on the subject?

A. We did not know we had anything to consult counsel about or we should have done so.

XQ33. You did not consult counsel about any rights you might have had, did you?

A. No, sir; we did not; at least not to my knowledge. I did not do it. What any other official of the concern may have done I have no knowledge.

XQ34. In referring to Lactopeptine as a product marketed by the New York Pharmacal Company, you seemed to me to have in your mind the idea of some "protection" for that product. Will you tell me what kind of protection you had in your mind?

A. That protection which would naturally follow priority and originality. As I have always understood it, and understand it now, they did develop or originate that product, giving it a distinctive title and a distinctive color.

XQ35. Do you mean protection by a patent or by a trade-mark, or what?

A. I don't know whether they are protected by patent, trade-mark, or one or the other, but I simply recognized them as the original makers of that article.

XQ36. Laying aside the Lactopeptine, I want to find out whether you have in your mind that the first originator of any medicinal preparation is entitled to any protection.

A. If he gives it something to distinguish it from other similar preparations, something that is non-essential to the product itself, I certainly think the manufacturer should be entitled to protection to the extent that the peculiar appearance or characteristic of his product should be respected.

XQ37. Is it not rather his brand or the name given the product which is entitled to protection?

A. In some cases it is the brand only that is entitled to protection, and in other cases, name only, but in many cases, without regard to the question of patent or trade-mark, the name and product in so far as any peculiarity of that particular product is concerned, should be given protection. I mean by that, as in the case of Lactopeptine, if a manufacturer makes a product and colors it red, and the purpose of such coloring is to give individuality to his particular product, then no other manufacturer ought to duplicate that product, even though he might be free to do it as a general pharmaceutical item, and color the product red as did the original maker.

XQ38. Do you not remember that at the Indianapolis interview, after this suit was begun, and the first testimony had been taken, in Mr. Bradford's office, you, or Mr. Lilly, criticised the defendants for marketing Quin-Coco, whereupon Mr. G. A. Pfeiffer said that if that was the case you could be criticised for certain products originally put out by Warner or some of their affiliated companies, is not that correct?

A. That is correct so far as you have gone.

XQ39. To clear up the record in regard to a list of competitive preparations marked "Lilly List of Competitive Preparations," is it not a fact that this particular four sheets of paper so marked were produced yesterday at this meeting by the plaintiff?

A. I don't know.

MR. BRADFORD: Plaintiff's counsel states that the list which he introduced yesterday afternoon was found by someone connected with the plaintiff corporation, and I believe at Mr. Lilly's direction. Just from what department of the plaintiff corporation this list came I am not able to state, but I assume that it is an authentic copy of the list that was at one time used, as testified to by the present witness.

THE WITNESS: I would like to add to my previous answer that I never saw to my knowledge that particular list under discussion until it was handed me this morning by our counsel.

XQ40. By the words "that particular list" do you mean to indicate those particular four sheets of paper?

A. I do.

XQ41. What position did Sparks fill in the Lilly employ, who you say was responsible for this list, and the distribution of it among the Lilly salesmen?

A. General correspondent.

XQ42. How old a man was he?

A. I think about fifty.

XQ43. How long after you first became aware of the preparation and issuance of these lists of "competitive preparations" did the occurrence you have just mentioned take place, in which you said you gave directions to discontinue the further giving of these lists to the salesmen?

A. Immediately.

XQ44. What actual knowledge have you of the extent to which your salesmen did in fact turn into the company their respective copies of this list of competitive preparations?

A. I have no knowledge whatever. When I issue instructions I expect them to be carried out, and they are carried out.

XQ45. Your instructions first were to discontinue sending out these lists to salesmen, and secondly, to call in those that had been given out?

A. Yes, but the instructions were both given at the same time.

XQ46. You had no more concern after that whether the lists had in fact been returned by the respective salesmen?

A. If I made it my personal business to see that every order I gave was carried out I could not retain my position.

XQ47. How many salesmen, including detail men, did you have at that time traveling about?

A. Well, I can only roughly approximate it, something slightly over one hundred.

XQ48. How many have you had during the last fifteen months at a time?

A. One hundred and fifty to one hundred and sixty.

XQ49. I take it you consider you have an intelligent staff of traveling men, don't you?

A. I certainly do.

XQ50. In calling on druggists, are they not supposed to know the prices at which the house markets its products?

A. They have to carry a price list to keep them informed. Changes are frequent, and change sheets are sent them at regular intervals as changes are made.

XQ51. If they are well equipped in salesmanship, as doubtless your's are, are they not supposed to have some knowledge of the prices at which competitive articles are listed and sold?

A. Some knowledge, yes, sir. A man picks up that sort of information as he covers his territory, and gradually adds to such a fund of information.

XQ52. Then your trained and experienced salesmen in soliciting a sale from a druggist, and having a copy of this list of competitive preparations before

him, is presumed to have some knowledge at least of the prices of competitive articles on this list, is he not?

A. Not at all, not all of them, comparatively few of them. I have been in the drug business for a good many years. I have been over twenty-one years with Eli Lilly & Company, and in glancing over that list this morning I saw many items there I never heard of before. I don't know who makes them, and certainly I don't know what they sell for now or ever did sell for.

XQ53. But it is many years since you were traveling salesman?

A. It is a good many years, but I keep in pretty close touch with what is going on. That is my business.

XQ54. One of your trained salesmen in soliciting an order from a druggist would have no trouble in ascertaining from the druggist what price he had paid for the competing article, would he?

A. Not if the druggist knew what it was worth, no.

XQ55. By "worth" or market value, do you mean selling price?

A. To the merchant, yes.

XQ56. Will you look at the letter from the defendant to the plaintiff on page 39 of D. R. You will observe that it speaks of a request of the Lilly Company to the defendant in regard to Quin-Coco. It also in the second paragraph admits that Coco-Quinine was original with your house, and states that the defendant made that same claim for four items on the defendant's list. Bearing these two facts in mind, please state whether any offer from the Lilly Company was made to the defendant to discontinue any of the items mentioned in that letter on page 39, until after this suit was begun?

MR. BRADFORD: The question is objected to on the ground that the matter inquired about was fully covered in the examination of Mr. J. K. Lilly yesterday, who was the person who carried on this

correspondence, and if specific questions relating to these letters were to be asked they should have been asked of him. The four items mentioned in the letter were all commented upon by Mr. Lilly in his examination, and ample opportunity given for obtaining any additional information concerning them in his cross-examination.

THE WITNESS: I have no knowledge of it. The letter is addressed to Mr. J. K. Lilly, and not myself, and I have no knowledge of it whatever.

XQ57. Did Mr. Lilly usually confer with you about such matters? Had you knowledge of this correspondence, and what was going on between your company and the Warner Company in relation to these matters?

A. In a general way, yes. I knew Mr. Lilly was protesting against the further marketing of their Quin-Coco and trying in some way to relieve the situation.

XQ58. And you were representing the company in these interviews in regard to this product when you met Mr. G. A. Pfeiffer in Atlantic City?

A. Yes. I was there attending a meeting of the Homilia Club.

XQ59. You were representing the company, were you not?

A. Yes.

XQ60. When you voluntarily offered the defendant in your letter of May 3, 1915, produced by you today, to discontinue four specified items, and to raise the price of one other, that is the first specific offer made to the defendants to discontinue any items on your list which were on the defendant's list before you marketed them. Is that correct?

A. That was the first offer of that kind that I made to the William R. Warner & Company, or to Mr. Pfeiffer, and that was in response to the first statement from him that had come to me that he thought we ought to do such as that?

XQ61. When, and in what form, did a statement come from "him to me."

A. I was present and took part in the conversation in Mr. Bradford's office. When Mr. Lilly and I left Mr. Bradford's office I told Mr. Lilly that I thought we should accede to the suggestions made by Mr. Pfeiffer without regard to the case at issue; that if there was any question in Mr. Pfeiffer's mind as to any wrong action on our part we ought to make it right, and I had no intention whatever of introducing this correspondence in this case until I found that in spite of the fact that we had agreed to do that, and had done it, that after Mr. Pfeiffer knew of it, he nevertheless persisted in putting those items into this record, as if at the time he put them there we were marketing them in opposition to his express wishes.

XQ62. Do you not know, and have you not just admitted that G. A. Pfeiffer never requested you to discontinue any of your products on the ground they had been previously Warner products?

A. No, I don't know, and I think I have not admitted any such thing. I am simply not clear as to whether he made the direct request, or whether it was merely a statement he thought it was something we ought to do. The end was the same in either case.

XQ63. Let me refresh your memory. At that interview there was a discussion as to the propriety on the part of the defendant company in putting out Quin-Coco. Thereupon, in the conversation, Mr. Pfeiffer called attention to the fact that Lilly & Company had put on the market three or four products originally put out by Warner & Company. Is not that the true fact as to what occurred?

A. No doubt that is true, so far as you have gone, but following that I am quite certain that Mr. Pfeiffer made it plain to us that he felt we ought to withdraw those items, or make the changes or modifications suggested.

XQ64. I hand you a letter produced by you this morning, dated June 3, 1915, from G. A. Pfeiffer, for the attention of Mr. Charles J. Lynn, and ask you whether this letter does not correctly state what happened at the March interview in Indianapolis?

A. No, I cannot say that does, because my distinct impression is that the suggestion was given that Mr. Pfeiffer felt we should withdraw and change those items, as we later did.

XQ65. Are you not mistaken. Did not the conversation begin with the suggestion that perhaps the differences between the two houses indicated by this lawsuit could be adjusted in some way, and that thereupon Mr. G. A. Pfeiffer suggested that if differences were being adjusted there would be a certain merit in having the Lilly house give up certain of its products which had been originated by defendant. Is not that correct?

A. I think the conversation did begin in some such way as that, and yet I do not see how I could have failed to take from what you quote as Mr. Pfeiffer's statement the thought that he felt that we were marketing certain products, which they felt belonged to them, and that we ought not to market. I took that as a direct suggestion from him that we ought to discontinue them or modify them as the case might be, and in spite of the fact that whereas it looked as though our differences might at that time have been settled, and it appeared before we left the room that they could not be, I made up my mind that we would do the right thing in any event.

XQ66. You have referred to Meyer Brothers of St. Louis, as acceding to your request to discontinue their chocolate quinine preparation, which they called "Quinico." Were they not at the second time they agreed to discontinue it in some financial trouble?

A. They were and are in the hands of a committee of trustees, representing the creditors.

XQ67. And might not the very high price of quinine had something to do with it?

A. Not in the slightest.

XQ68. But the price of quinine was very high at that time, was it not?

A. It was above normal, but not anywhere nearly as high as it had been earlier in the present year. And I would like to say further while Meyer Brothers Drug Company are in the hands of trustees representing the creditors they are discounting all their bills and have paid the notes due at the end of the first year.

XQ69. It appears in this record that H. K. Mulford Company of Philadelphia made a chocolate quinine preparation as early as 1904. When did you first hear of that being on the market?

A. I cannot say exactly, but no doubt soon after it appeared, within a year or two, but it never was much of a product, and while it was an imitation of our Coco-Quinine it was a poor imitation.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ70. Referring to the items enumerated in your letter of May 3, 1915, to Mr. G. A. Pfeiffer, which of the items, for which you were furnished formulas by Mr. Hereth, formerly of the Searle & Hereth Company, were originated by him?

A. Liquor Tritici and Guaiacol Comp.

RDQ71. As to the other three items, are they what are commonly termed general line items or specialties?

A. General line items.

Re-direct-examination closed.

Re-cross-examination (not waiving objections).

By Mr. Rawle:

RXQ72. I understand this letter of May 3, 1915, shows your house in 1914 only sold twenty-six pounds of Calomel and Bismuth Powder, and up until the date of this letter in 1915 you did not sell any of it. Is that correct?

A. Yes.

Mr. Bradford: Counsel for defendant requests counsel for plaintiff to permit him to take from the sample bottles Nos. 1 to 10, introduced in Mr. Bibbens' deposition a small quantity for the purpose of examination and comparison. This request is granted, and the bottles are given to counsel for defendant for this purpose.

Mr. Rawle: Counsel for defendant states that in view of the relative time in the case in which the witness Bibbens produced the ten sample bottles, he will examine the contents of these bottles, and ask the Court at the proper time to permit the result of this examination to be made known as a part of the case if desired.

Re-cross-examination closed.

Deposition Closed.

Chas. J. Lynn.

November 28, 1916.

The parties met pursuant to adjournment, and taking of depositions was resumed as follows:

Present: Same as November 27, 1916.

J. K. Lilly, being called as a witness on behalf of plaintiff, in answer to interrogatories, by Mr. Bradford, testified as follows:

By Mr. Rawle: Counsel for defendant states on

the record that he has recently come into possession of, and has now in his hands, a copy of a tabulated list of medicinal preparations, arranged in two columns. The first column contains a list of medicinal preparations originated and introduced and marketed by many various manufacturers other than Eli Lilly & Company, arranged alphabetically. Opposite each preparation, in Column One, appears the name of a Lilly product, thereby indicating that each Lilly product is medicinally or therapeutically similar to the corresponding product for preparation in Column One.

This list was obtained by defendant and handed to their counsel about six months after the defendant's case was closed. The date was August, 1916. Defendant's counsel is instructed that this list was, since August, 1908, furnished by Eli Lilly & Company to its salesmen and to the trade, and has been in regular use by Eli Lilly & Company in its business as part of its salesmen's equipment more or less of that time.

As it is an Eli Lilly & Company list of precisely the same significance as the Warner list offered in evidence by plaintiff, and marked "Complainant's Exhibit Document No. 3" (whatever plaintiff claims that significance to be) defendant's counsel calls upon plaintiff's counsel to produce an original of such list.

This notice and call is given before the examination of the president of the plaintiff company.

By Mr. Bradford: No objection is made to the introduction of this list, and for such use as defendant's counsel may wish to make of it, and with the consent of counsel for the defendant, it is here offered in evidence, not only for the purposes of defendant's counsel, but also to show the Court how inaccurate the statement by counsel for defendant just placed of record is. Said list produced by counsel for defendant, if he consents, is here offered in evidence and marked "Defendant's Exhibit, Comparative List." It is not offered, however, on behalf of plaintiff, but by defendant's request on behalf of defendant.

By Mr. Rawle: Counsel for defendant asks counsel for plaintiff if he is willing, without objection, to have Mr. Lilly, who is now on the witness stand, and the general manager of the company, Mr. Lynn, who has been noticed as a witness, cross-examined as to this list, and the use made of it by the plaintiff in its selling business. If the statement made by defendant's counsel in putting this copy of a list on the record is inaccurate, this will enable the inaccuracies to be corrected.

By Mr. Bradford: So far as inaccuracies in the statement by defendant's counsel is concerned, respecting this list, the list itself is sufficient evidence. So far as questioning the witnesses, Mr. Lilly and Mr. Lynn when he shall be called, as to this list, no objection is made.

By Mr. Rawle: Defendant's counsel considers that his call has not been answered and asks for an answer; namely, the production of an original from the papers of the plaintiff company, being willing, however, to accept in place thereof an admission on the record that the typewritten paper, containing three sheets, produced by defendant's counsel, is a true copy.

By Mr. Bradford: Plaintiff's counsel is unwilling to admit that the paper produced is a true copy, but is willing to have it compared with any original list in possession of plaintiff, and later state on the record the result of such comparison.

By Mr. Rawle: Defendant's counsel asks plaintiff's counsel if he declines to produce an original from the Lilly papers.

By Mr. Bradford: I do not, if such is in existence.

By Mr. Bradford:

Q1. You are the same J. K. Lilly who previously testified in this case, being the president of the plaintiff corporation?

A. I am.

Q2. Mr. G. A. Pfeiffer, when called as a witness for defendant in this case, in answer to Q78, page 19, Defendant's Record, and the following questions on pages 20 and 21, testified that your house puts out preparations similar to specialties put out by other houses, and subsequently to the putting out of such specialties by other houses, and he introduced a list of preparations put out by your house, comparing them with what he claims are specialties put out by other houses prior to the time when your named preparations were put out. This list is published on page 560 of Defendant's Record, to which I call your attention, and will ask you to go through this list, item by item and explain wherein Mr. Pfeiffer was in error, if at all, and in what respect, if any, the marketing of your preparations here named differs from the marketing of Quin-Coco by the William R. Warner & Company, as shown by the evidence in this case.

A. First, I would like to state that it is the policy of our concern not to infringe upon any proprietary rights that may be possessed by anyone exploiting a proprietary article.

Proceeding with this list: Albolene. The proprietors of the word "Albolene" have not the slightest proprietary right on colorless mineral oil, this being common property and a substance well known for many years prior to the exploitation of Albolene. Therefore, the only proprietary feature in this item is the name, which Eli Lilly & Company have never used, nor anyone else to our knowledge.

Analgesine. This is of foreign origin. French, I believe, it being a very well known compound of ingredients that have been used for generations, but brought into this country simply under a proprietary name. It is composed of petrolatum, menthol and thymol. Eli Lilly & Company have never violated any proprietary rights in this preparation.

Angiers Emulsion. A combination of petroleum oil with hypophosphites, a combination well known to, and used by physicians, and not original with Angier, and the only proprietary rights he has is in the name.

Antiphlogistine. Used in Germany fifty to sixty years ago; not original with the proprietors; being a poultice containing aluminum, silica, and other ingredients. The only proprietary rights possessed by the Denver Pharmacal Company, the manufacturers, is in the word "Antiphlogistine."

Arsenauro. A case of the same nature as the preceding. I believe now it is included in the National Formulary.

Bromidia. A combination of sedatives and narcotics made by Battle & Company, being a compound frequently prescribed by physicians prior to the adoption of the word "Brimidia." The proprietary rights in the word "Bromidia" have been recognized by everyone, but various combinations under various names of the same nature as the Bromidia formula have, and are and always have been common property.

Calenduline. A word adopted as a proprietary name to Glycerole Calendula, the origin of which is so remote that my memory does not serve me.

Calolactose. A proprietary word adopted by Searle & Hereth Co. many years ago for the well-known combination of calomel with bismuth. The only proprietary rights held by the Searle & Hereth Company was in the name "Calolactose."

Campho Penique. Similar case to the preceding.

Creo Terpin. I am not familiar with the formula of that preparation, and do not believe that the proprietors gave a complete formula with proportions, but Eli Lilly & Company have, for some years, marketed an elixir creosote and Terpin hydrate compound in response to calls for a preparation under that title, a formula with full particulars as to ingredients and quantities being given.

Castoria. It is a well-known fact that this formula is no longer proprietary, even if the exact formula were known. The original preparation known as "Pitcher's Castoria," made by Fletcher, now has competition from the Pfeiffer Chemical Company, even under the name "Castoria." Laxative Carminative, made by Eli Lilly & Company, is an ordinary formula of well-known ingredients and is not the same as the original Castoria.

Compound Digestive Powder. An ordinary mixture of well-known ingredients with a pharmaceutical title, and is not considered as possessing proprietary rights, as there is nothing distinctive or characteristic in the mixture or in the name. Generally regarded by reputable manufacturers as being common property.

Eczemacide. An ordinary mixture of well-known ingredients used for the purpose of an eczema lotion for many years, and the only proprietary rights, as far as I know, are in the word "Eczemacide."

Elixir Femella. It has no connection whatever with Femagen Lilly, the formulas being entirely different, and the formula for Femagen Lilly having been designed by Mr. James E. Lilly. The comparison, therefore, is not warranted.

Elixir Salicylic Compound Warner. An ordinary compound of well-known ingredients, given an ordinary pharmaceutical title and not considered by manufacturers generally as possessing proprietary rights. Mr. G. A. Pfeiffer, indicating to Eli Lilly & Company, that they considered that they did possess proprietary rights in the title, Eli Lilly & Company acquiesced and changed their title to an Elixir Acid Salicylic Compound; this, in deference to the desire of William R. Warner & Company, and not from the belief of Eli Lilly & Company that said Warner possessed any proprietary rights.

Essence of Pepsin, Fairchild. After liquid prep-

arations of pepsin had been on the market many years, the original liquid pepsin having been marketed by our Mr. James E. Lilly, of the firm of Lilly & Phelan, Evansville, Indiana, about the year 1869, Fairchild Bros. & Foster placed on the market an active, efficient preparation under the name of "Essence of Pepsin." While the liquid form of pepsin was not original with them, their preparation did possess certain peculiarities, and they gave it an ordinary title. Eli Lilly & Company refrained from making an essence of pepsin for over ten years after essences of pepsin had appeared upon the market in great numbers by different manufacturers. Still feeling that ethically, if not legally, Fairchild Bros. & Foster should have a monopoly of this preparation, we bought and sold the original Fairchild article. Upon discussing the matter with Mr. B. F. Fairchild, one of the proprietors, he stated that under the circumstances we were not justified in refraining from making essence of pepsin, and after this conversation we manufactured an essence of pepsin which now seems to have become common property, as the proprietors did not protect their rights as they might.

Glyco-Heroin (Smith). My memory does not serve me as to the origin of this compound, but it is a mixture of well-known ingredients that have been used by physicians for many years for the purposes mentioned, and Eli Lilly & Company, nor any other manufacturer, as far as I know, have infringed upon the title that Smith & Company selected for this compound.

Glyco-Thymoline. My knowledge of this compound is essentially the same as the preceding.

Grays Glycerine Tonic. A compound of well-known ingredients without originality in its selection or composition, and the only proprietary rights considered by manufacturers generally is in the title selected by the Purdue Frederick Company.

Guaiatonic, Searle & Hereth. I am not familiar with the working formula of Guaiatonic, Searle & Hereth, but I would consider that this combination of well-known ingredients that have been utilized by physicians for many years would leave the title as the only proprietary rights possessed by Searle & Hereth Company.

Fellows Hypophosphites. Combinations of the various hypophosphites had been known and used by physicians years before the introduction of this item by Fellows & Company. It has never been my understanding that Fellows & Company claim any proprietary rights other than the name "Fellows" to designate their particular product.

Hires Root Beer Extract. As far as I know, Mr. Hires did not originate the first root beer. He marketed a root beer under the name of Hires, but no one has ever considered that he had proprietary rights in a root beer, or a concentrated root beer extract. Considered by all manufacturers common property.

Lactopeptine, New York Pharm. Asso. In my judgment the proprietors of Lactopeptine possess, or did possess, proprietary rights in this preparation, both in naming and in the preparation itself, for the reason that in addition to the coined title, which no one has questioned, they gave their preparation a distinctive color and flavor to give it distinguishing characteristics. To my knowledge, however, they have never asserted these rights, and so many years have passed that the preparation has been introduced into the national authorities, and seems to have become common property. In common with all other manufacturers, Eli Lilly & Company make elixir lactated pepsin of the peculiar color desired by physicians, but the facts are as above stated to the best of my knowledge and belief.

Listerine, Lambert Pharmacal Company. Eli Lilly & Company are not informed as to the formula

of listerine, but antiseptic solutions containing certain volatile oils and other antiseptic ingredients were known and used years before listerine was placed upon the market. My belief is the only proprietary rights possessed by the Lambert Pharmacal Company reside in the title, but Eli Lilly & Company have never made any effort to duplicate the preparation, but make a competing article to fill the same field.

Liquid Peptonoids. To the best of my knowledge and belief the proprietary rights in this article reside in the title "liquid peptonoids." A solution of peptones in combination with other items is evidently common property and is not a parallel case to the present case where the preparation itself has been given distinctive characteristics as well as in the title.

Liquid Peptonoids with Creosote and Guaiacol. Same as preceding.

Maltine Combinations. In my judgment the proprietors of Maltine have never possessed, nor to my knowledge have they ever claimed proprietary rights in the combination of an extract of malt with other therapeutics. It goes without question that they possess the title "Maltine," which no one to my knowledge has ever infringed upon. In manufacturing malt extracts with combinations Eli Lilly & Company have never sought to deceive or duplicate in appearance, using a different extract of malt and presenting them to the profession on their own merits. Malt extracts and combinations were known and used many years prior to the establishment of the title "Maltine."

Milk of Magnesia, Phillips. I am not informed as to the origin of milk of magnesia or a preparation of this nature, but inasmuch as reputable manufacturers throughout the world have made milk of magnesia and used that ordinary pharmaceutical title for it I take it that the proprietors of Phillips possess rights only in the name of Phillips.

Passifloria, Daniel. This preparation is entirely

different and has no connection in similarity of formula with Lilly's Passolaria, the latter preparation having originated as far as title is concerned with Lilly & Company. The formula is an ordinary compound of well-known ingredients and is considered common property, inasmuch as no effort was made to give it distinguishing characteristics not possessed by the formula in its natural state.

Pepto Mangan "Gude." I am not informed as to the origin of this formula but it is composed of well-known ingredients used by physicians for many years, and the proprietors have never to my knowledge maintained any proprietary rights except in the title.

Pil Case. Cathartic Hinkle. This combination of well-known ingredients that have been used for many years was, I am informed, originally the prescription of Dr. Hinkle, and our understanding was that this prescription had been dispensed by many pharmacists; that William R. Warner and Company added them to their list. Other manufacturers, considering this an ordinary line item, responded to the demand and made the pill under the same item and formula as has been the case in thousands of other formulas. The William R. Warner & Company, however, having indicated to Eli Lilly & Company that they considered that they possessed a certain proprietary interest in the name "Hinkle," the original Dr. Hinkle being a relative of Mr. Warner's, we relinquished the use of this title in deference to their representations.

Resinol. Lilly & Company do not market a preparation under the name of "Resinol" or "Resinol Compound." Resinol, as made by the Resinol Chemical Company, is of a formula with which we are not familiar. Resorcinol, however, is a well-known ingredient of ointments both alone and in combination. Ointment Resorcinol Compound, Lilly, in no way infringes upon the rights of the proprietors of Resinol, for Resorcinol Compound, Lilly, is an ordinary com-

pound of well-known ingredients under a pharmaceutical title, and is not to our knowledge identical with the formula of Resinol, with which we are unacquainted. The Resinol Chemical Company do possess proprietary rights, no doubt, in Resinol, but not in the various combinations of Resorcinol.

Syr. Tolu & Heroin Co. An ordinary compound of well-known ingredients given a title of an ordinary pharmaceutical, with no particular characteristics either in title or product, and, therefore, considered by reputable manufacturers generally as common property.

Taka Diastase Liquid, Parke Davis & Company. The Liquid Diastase, Lilly, mentioned in connection with this item is an entirely different preparation, Taka Diastase Liquid being a preparation of Takamine's Diastase, made by the growth of certain molds, while Liquid Diastase, Lilly, is an ordinarily percolated product from malted barley and standardized as to diastatic strength. There can, therefore, be no comparison here where the products and titles are absolutely different.

Tr. Digitalis Fat Free. Making a Fat Free Digitalis is an ordinary pharmaceutical process, manufacturers generally have never considered the Searle & Hereth Company had any proprietary rights in the ordinary title Tr. Digitalis Fat Free, or in the process of making the same.

Tritica S & H, Searle & Hereth. This is a concentrated preparation of Triticum, or Couch Grass. The Searle & Hereth, no doubt, have proprietary rights in the name "Tritica," and it having been brought to us, and we becoming convinced that their proprietorship also followed into the product itself, it being much more concentrated and of distinguishing characteristics, we relinquished its manufacture and it is no longer on our list.

Wine of Extract of Cod Liver Oil with Malt and

Hypophosphites. This combination of well-known ingredients, to which no distinguishing characteristics whatever have been given, and the use of the ordinary pharmaceutical title, does not in the judgment of manufacturers generally constitute proprietorship. The only proprietary rights would be in the name Wampole for that particular product.

With the possible exception of an elixir lactated peptine, the particulars of which were given, none of the items in the above list are comparable with the present case, for in Coco-Quinine a distinguishing, non-essential characteristic was given the product to distinguish it from ordinary mixtures, and a distinguishing title also selected.

At this point the taking of this deposition was adjourned until November 28, 1916, at 2.15 P. M.

November 28, 1916, 2.15 o'clock P. M.

The parties met pursuant to adjournment and taking of depositions was resumed as follows:

Present: Same as in forenoon.

J. K. LILLY, recalled on behalf of plaintiff, resumed his testimony as follows:

By MR. BRADFORD:

Q3. Will you please explain on the record your understanding of the difference between what many witnesses in this case have referred to as "general line items" and "specialties," and which of the items in the list you have just testified concerning belong to the general line class, and which to the class of specialties?

A. A line item is an ordinary formula of well-known ingredients with an ordinary pharmaceutical or medical title. A specialty is supposed to be an article

in which the maker has proprietary rights either in the title or composition or both. As indicated in the detail description of the items on the list designated as "Defendant's Exhibit, G. A. Pfeiffer's List of Lilly Products," most of these are specialties in name or brand only, and where competing items are manufactured by Eli Lilly & Company our understanding is that they are general line items with us, and only proprietary rights exist in the titles to those who have selected said titles for such combinations.

Q4. By "pharmaceutical name" which you have used in your answers many times, I understand you to mean a purely descriptive name from a pharmaceutical standpoint. Is that correct?

A. Yes.

Q5. In the deposition of Mr. G. A. Pfeiffer, a witness for defendant, in answer to Q112, page 27, defendant's record, Mr. Pfeiffer refers to a number of chocolate or cocoa and quinine mixtures similar to Quin-Coco, as having been on the market for a number of years, some of which prior to the time Quin-Coco was marketed. I will ask you to refer to this list and state what you know about this subject.

MR. RAWLE: Question is objected to so far as it seems to call for his evidence.

A. There was no liquid preparation of quinine sulphate of a bitterless nature prior to the creation and marketing of our Coco-Quinine. There were some syrups containing the combined alkaloids of cinchona, in which the alkaloids in an insoluble form were suspended, but this is entirely different from the suspension of pure quinine sulphate as it is in Coco-Quinine. There was on the market tablets of quinine with chocolate in which the quinine was in the form of an insoluble tanate. This is entirely different than a suspension of pure quinine sulphate in a chocolate flavored syrup, as in Coco-Quinine. The first preparation of the same nature as Coco-Quinine, of which I had

knowledge, was known as Quin-Coco, William R. Warner & Company. Some of the preparations mentioned in the aforesaid answer were subsequently known to me and some were not.

Q6. Do you recall approximately when the preparation known as Quin-Coco was first called to your attention, and by whom, and under what circumstances?

A. My memory does not serve me as to the specific instance.

Q7. Did you ever make any protest to any of the officials of the William R. Warner & Company respecting their manufacture and sale of this item Quin-Coco, and if you did, to whom?

MR. RAWLE: Objected to as not proper for rebuttal.

A. Upon the occasion of a visit by Mr. G. A. Pfeiffer to my office in our laboratories, I expressed the desire that he discontinue the manufacture of this item Quin-Coco, but upon his stating that it was one of the assets which they purchased from the Searle & Hereth Company, he could not see his way clear to accede to my desire. Thereupon I dismissed the subject.

Q8. During the taking of Mr. Pfeiffer's deposition there was introduced on page 38 of defendant's printed record a letter purporting to be from you to Mr. Pfeiffer, to which I call your attention and ask you whether or not the oral interview by you with Mr. Pfeiffer was before this letter was written or afterwards?

A. I am not positive, but I should judge it was after my interview with Mr. Pfeiffer at my office. The letter was written by me after Mr. Pfeiffer's visit to my office.

Q9. How long, approximately, was it before this interview that your attention had been called to the Warner preparation and its sales on the market by the Warner Company?

A. I cannot answer that question. My memory does not serve me back of 1909.

Q10. Did you have more than one interview with Mr. Pfeiffer on this subject?

A. I met Mr. Pfeiffer later after the interview mentioned at Atlantic City. The matter was discussed in his presence at a meeting of the Homilia Club. The exact words of the conversation I do not recall.

Q11. Comparatively speaking, how have the products of the other houses referred to in Mr. Pfeiffer's answer Q112 been considered by you as taking the place in the market of Coco-Quinine?

MR. RAWLE: Objected to as irrelevant and inadmissible.

A. All of these preparations of which I have knowledge closely resemble Coco-Quinine, and could be used in the place of it with more or less success.

Q12. To what extent, comparatively speaking, so far as you know, has the sale of these other preparations been pushed in the same or in a similar manner to that used in pushing the sales of Quin-Coco?

MR. RAWLE: Same objections.

A. The sale of Quin-Coco was pushed with greater energy than any of the others of which we had knowledge, and comparatively little interference with our trade was discovered from any of the preparations other than Quin-Coco.

Q13. At the time this suit was brought you had knowledge of some of these other preparations being on the market?

A. I did.

Q14. Why was it decided to bring this action against William R. Warner & Company rather than against some of the other concerns named?

MR. RAWLE: Objected to as irrelevant and inadmissible.

A. Because Quin-Coco was the oldest preparation within our knowledge and had secured the largest volume of sales.

Q15. You have referred to the Homilia Club. This subject was also discussed by Mr. Pfeiffer in his deposition. I call your attention to Mr. Pfeiffer's testimony beginning with his answer to Q156 on page 43 of defendant's record, and ask you to read his answer and explain your understanding of the purposes and objects of the Homilia Club.

A. Mr. Pfeiffer's reply is correct and I might add that another purpose was to cultivate the best along ethical lines, and to obviate as far as possible unfair competition in trade.

Q16. There was introduced in evidence a booklet marked "Defendant's Exhibit Homilia Registrations", and Mr. Pfeiffer explained in reference to these registrations in the Homilia Club. I ask you to give your version of the purposes of these registrations and the significance of the different classes.

MR. RAWLE: Objected to, because the book speaks for itself and indicates in a note at the bottom of the page that Class A refers to name only, and Class B refers to registered name and formula.

A. When this list was first formed it was found impracticable to make it retroactive, that in considering the long list of preparations that were then made and claimed as specialties by each house could not be satisfactorily agreed upon. Therefore, everything previously made was thrown into Class A with the distinctive understanding by formal action of the Homilia Club that competitors would respect that registration not only in name but in substance also. Subsequent to this original action, all new items were classified in either A or B, according to the desires of the applicant and the action of the club, Class A then being protection in name only; Class B, both name and substance.

MR. RAWLE: Answer is objected to. If what the witness has stated is the result of Club action intended to have some significance, the minutes

must be produced. If it was merely the result of discussions between some gentlemen, it could have no legal weight. I understand that Mr. Lilly, the witness, was the registrar of the Homilia Club.

Q17. Do you recall about when the Homilia Club held its first meeting?

A. It must have been not long after the passage of the Food and Drugs Act of 1906, at the Waldorf Hotel, in New York City.

Q18. What bearing did the passage of the Food and Drugs Act of June 30th, 1906, have upon the meeting of this Club?

A. The formation of the Homilia Club followed several informal meetings of representatives of various manufacturing pharmaceutical houses to co-operate in meeting the requirements of the new Food and Drugs Act of June 30th, 1906.

Q19. I show you a booklet and ask you what it is.

A. This is the Fourth Issue of the list of preparations registered with the Registrar of the Homilia Club in the classes as agreed upon.

MR. BRADFORD: The booklet referred to is offered in evidence and marked "Plaintiff's Exhibit Homilia Club List of Registrations".

Q20. Do you know when this particular booklet was published?

A. Not the exact date, but I should judge about four years ago.

Q21. Is the Homilia Club still in existence?

A. No, not formally. It is merged now into the National Association of Manufacturers of Medicinal Products, which serves the purposes for which the Homilia Club was organized.

Q22. Will you please explain the methods employed by your house in selling or introducing your products to the medical profession and drug trade?

A. What is termed "line items" are simply placed

upon the list and find their sale through our regular organization of salesmen and through the ordinary purchases of our customers. Specialties such as Coco-Quinine, specialties in which we possess proprietary rights, such as Coco-Quinine, are sampled to physicians. Our salesmen, combination men, and strictly detail men call upon physicians demonstrating its merits and inviting their prescriptions. The preparation is also largely advertised in medical and pharmaceutical papers and circularized through the mails to druggists and physicians.

Q23. It has been suggested by Mr. Pfeiffer and some of the other witnesses for defendant that detail work is rather going out of fashion, and not either as popular or as much practiced as it once was. What is your view on this subject?

A. I cannot speak from an exact knowledge of other manufacturers, but we are doing more of such work every year, and it is now a large factor in our expense and seems efficient in the creation of demand for special items as well as the general line. I can also speak from exact knowledge that the largest pharmaceutical house in the world is doing more of this work than ever.

Q24. Referring to "Plaintiff's Exhibits, Sample Syrups, No. 1 to No. 10", inclusive, introduced during the course of Mr. Bibben's examination yesterday, will you please state whether the suspending agents used in their preparation, namely Mucilage of Quince Seed, Tragacanth, Gelatine, Gum Acacia, Dextrin, Mucilage of Irish Moss, and so forth, are substances obtainable in commercial quantities such as to enable a manufacturer to use them if he desired in the manufacture of these preparations on a commercial scale?

A. These are all articles of commerce easily secured, and are not so expensive in the proportions used as chocolate.

Q25. How would these preparations as a whole, I

mean the complete compound in each sample, compare in the expense of manufacture with the expense of manufacturing Coco-Quinine?

A. Slightly less than Coco-Quinine.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle (without waiving objections):

XQ26. Referring to "Defendant's Exhibit, G. A. Pfeiffer's List of Lilly Products", was not Antiphlogistine introduced and marketed by the Denver Chemical Company prior to Lilly & Company marketing Osmosum, Lilly?

A. Yes, many years before.

XQ27. Is not your product Osmosum, Lilly, competitive with Antiphlogistine in the market?

A. It is.

XQ28. And is it not a similar product in character and effect to Antiphlogistine?

A. Used for the same purposes, but different composition in some respects.

XQ29. Can you say in what respect it differs?

A. The proportions of glycerine and aluminum silicate are different, and Osmosum, Lilly, contains methyl salicylate, which is not, to my knowledge, contained in Antiphlogistine.

XQ30. Have you knowledge of the formula and ingredients and constituents of Antiphlogistine?

A. Not as to proportions or as to all of the ingredients.

XQ31. Can you give substantially the formula of your Osmosum out of your head, if desired?

A. I could not give the complete formula.

XQ32. Do you pretend to know the formula of Antiphlogistine?

A. Not as to every ingredient, only in the principal ingredients, namely, glycerine and aluminum silicate.

XQ33. Are not Antiphlogistine and your Osmosum recognized and understood in the trade as similar preparations?

A. Yes, of a similar nature and use.

XQ34. Did not the exploitation of Antiphlogistine by the Denver Chemical Company create a market in the United States for that class of preparations?

A. Yes, it enlarged the demand materially.

XQ35. And to a certain extent, introducing a competitive article by your house, you got some of the benefit of that market?

A. Undoubtedly.

XQ36. Was not Glyco-Heroin introduced and exploited by Martin H. Smith & Company before Eli Lilly & Company marketed its product "Glycerole Heroin Comp."?

A. Yes.

XQ37. And isn't it, your said product, competitive with the Smith product?

A. Yes.

XQ38. And is it not of a similar nature in character and effect to the Smith product?

A. Not identical in formula, but of the same general nature and for the same use.

XQ39. Is it not recognized in the trade as being a similar article?

A. Yes.

XQ40. And did not the exploitation by Martin Smith & Co. of Glyco-Heroin create a market in the United States for that class of preparations?

A. It materially enlarged the demand for such preparations.

XQ41. And to a certain extent, at least, your Glycerole Heroin Comp. got some of the benefit of that market, did it not?

A. Yes.

XQ42. Could you, if desired, give the formula of your Glycerole Heroin Comp. out of your head?

A. No, not out of my head, but I could give it from our records.

XQ43. Of course, you do not pretend that you could give at this moment the formula of Smith's Glyco-Heroin, do you?

A. No.

XQ44. Was not Tincture Digitalis Fat Free introduced and marketed by Searle & Hereth before Lilly & Company introduced and marketed its Tincture Digitalis Fat Free, Lilly?

A. Yes.

XQ45. And is not your said product in competition with the Searle & Hereth said product?

A. Yes.

XQ46. And are not they similar in character and effect?

A. Yes.

XQ47. And so understood in the trade?

A. Yes.

XQ48. And you understand that the exploitation of Searle & Hereth of its said product created a market in the United States for that class of preparations?

A. I do not know that, but it evidently was a factor.

XQ49. And perhaps it is true your house shared somewhat in that market when it introduced its said product?

A. Yes.

XQ50. Was not Guaiatonic introduced and marketed by Searle & Hereth before Eli Lilly & Company had marketed its product under the name of Guaiacol Comp. Lilly?

A. Yes.

XQ51. And is not Guaiacol Comp. Lilly competitive with Guaiatonic, Searle & Hereth, in the market?

A. Yes.

XQ52. And similar in character and effect, one to the other?

A. Yes.

XQ53. In your opinion did the exploitation by Searle & Hereth of its product Guaiatonic, create or help to create in the United States a market for that class of preparations?

A. It was a factor.

XQ54. And, perhaps, your house shared somewhat in that market?

A. Yes.

XQ55. Could you, if desired, and out of your head, at the present moment, give the formula of Guaiacol Comp. Lilly?

A. No, sir.

XQ56. And, of course, you could not of the Searle & Hereth Guaiatonic?

A. No. I could produce records.

XQ57. Was not Elixir Salicylic Comp. introduced and marketed by William R. Warner & Company, the defendant, before Eli Lilly & Company manufactured and marketed Elixir Salicylic Acid Comp.?

A. Yes.

XQ58. And is not your said Elixir Salicylic Acid Comp. competitive with Elixir Salicylic Comp. of Warner?

A. Yes.

XQ59. And similar in character in effect, one to the other?

A. Yes.

XQ60. And so understood by the trade?

A. Yes.

XQ61. How far did the exploitation by Warner & Company of their Elixir Salicylic Comp. create a market in the United States?

A. Being considered a general line item, it was no doubt a great factor in increasing this line of formula.

XQ62. And probably your article, when introduced, had some share in that market, is that right?

A. Yes.

XQ63. Could you now, if desired, and offhand, give the formula for Elixir Salicylic Acid Comp.?

A. No.

XQ64. And, of course, you could not for the Warner product?

A. No.

XQ65. I have now asked you a series of questions in relation to five or six of the preparations contained in this Pfeiffer list of Lilly products, and I now ask you to state in general terms whether the remaining items in column 1 of this list were not introduced and marketed by the respective houses named in column 2, before the respective Lilly products in column 3 were put on the market?

A. Possibly all of these in column 1 were introduced by the people in column 2 previously to the listing by Lilly of the preparations in column 3 with the possible exceptions of Elixir Femella, which, as stated in testimony, is not the same as Femagen; Maltine Combinations; and Liquid Diastase; with the possible exception of those three.

XQ66. Then in your opinion, having carefully looked over the list, those are the only exceptions which you make to your answer?

A. As far as I know.

MR. RAWLE: Defendant's counsel, having at the morning session called upon plaintiff's counsel to produce an original from Eli Lilly & Company's papers of a certain list which defendant's counsel himself produced this morning, now asks for a specific answer to his call and asks whether plaintiff's counsel will produce such an original list from that source.

MR. BRADFORD: Counsel for plaintiff states that he has been unable to verify the correctness of the list submitted by counsel for defendant, but produces a similar list herewith furnished him by

plaintiff as a copy of a list that was at one time used in their business. This list is also offered in evidence and marked "Defendant's Exhibit, Lilly List of Competitive Preparations".

XQ67. In this list which has just been produced on call, marked "Lily List of Competitive Preparations", is the second name, printed in capitals, in respect to each item, the Lilly product, and the name preceding it, printed in ordinary type, the name of the product of the other house?

A. Yes, these have the names of the competing items.

XQ68. In what years, approximately, did Eli Lilly & Company use this list, or a similar list in its business?

A. I cannot answer that question but it was such a list as has not been used for a great many years.

XQ69. Can you state approximately when it was used or when you began to use it?

A. No.

XQ70. Was its use discontinued more than five years ago?

A. I should judge longer than five years ago. Of course, some salesman might have kept such a list in his possession for less than five years.

XQ71. Then by saying it has not been used for a certain number of years you mean no more than to say you have not issued new editions of it; is that correct?

A. Yes.

XQ72. But you have not required the salesmen to turn in their old copies, have you?

A. I cannot say that, I do not know. New men are not furnished with it.

XQ73. Who would know when it was used?

A. Mr. Lynn might possibly locate the years. He has been in closer touch with the selling department.

XQ74. Would Mr. Caperton know?

A. Possibly.

XQ75. Might it have been in use, say, six years ago, and for four or five years prior to that?

A. Possibly so.

XQ76. When it was in use, were copies of it handed to your salesmen as part of their outfit?

A. Yes.

XQ77. Were copies of it sent to the jobbers with whom you dealt?

A. Not to my knowledge.

XQ78. Did the salesmen distribute it to the jobbers?

A. No, sir; for the salesmen were furnished but with one copy.

XQ79. Please compare this list as produced with the G. A. Pfeiffer list at page 560 D. R., and state whether or not a number of the items of the Pfeiffer list are not found on this competitive list just produced?

A. I see there are a number of items on the Pfeiffer list that are on this list.

XQ80. Are the Lilly items on this competitive list "Specialities"?

A. There are a few items that we would term "Specialties", but in the main they are what we term "General line items".

XQ81. Please pick out the specialties.

A. Kreseptol, which, since this list, has been discontinued. Acetoform Dusting Powder. Cas-Cathartic. Prunicodeine. Passolaria. Formaseptol. Femagen. Laxalithia. All the other items are what we term "General line" items.

XQ82. About how many specialties is your house marketing now?

MR. BRADFORD: Objected to as incompetent, irrelevant and immaterial, and not cross-examination, having no bearing on the direct-examination or on the examination based upon this list of competitive preparations which has been introduced, without objection by plaintiff.

A. We have very few items that could be called specialties, and upon which we claim proprietary rights. The exact number I could not give without a study of our list.

XQ83. You have yourself, when examined in chief, defined "Specialties". I will ask you whether you mean to say that specialties with your house are only those things upon which you assert a proprietary right, is that correct?

A. That is correct.

XQ84. Have you not about twenty pages of your catalog devoted to a list of specialties numbering probably one hundred items or more?

MR. BRADFORD: Objected to as incompetent, irrelevant and immaterial.

A. What you refer to is Part 2 of our list which consists of miscellaneous general line items and a few specialties. The heading of that section of our catalog may be a little misleading. As you will notice it says "Miscellaneous Specialties". It should be more specific and say "Miscellaneous Preparations and Specialties", because all of the preparations in that Part 2 are not specialties, and it has been corrected for the next list.

XQ85. Looking at this competitive list, were not a considerable number of the items therein introduced and exploited by other drug manufacturers before Lilly & Company introduced and marketed its corresponding items in this list?

A. That is entirely too blanket a question to be answered by yes or no. Many of these Lilly preparations have been in use and manufactured by all manufacturers for so many years that their origin is unknown to me.

XQ86. Are the Lilly items in this competitive list similar in character to the corresponding items manufactured by another house?

A. Not in all cases. They are designed simply to

occupy the same field and to compete for the field, and are not made identical in color, character and formula, except in certain cases where it is an ordinary formula put up in an ordinary way under a pharmaceutical title.

XQ87. I think you said this morning that the formula for Pitcher's Castoria was secret. Is that correct?

A. I will answer that question this way. If I did state the formula was unknown, I should have qualified by stating it was unknown to me. Castoria is a patent preparation upon which the patent has run out and the formula as disclosed in the patent is known.

XQ88. Do you know who introduced and marketed Pill Evacuant?

A. Parke, Davis & Company were the first to make that formula under that name.

XQ89. I see in Eli Lilly & Company's catalog of 1916-17 on page 46 a title under Pills as follows: "Evacuant, see A., S., B. and I., Lilly." What was the reason for putting this title in your catalog at that place?

A. In common with all other manufacturers, that formula is made under various titles. We formerly listed that pill as Pill Evacuant, but on the formation of the Homilia Club it came to our knowledge that Parke, Davis & Company originated that title and considered that they had proprietary rights in it. We discontinued the use of the word Evacuant on all of our labels and simply made a cross reference to the new formula.

XQ90. And Parke-Davis lists this item as Pill Evacuant, do they not?

A. They do.

XQ91. Do you know what drug houses make a preparation called Little Devils?

A. I do not. The origin of that term is so ancient that my memory does not serve me.

XQ92. You do not know who makes it?

A. No.

XQ93. Do you market a product under that name?

A. We do not. There is a couple of laxative pills called L. D. No. 1 and L. D. No. 2, I suppose because we were too cultured to say "Little Devils". I do not know the origin of that.

XQ94. Do you know what house markets it?

A. I do not and never did.

XQ95. You have spoken of proprietary rights. What do you mean, what kind of a "right"?

A. That is a general term, as I use it, to indicate originality of substance, ingenuity, and originality in presentation and exhibition, and again it may be a proprietary right in a matter of a coined name.

XQ96. Of course, if the article were covered by United States patent, it would be a proprietary, would it not?

A. Yes.

XQ97. If the name of the product were covered by a registered United States trademark, it would be a proprietary within your understanding, is that correct?

A. Yes.

XQ98. Are there any other classes of protection than those two in your mind when you use this term?

A. Yes. In my opinion, and I think it has been demonstrated, that proprietary rights may exist outside of patents and trademarks and registrations.

XQ99. Does the term specialty mean much more than that the house whose specialty it is said to be, is using extra efforts to push it on the market?

A. Yes, and I think it means many other things. It means in many instances the question of proprietorship even though it may not be pushed with great energy. There may be several kinds of specialties, proprietary and non-proprietary. For example, we make a specialty of manufacture of empty capsules in a large way, and push them energetically, but have no proprietary rights. This would be a non-proprietary specialty. Alcresta tablets of ipecac is a type of what I mean in the way of a proprietary specialty.

XQ100. For what reason are they proprietary?

A. In that they were invented by us and the only method of giving ipecac alkaloids by the mouth without giving nausea.

XQ101. You mean it was patented by your house?

A. This product bears no direct patent as yet. I believe that would be our property whether patented or not.

XQ102. Is Alcresta a coined name, or does it indicate an ingredient?

A. It is purely a coined name and means nothing.

XQ103. When a particular product has been a specialty of one house and a lot of other houses have marketed the same product, or a similar product, do you consider it is to be called a specialty in respect to the first house and a line in respect to the others?

A. It depends entirely upon the nature of the preparation and the title employed. If it is an ordinary pharmaceutical preparation, made up of well known ingredients, without any ingenuity or invention displayed, it is not generally considered proprietary. If the title is of an ordinary pharmaceutical or medical nature, manufacturers and the trade generally consider it common property. If, however, the manufacturer should use for this ordinary compound a coined name or title, it is generally conceded he has proprietorship in that particular title.

XQ104. By a "title of an ordinary pharmaceutical or medical nature" do you mean to include what is generally called a descriptive title; namely, a title made up of the names of some or all of the ingredients?

A. Yes, that is one sort of a title of that nature.

XQ105. I think you spoke this afternoon of chocolate quinine preparations put out by various competitors of yours, and I think you said that the defendants were the first to put out such a product. Mr. Mulford, of H. K. Mulford & Company, of Philadelphia, has testified they put out a "Syrup Quinine with Chocolate,

H. K. Mulford Company", in February, 1904. Do you know anything about this (referring to D. R. page 439, XQ50)?

A. I do not. If that be true, I know nothing of it.

XQ106. Was not that date of February, 1904, some time prior to the time at which you heard of Quin-Coco, Searle & Hereth, being on the market?

A. Evidently from the testimony it was between two and three years before I heard of the Quin-Coco, but I heard nothing of the Mulford preparation.

XQ107. You have testified in chief as to the Homilia Club. Was not that club to a certain extent organized for the purpose of regulating what you considered undue competition among members and in the trade, and the imitation of products and specialties and properties of one house by another?

A. It was not for the purpose of regulating competition in the trade along ordinary commercial lines. It had, as you stated, as one of its principal objects, a cultivation of fair business methods regarding the competition of specialties and certain items.

XQ108. I understand the mischief you sought in this Club to remedy was the copying in one house of the products of another house in what seemed considered an unfair way, is that correct?

A. That is true, one of the objects.

XQ109. How many years did it last, approximately?

A. Seven or eight years—until the National Association of Manufacturers of Medicinal Products was formed.

XQ110. It was not very active in its later declining years, was it?

A. No; the objects had been largely secured through the registration system.

XQ111. I understood you to say that by common consent you did not persist in applying your registration system to the products of one house which had

been imitated by another house prior to the organization of the Club?

A. That is true. At the same time, it was the declared policy that such efforts would not be increased, and, in fact, should be reduced, which turned out to be the case.

XQ112. By efforts I suppose you mean imitations, do you not?

A. Yes. As an indication of what I have stated above, note in the little volume entitled "Fourth Issue, Adrenalin and Preparations" listed in Class A by Parke, Davis & Company, it is well known these items are thoroughly covered by patents and indicate that such items even were thrown into Class A along with other items established before the registration system was inaugurated.

XQ113. But if they were patented, they needed no protection?

A. No, sir.

XQ114. You have testified today as to Lilly & Company abandoning the marketing of Tritici, Lilly. When did you cease to market this product? Was it not after this suit was begun?

A. Yes, and occurred as the result of conversation had with Mr. Pfeiffer in which he indicated in this and some other items we were infringing upon his proprietary rights. While not acceding these, it has always been the policy of our house to accede to such reasonable requests by our competitors.

XQ115. Mr. G. A. Pfeiffer produced, when a witness in this case, copies of letters written to you. When he was on the stand, I called for the production of the originals of these letters if they were in your possession. Can you now produce those originals?

A. I can not.

XQ116. Have you made search for them?

A. We made a diligent search and cannot find them. I am perfectly willing to accept the copies, but we are unable to locate the originals.

Cross-examination Closed.

Re-direct-examination.

By Mr. Bradford:

RDQ117. Referring to several of the items in the Pfeiffer list on page 560, defendant's record, you spoke of the exploitation of these items by the houses named in the second column as probably resulting in an enlargement of the demand. This, I take it, means that similar preparations were already on the market, and that there was a demand for such preparations prior to the time when the preparations under these particular names were advertised by the parties named. Is that correct?

A. Yes. It has always been the policy of our house not to make these preparations mentioned in the third column until the demand became general, and manufacturers generally were making them.

RDQ118. In introducing your preparations to the profession, did you rely upon the demand created by your competitors, or did you seek by your sales methods to create a demand for your own preparations?

A. We rarely put any sales effort on these competitive preparations other than specialties, rather answering a demand than creating it.

RDQ119. This demand came to you in what way?

A. Merely in the course of business from druggists and physicians throughout the United States.

RDQ120. Referring to Catalogue, Part 2, in which you stated the heading might be more or less misleading, is this catalogue intended for use of the laity or merely for the salesmen and druggists?

A. For the use of salesmen, druggists and physicians.

RDQ121. Confined to such use, the title used would not probably be misunderstood, would it?

A. No.

RDQ122. What was the purpose of the list of competitive preparations which has been introduced for defendant's benefit?

A. It was for the information of our salesmen and detail men, when finding the trade or physicians using quantities of competing preparations we could present the merits of our preparations that were designed to fill the same needs. In no case were these preparations intended as substitutes, as clearly indicated at the heading of the list in question.

RDQ123. Why was it discontinued?

A. If my memory serves me right, it was discontinued for the reason our men paid too much attention to this list and took their efforts from other and more important products.

RDQ124. May it be true that specialties can be designated by peculiar physical appearance as well as by distinctive names and original formulas?

A. Yes, that is not an uncommon method of giving the preparation some distinction to take it out of the ordinary line of pharmaceutical preparations.

Re-direct-examination closed.

Re-cross-examination.

By Mr. Rawle (without waiving objections):

RXQ125. You said that you did not sell certain competing preparations as substitutes, but would it not have been possible for a druggist to have bought them to use in place of the similar product of other houses?

A. Not as a general rule. A very few of the ordinary kind have the same appearance, such as Petronol, Lilly, not being a manufactured product, has the same appearance as Albolene. It is a natural mineral oil. But in very few instances are the physical properties of such nature that they could be used in deliberate substitution. No effort was made to make our preparations so that they could be substituted.

RXQ126. But after all, is not the question of deliberate and dishonest substitution by retail druggists on a prescription, or over the counter, a mere matter of honesty of that particular druggist, in the long run?

A. Not altogether. It is a question of his honesty in the main, but of course he must have the weapons to use in order to substitute one preparation for another formula. In other words, the preparation must so closely resemble the original that he could use it to deceive. This is where the manufacturer has some responsibility.

RXQ127. But the honest druggist does not use the weapon, does he?

A. No.

Re-cross-examination Closed.

Deposition Closed.

JOSIAH K. LILLY.

CERTIFICATE.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN EQUITY.

No. 1355.

THE ELI LILLY AND COMPANY, a corporation,

vs.

WM. R. WARNER & COMPANY, a corporation.

STATE OF INDIANA,
COUNTY OF MARION. } *ss.*

I, A. C. Rice, a Notary Public in and for the County of Marion and State of Indiana, DO HEREBY CER-

TIFY: That, pursuant to notice and agreement of counsel, I was attended at the office of Bradford & Doolittle, 1104-5 Fletcher Savings & Trust Building, in the City of Indianapolis, and State of Indiana, by E. W. Bradford, Esq., on behalf of complainant and Francis Rawle, Esq., counsel for defendant, on the days and dates hereinbefore stated; that the forenamed witnesses, Frank E. Green, C. J. Thurman, Francis E. Bibbins, John E. McCambridge, Sr., John E. McCambridge, Jr., Charles J. Lynn and Josiah K. Lilly; who were of sound mind and lawful age, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the above entitled cause, and that they thereupon testified as is above shown; that the depositions by the witnesses Francis E. Bibbins, John E. McCambridge, Sr., John E. McCambridge, Jr., Charles J. Lynn and Josiah K. Lilly, subscribed as above set forth, were taken down stenographically by N. E. Metcalf and reduced to writing by him under my direction; that the depositions by the witnesses C. J. Thurman and Frank E. Green, subscribed as above set forth, were taken down stenographically by myself and reduced to writing by me and said depositions were read over by the said witnesses and subscribed by them, and that all was so done at the place above specified and at the times set forth, and that said depositions were written and signed in the presence of myself and counsel for complainant, with the exception of the depositions of John E. McCambridge, Sr., and John E. McCambridge, Jr., which by consent of counsel were sent to the respective witnesses for signature and were signed by them.

I FURTHER CERTIFY THAT each of the above witnesses resides at a place more than one hundred miles from the place of the trial of this cause.

I FURTHER CERTIFY THAT the exhibits as cited, were offered in evidence and marked by me as specifically noted in the foregoing depositions and that

the said exhibits thus noted and marked have, pursuant to a stipulation by counsel for the respective parties, been delivered to counsel for complainant to be retained and produced in accordance with the stipulation in that behalf contained.

I FURTHER CERTIFY THAT I am neither attorney or counsel for any of the parties in said deposition or caption named, and am in no wise interested in the result of said cause.

WITNESS MY HAND AND OFFICIAL SEAL at Indianapolis, in the State of Indiana, this 26th day of December, 1916.

A. C. Rice,
Notary Public,
(Seal) Marion County Indiana.
My commission expires June 3, 1920.

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

No. 1355. December Term 1914.

IN EQUITY.

THE ELI LILLY AND COMPANY, a corporation,
Plaintiff,

vs.

WM. R. WARNER & COMPANY, a corporation,
Defendant.

DEPOSITIONS OF WITNESSES, IN REBUTTAL, ON BEHALF OF PLAINTIFF.

Washington, D. C., January 15, 1917—11 a. m.

Met pursuant to notice and agreement of counsel.

Present:

MR. E. W. BRADFORD, on behalf of plaintiff, and
MR. FRANCIS RAWLE, on behalf of defendant.

RALPH E. MCCORKLE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Ralph E. McCorkle; age 25; Atlanta, Georgia;

retail druggist; a partner in firm of Atkins Park Pharmacy, 854 Highland Avenue, Atlanta, Georgia. I have been a retail druggist for three years.

Q2. Has any drug salesman at any time endeavored to sell you a preparation called Quin-Coco, and if so, will you relate the circumstances, stating when the incident occurred, who the salesman was, and what he said to you on the subject?

By Mr. Rawle: Objected to as not proper for rebuttal.

A. Mr. Jack Wilson, a salesman for Wm. R. Warner & Company, was in my store the first part of December, 1916, and offered Quin-Coco as a substitute for Coco-Quinine, stating that it had the same appearance and the same formula as Coco-Quinine. He offered it at about the half price of Coco-Quinine. He said it could be used for Coco-Quinine, to fill calls for Coco-Quinine, to be used as a substitute for it. That is about all about Quin-Coco. He had several other preparations I could tell you about that he offered as substitutes.

By Mr. Rawle: Objected to because inferences and not facts are stated.

Q3. What other preparations?

By Mr. Rawle: Objected to as not rebuttal and as irrelevant.

A. Fluid viburnum as a substitute for Hayden's Viburnum Compound, and also Glycerole Thymol as a substitute for Glyco-Thymoline, and also A. B. S. & I. pills as a substitute for lapactic pills, Sharpe & Dohme. In fact, his chief talk in selling his pharmaceuticals was that they were offered as substitutes for other preparations recognized as standards.

Q4. With what Lilly man have you talked about this case and when?

A. Mr. W. R. Bell, the Lilly representative at Atlanta, on two or three occasions, the first time about

the first of this month, and probably two or three times since.

Q5. What did Mr. Bell promise in reference to your expenses or other compensation for coming to Washington to testify?

A. That my expenses were to be paid and pay for any time necessarily lost.

(Direct-examination closed.)

Cross-examination.

By Mr. Rawle, without waiver of objections, and now giving notice of motion to strike out the deposition for reasons given:

XQ6. When did you reach Washington and when do you expect to leave Washington on your return provided you finish your testimony by 1 o'clock?

A. Last night about 10.30, and I expect to leave at once after I finish my testimony.

XQ7. Had you before the date mentioned ever had dealings with Jack Wilson, the Warner salesman?

A. Yes, sir.

XQ8. For how long a period before then?

A. About six months.

XQ9. How many calls had he made on you at which you were present?

A. About three.

XQ10. How many calls since the one you have referred to?

A. None.

XQ11. At the call that you have mentioned were you doing the buying or your partner, or both?

A. I was doing the buying, by myself.

XQ12. How long did the interview last at that time?

A. About an hour.

XQ13. What time of the day?

A. About twelve o'clock.

XQ14. Was the talk between you sometimes interrupted by other matters coming in?

A. Yes, sir.

XQ15. Quite frequently?

A. No.

XQ16. Did he go over his entire line of Warner and Pfeiffer and Searle and Hereth perfumery goods, with you?

A. Not all of them.

XQ17. Did he go over a large part of them?

A. Yes, sir.

XQ18. When he offered you Fluid Viburnum, did he say that it was the same thing or similar to Hayden's Viburnum Compound, or words to that effect?

A. Yes.

XQ19. And is that substantially what he said about those two preparations?

A. Yes, sir.

XQ20. I mean is that substantially all that he said about those two preparations?

A. No, sir.

XQ21. What else did he say? Please give his exact words?

A. Well, I can not give his exact words, but about what he said.

XQ22. State his words as near as you can?

A. He stated that it was the same formula and that it came up to the requirements that Hayden's Viburnum Compound is.

XQ23. Have you now stated substantially all that he stated about the Viburnum?

A. He offered as an inducement to buy this article a much cheaper price.

XQ24. Have you now stated all that he said about the Viburnum in comparison with the Hayden Viburnum?

A. Yes, and what I have told before as to what was said about it.

XQ25. It is my right on cross-examination to ask

you to restate just what Wilson said to you. I shall have to ask you again to state the substance and as near as you can the exact words used at this interview regarding Viburnum?

A. He asked if we carried Hayden's Viburnum Compound and was told yes. He showed me a label of Fluid Viburnum and stated it was the same thing at a cheaper price.

XQ26. When he showed you the Viburnum label was it pasted in a blank book somewhat like the one I now show you?

A. I can not say definitely whether it was exactly like that or not.

XQ27. When he was offering you his various items did he use a blank book with the labels pasted in substantially like the one I am showing you?

A. Yes.

XQ28. And did he run through the successive pages and call your attention to some or many of the labels as he turned the pages over?

By Mr. Bradford: Objected to as immaterial and not cross-examination, and this applies also to the last previous question.

A. Yes.

XQ29. Give me an idea of about how many pharmaceuticals in his line he called your attention to and offered to sell you?

A. I can not give an idea about the number he mentioned to me.

XQ30. Were there as many as fifty or more than a hundred pharmaceuticals?

A. Possibly fifty or more.

XQ31. How long did he talk about each of them?

A. I do not recall.

XQ32. On an average as much as half a minute?

A. More.

XQ33. Had you never bought any of his line before?

A. Yes.

XQ34. Were you not familiar at that time with his pharmaceutical line more or less?

A. No.

XQ35. Not at all, did not carry any of them.

A. No.

XQ36. If the entire interview lasted only an hour and was sometimes interrupted how could you give a minutes to each of fifty or more pharmaceuticals and besides that go over his whole line more or less?

A. I did not state the exact time that the interview took place. It may have lasted longer than I have stated.

XQ37. How much time did you consume on Quin-Coco?

A. A short while.

XQ38. More or less than a minute?

A. Yes, more than a minute.

XQ39. And Wilson told you that Quin-Coco was just like Lilly's Coco-Quinine, did he?

A. Yes.

XQ40. And did he say it was cheaper?

A. Yes, sir.

XQ41. Now please state just what he said about Quin-Coco?

A. He asked if I carried Coco-Quinine and I said yes. He said I have it in Quin-Coco, being the same stuff under a different name.

XQ42. Go ahead.

A. That is about all I can recall.

XQ43. I take it that you knew that he was a Warner salesmen, did you not, and not a Lilly salesman?

A. Yes.

XQ44. Did he show you the Quin-Coco label in his blank book?

A. Yes.

Cross-examination closed.

Re-direct-examination.

By MR. BRADFORD:

RDQ45. Did he tell you how you could dispense his preparation Quin-Coco and if he did what did he say?

By MR. RAWLE: Objected to as leading and as an improper question to ask the witness on re-direct-examination after he has been fully examined in chief and cross-examined and after he has stated that he had given all that was said by the salesman at that interview.

A. He stated it was the same stuff as Coco-Quinine.

RDQ46. Did he tell you that in selling it or dispensing it you should use a label similar to the one he showed you in his book and sell it under such a label?

By MR. RAWLE: Objected to as leading and because the witness has already stated on his cross-examination all that was said by the Warner salesman at the interview and that it is therefore improper to push the witness any further.

Mr. Bradford here shows the witness the blank book with labels pasted in it, produced by Mr. Rawle.

A. No.

RDQ47. How did you understand from what he did say to you that he intended you to sell his preparation if you bought it?

By MR. RAWLE: Objected to for the same reasons and because the witness' understanding is not evidence, but only the witness' statement of what the salesman said to him.

A. As a substitute for Coco-Quinine.

RDQ48. Is Mr. Wilson a comparatively new man in that territory?

A. Yes.

RDQ49. How long so far as you know has he been representing Wm. R. Warner & Co., in that territory?

A. To my own knowledge about eight months. I mean that is about the time that he called on me first, about eight months ago.

RDQ50. Who was the Warner representative in that territory before Wilson?

A. I think it was Mr. Nottingham, I am not positive.

Re-direct-examination closed.

Re-cross-examination.

By Mr. Rawle:

RXQ51. State what words he used which gave you to understand "that he intended you to sell his preparation" in the way you have mentioned?

A. I understood it by him stating that it had the same appearance and was the same formula as Coco-Quinine.

Deposition Closed.

Ralph E. McCorkle.

L. S. James, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. L. S. James; age 27; Atlanta, Georgia; retail druggist. I have an interest in the store of Marshall and Pendegrast, located at 156 North Moreland Avenue, Atlanta, Ga. I have been a retail druggist for seven years.

Q2. Has any drug salesman at any time endeavored to sell you a preparation called Quin-Coco, and if

so, will you relate the circumstances, stating when the incident occurred, who the salesman was, and what he said to you on the subject?

By Mr. Rawle: Objected to as not proper for rebuttal, the subject matter constituting an essential part of the plaintiff's *prima facie* case and having fully been gone into there.

A. Yes, sir. Mr. Wilson was his name, a salesman for Wm. R. Warner & Co. He called on us about the 20th of May, 1916. He came in with his samples as usual. He asked us if we sold Lilly's Coco-Quinine. I told him we did. He said, "Well, I have it." He reached in his sample case and pulled out a little sample. He said I have it at about the half the price you pay for Lilly's. He shook the bottle and said "You can't tell it from Lilly's." The next thing he asked me if we sold lapactic pills. I told him we did. He showed me a sample from his case and said that he had them for which we could get them at a great deal less price than Sharp and Dohme's. Next he asked me if we sold Hayden's Viburnum Compound. I told him we did. He said he had the identical Hayden's at a much less price than we had to pay for Hayden's Viburnum Compound. He also said that the Hayden's Viburnum people had had a suit against them and that they had won out in the case and had found his preparation to be identical with theirs. He also stated that he had a cod liver oil preparation similar to Wampole's and better.

By Mr. Rawle: The answer is also objected to in so far as it is volunteered.

Q3. Did he say anything respecting how you should or could dispense his preparation Quin-Coco if you bought it. If so, what did he say?

By Mr. Rawle: Same objection and because the question is leading, the only proper question being as to what was said.

A. He said that we could dispense it on orders for Lilly's Coco-Quinine, either on prescriptions or over the counter.

Q4. How long has Mr. Wilson been representing Wm. R. Warner & Co., in the Atlanta territory, so far as you know?

A. About twelve months to my knowledge.

Q4. Do you remember who had the territory before Wilson, I mean, as the Warner representative or salesman?

A. Mr. Nottingham, I think.

Q6. Who asked you to come here to testify today?

A. Mr. W. R. Bell, the Atlanta representative of Lilly.

Q7. When did you first talk with Mr. Bell on the subject of testifying in this case?

A. It was just after Mr. Wilson had been around to see us, about a month after, about June 1916.

Q8. When did Mr. Bell first ask you if you would come up here to testify?

A. About two or three weeks ago.

Q9. How many times have you talked with him about what Wilson said to you on this subject?

A. About two or three times.

Q10. What did Mr. Bell promise you respecting what you should receive if you came up here in the way of compensation or expenses?

A. He said that my expenses would be paid and that I would be paid for my time I lost from my business.

Direct-examination Closed.

Cross-examination.

By Mr. Rawle, without waiver of objections:

XQ11. What other pharmaceuticals besides Lapactic Pills and Hayden's Viburnum did he call your especial attention to as you say he did to those two items?

A. There were a number that he tried to sell, the

general Warner line; Lithia tablets, Glycerine Tonic, Sloan's Liniment.

XQ12. Were they all goods that were competitive with similar goods of other makers?

A. All makers make similar pharmaceuticals; some have specialties.

XQ13. State all that he said to you about his pills that were just like lapactic pills, S. & D.

A. He said that we might sell them on orders for lapactic pills; also that they would cost us about half as much as lapactic pills, and that we could tell no difference in them.

XQ14. Did you buy any of his pharmaceuticals?

A. Yes.

XQ15. Do you believe that it is honest in the drug business, when a pharmaceutical of one house is specifically called for to dispense a similar pharmaceutical of another house, without saying anything about it, either to a customer or on a prescription?

A. I do not.

XQ16. And you would not like to have it known that your drug store did that sort of thing, would you?

A. No, sir; we don't practice it.

XQ17. Then if Wilson made any suggestion to you that you should do such a dishonest thing, how did you show him that you resented the suggestion?

A. I just told him we did not care for it.

XQ18. By "it" did you mean the particular item he was then talking about?

A. I meant all the items that he offered.

XQ19. I thought you said that you bought some of his items and that they were competitive goods?

A. We bought Cod Liver Oil and Glycerine Tonic. We have a number of calls daily for cod liver oils.

XQ20. And the Warner Cod Liver Oil was similar to some other make, was it not?

A. That is what Wilson said.

XQ21. And as to Glycerine Tonic there were similar preparations of other houses were there not?

A. I think that all pharmaceutical houses make a glycerine tonic.

XQ22. And perhaps Wilson told you that his glycerine tonic was similar to the preparation of other houses?

A. I don't know whether he said it was similar to that of other houses, but that he had a good glycerine tonic compound.

XQ23. And did not other houses market a glycerine tonic preparation?

A. Yes, and they have different names for them. Some are glycerinated gentian and some call them gentian and glycerine and some glycerine and gentian.

XQ24. How long did the entire interview last?

A. About thirty minutes.

XQ25. Were there interruptions during the interview?

A. None.

XQ26. In those thirty minutes did he go over his entire line of pharmaceuticals, pills, and elixirs, specialties, &c.?

A. I have not noticed of what his entire line consists of, but I don't think he could go over them in thirty minutes.

XQ27. Did he have a blank book with his labels pasted in it like the one I hand you and did he work from that turning over the pages with the reading matter facing toward you across the counter?

By Mr. Bradford: Objected to as immaterial.

A. He had a similar book and also had a sample case containing many articles. Yes, he worked from both the label book and the sample case.

XQ28. How much time did he spend in talking about lapactic pills and his similar preparation?

A. I should say five minutes, not more than that.

XQ29. How long did he spend on his viburnum preparation similar to Hayden's?

A. Not over five minutes.

XQ30. How long did he spend on his cod liver oil and glycerine tonic respectively?

A. Not over five minutes each.

XQ31. How long did he spend over Quin-Coco? He now has left only ten minutes for the rest of his line, including Quin-Coco?

A. About the same.

XQ32. Did he take up his perfumery line?

A. No, sir.

XQ33. Did he take up Sloan's Liniment?

A. He asked if we needed any.

XQ34. How long did he spend on that?

A. About one minute.

XQ35. Did he call your attention to and offer to sell you as many as a hundred different items?

A. No, sir.

XQ36. How many approximately?

A. About four or five.

XQ37. Didn't he turn over the pages of his label book?

A. Part of it.

XQ38. Did he tell you that his Quin-Coco was a similar preparation to Lilly's Coco-Quinine?

A. Yes, and that it could be dispensed on orders for Coco-Quinine.

XQ39. Give the exact words that he used?

A. You mean in regard to Coco-Quinine or Quin-Coco?

XQ40. State the exact words that he used in trying to sell you his Quin-Coco? State the entire conversation on that particular preparation?

A. First he asked if we sold Lilly's Coco-Quinine. I told him we did. He said, "I have it", and reached into his sample case and brought out a sample that looked very much like Coco-Quinine, and that it would cost us about half as much as Lilly's Coco-Quinine.

XQ41. Have you now stated all that he said about it? If not, please proceed?

A. I think that is all.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ42. Do you mean by your last answer that that answer contains all that Wilson said to you on this subject, or that your previous answers contain the whole story?

By Mr. Rawle: Objected to as leading and as improper for re-direct-examination, the witness having been fully examined and cross-examined.

A. I meant that what he said on the last answer and on the first answers is all that he said to me. I meant the last answer and all that I have said before.

Re-direct-examination closed.

Deposition closed.

L. S. James.

George Martin, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows:

By Mr. Bradford:

Q1. Are you the same George Martin who has heretofore testified on behalf of plaintiff in this case?

A. I am.

Q2. After the conclusion of your deposition previously given in this case you mentioned in a conversation with me that Mr. Harry Fritch had had a conversation with you on the Friday evening previous at your home in Philadelphia on the general subject concerning which you were interrogated. Will you please relate the circumstances of Mr. Fritch's call on you and the substance of what was said to you by him on that occasion?

A. On Friday night previous to my giving testimony Mr. Fritch called at my house and said to me, this is as near as I can remember, "I have called either

to refresh your memory or to see how far back your memory goes." He then told me how I was brought into the case by his testimony, going over the circumstances in connection with his experiments with Coco-Quinine. I told him at the time that I was not positive that I did or that I did not bring this subject up and he related certain circumstances in connection with the experiments which I do not recall, while I might have been instrumental or the cause of having the experiments made. I do not know. As far as I can remember there was nothing said at that time with reference to my being a witness in this case.

Q3. And you told him then that you could not recollect the circumstances which he endeavored to recall to your mind?

By Mr. Rawle: Objected to as leading and as not merely asking for what was said.

A. I did.

Q4. Has Mr. Fritch been a frequent caller at your home in recent years?

A. This makes the second visit in eight years. He called shortly after I left the Warner people about eight years ago, and his next call was the call I have just testified about.

Direct-examination closed.

Cross-examination.

By Mr. Rawle, without waiver of objections:

XQ5. Do you remember that Fritch did make some experiments on a tasteless quinine preparation before the Pfeiffers came to Philadelphia, which you have said was July, 1908?

By Mr. Bradford: Objected to as not cross-examination, as improper and irrelevant.

A. No, I don't remember any experiments that were made on Coco-Quinine or chocolate quinine.

XQ6. Do you know of any that were made after the Pfeiffers came to Philadelphia, in July, 1908?

Same objections.

A. No, I don't know of any experiments being made then. In fact it is hardly likely they would make any experiments then because the Pfeiffers brought their preparations with them.

XQ7. What person connected with the Lilly company first talked with you about this case?

A. Mr. Smith and Mr. Grove both called on me, may be six months or a year ago, I don't remember when it was. As far as I can remember it was last Spring some time. Mr. Smith is the Lilly representative in Philadelphia and Mr. Grove is a salesman under Mr. Smith.

XQ8. How often have you seen either Smith or Grove?

A. I think I have seen Mr. Smith twice and Mr. Grove once after he called on me originally in reference to coming to Washington as a witness.

XQ9. You mean that you originally saw Groves last Spring?

A. Yes, he and Smith called to see me together.

XQ10. And talked to you about this case?

A. Yes.

XQ11. Then just before you came to Washington to testify Groves called again?

A. Yes.

XQ12. And was not Groves here in Mr. Bradford's office the day you testified in this case?

A. Yes.

XQ13. Did he come down here with you on the train?

A. Yes.

XQ14. Who arranged for your coming down here today?

A. Mr. Bradford; by letter.

XQ15. Expenses and compensation paid by plaintiff?

A. I judge so.

XQ16. You used to work for Smith, Kline & French?

Objected to as immaterial and irrelevant and not cross-examination.

A. Never.

By Mr. Rawle: Objection is made to the entire deposition as not rebuttal, the entire matter having been gone into on the *prima facie* case by Groves and on the defendant's case by Fritch, and as irrelevant.

Deposition closed.

Geo. Martin.

By Mr. Bradford: Counsel for plaintiff states that after the conclusion of the witness' former testimony counsel for defendant said to him that he had neglected to ask the witness what Lilly men he had been talking with about this case and that he would like to ask him a question or two on this subject. Counsel for plaintiff readily acquiesced and added that he would like also to ask him what Warner men had been talking with him about the case and explained that the fact that Mr. Fritch called had come to his knowledge since the witness' deposition was closed. Thereupon counsel for defendant replied after consultation with Mr. Fritch, who was with him, that we need not bother about recalling the witness, that we could put the facts in by stipulation. The witness has been recalled because of the difficulty in reaching an agreement by stipulation.

By Mr. Rawle: Defendant's counsel deems it hardly necessary to say upon the record that, until after Martin deposition was closed and the meeting adjourned, he had no knowledge that

Fritch had called on Martin, and he further states professionally that his clients had no knowledge of the fact until he, counsel, disclosed it to them some days after the meeting.

By Mr. Bradford: Counsel for plaintiff states to counsel for defendant that Mr. Charles J. Lynn, General Manager of the plaintiff corporation, left Indianapolis yesterday on a train due in Washington at 8.46 this morning; that just before noon he received a telegram from Mr. Lynn dated at Harrisburg, Pa., stating that the train was then four hours late. It is now 3.30 and nothing further has been heard from him. Counsel for plaintiff expected to recall Mr. Lynn for the purpose of asking him some additional questions.

By Mr. Rawle: Defendant's counsel being obliged to leave Washington on the 4 o'clock train, after an explanation by counsel for plaintiff as to the additional evidence intended to be offered by Mr. Lynn's proposed deposition, stipulates, but subject to objection to the evidence, as follows:

That, if Mr. Lynn were present, he would testify that some months ago, Fairchild Brothers and Foster adopted the name "PEPSENCIA" as a coined or trade name for their product Essence of Pepsin, and that such product has been marketed under such name since that time, the exact date not being known to him.

Further, that in reference to the samples of experiments introduced in the Bibbins deposition, the same have been examined since the date of his deposition in Indianapolis (November 29, 1916) and that Numbers 7, 8, 9 and 10 have been found to have acquired a more or less (some more and some less) bitter taste, showing that further pharmaceutical experimentation is necessary to perfect these specific samples before they can be offered as commercial products, but that others particu-

larly those numbered 2, 4, 5 and 6, are found to be in perfect condition, thus proving to his satisfaction that they are already perfect pharmaceutically, and in condition to be offered as commercial products; that this is the first time these preparations have been examined, except as to "suspension" characteristics (which could be observed through the parchment wrapper) since they were made in March, 1916, when the bottles containing them were sealed with transparent parchment wrappers and placed on shelves in the laboratory of Eli Lilly and Company in Indianapolis; that the above mentioned recent examination was made from portions of the same lots made up in March, 1916, and part of which were bottled, kept and introduced in evidence as said exhibits during the taking of said Bibbins' deposition as aforesaid; and, further, that it is nearly always necessary to subject new pharmaceutical preparations of the general character of the one in question to time tests before it can be known definitely whether or not they will keep perfect for long periods, but that in making the experiments in question, the only purpose in mind was to show that the preparation can be made of a large variety of colors and flavors and yet of a character to hold the quinine crystals in suspension; that the suspension mediums used in the various experiments submitted are still thought to be entirely satisfactory for that purpose, and that in addition to samples numbers 2, 4, 5 and 6, which are in perfect condition, samples numbers 1 and 3 are in a fair condition, and, while not as perfect as they should be, are from a pharmaceutical standpoint as good, or better, than the majority of the chocolate quinine preparations, samples of which have been introduced by defendant; and that the results of these ten experiments are far above the average inasmuch as the usual ex-

perience is that many experiments are required to produce a single success.

Further, that he would identify a letter received from counsel for plaintiff on December 9, 1916, as follows:

"December
Seventh
1 9 1 6.

Eli Lilly & Company,
Indianapolis, Ind.
ATTENTION: Mr. Chas. J. Lynn,
General Manager.

Dear Mr. Lynn:

When we took our testimony at Philadelphia, and introduced the old bottle of Coco-Quinine, which was formerly in the store of Mr. Watson of Bristol, the question arose as to how long this bottle had been in his store. He states that he had had it in his store for five or six years at least, and probably more.

In examining the bottle, Mr. Pfeiffer observed your serial number on the label and suggested that this would identify when the particular bottle was made. I agreed with Mr. Rawle that I would write you, giving you the serial number, and from this you could ascertain from your records when the bottle was actually made. It is on the small label on the back of the bottle headed 'NOTICE' containing the guarantee under the Food and Drugs Act. On the bottom of this label it is stated, 'This article was perfect when bottled, if not so when received, advise us, giving the following

No. 42:1191—14786'

Will you kindly have this matter investigated and advise me what the facts, respecting this matter, are, so far as they can be ascertained from your records?

Yours very truly,
(Signed) E. W. Bradford."

Further, that he would identify his reply to said letter, written on December 9, 1916, as follows:

"December 9, 1916.

Mr. E. W. Bradford,
Washington, D. C.

Dear Mr. Bradford:

Answering your inquiry of December 7th, our records show that Coco-Quinine lot #14786 was made November 14, 1908.

I might explain to you that the number following the dash is the mark of identification for the particular lot of product, while the numbers preceding are the bottler and bottling numbers.

Very truly yours,
ELI LILLY AND COMPANY
(Signed) Chas. J. Lynn,
Secretary and General Manager."

By Mr. Rawle: This stipulation is made subject to an objection to that part of the stipulated evidence relating to the 10 Bibbins' samples as not proper for rebuttal and also because Lynn is not an expert and because Lynn does not appear to have seen or examined the samples of chocolate quinine preparations made by competitors; and also to that part relating to the act of Fairchild Brothers and Foster as irrelevant. Notice is also given of a motion to strike the stipulated evidence from the record and that counsel for defendant will at the proper time after plaintiff's rebuttal is finally closed ask leave of the court to produce in evidence the results of an expert examination of the 10 Bibbins samples.

By Mr. Bradford: Counsel for plaintiff notifies counsel for defendant, this 9th day of February, 1917, as he has notified him previously by letter, that Mr. Charles J. Lynn was in his office when

he returned there from the Examiner's office immediately following the close of the depositions on January 15, 1917; that he has submitted the stipulation appended to said depositions to witness Lynn, who has carefully read and approved the same. Also, that plaintiff's testimony in rebuttal is now closed.

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

No. 1355. December Term, 1914.

IN EQUITY.

THE ELI LILLY AND COMPANY, a corporation,
Plaintiff,

vs.

WM. R. WARNER & COMPANY, a corporation,
Defendant.

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } *ss.*

I, Charles E. Riordon, a Notary Public within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of Ralph E. McCorkle, of Atlanta, Ga., L. S. James, of Atlanta, Ga., and George Martin, of Philadelphia, Pa., witnesses

on behalf of plaintiff, in the above entitled cause, were taken before me pursuant to notice and agreement of counsel, at my offices in the Washington Loan & Trust Building, Washington, D. C., on Monday, January 15, 1917, commencing at eleven a. m., and concluding the afternoon of the same day; that each of said witnesses was by me first duly sworn in accordance with law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and by Mr. Francis Rawle, attorney for defendant, as appears in the record; that the deposition of each of said witnesses was read over and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit.

In testimony whereof I have hereunto set my hand and seal this 15th day of January, 1917.

CHARLES E. RIORDON,
(Seal) *Special Examiner.*

IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN EQUITY.

December Term, 1914. No. 1355.

THE ELI LILLY AND COMPANY,
Plaintiff,

vs.

WM. R. WARNER & COMPANY,
Defendant.

ORDER OF COURT.

Before THOMPSON, *J.*

Upon hearing the motion of defendant for leave to introduce sur-rebuttal testimony, on the first day of May, 1917, and upon agreement of counsel, pursuant to the suggestion of the court and in order to relieve the court of the necessity of reading the testimony in the case at this time to decide the merits of the questions raised, it is ordered this 7th day of May, 1917:

That defendant may recall Dr. George M. Beringer, as a witness, to be examined respecting certain samples produced at the examination of Francis E. Bibbins, and offered in evidence by plaintiff following Q21 of Bibbins' testimony, page 1057, plaintiff's Printed Record, and respecting the testimony of said Bibbins.

That defendant may recall S. J. Hagaman, as a

witness, to be examined respecting the testimony of Charles S. Lebo and Samuel H. Bell, witnesses for plaintiff, relating to certain interviews and transactions between said Hagaman and said Bell; also respecting the testimony of Earl R. Peabody, another witness for plaintiff, relating to certain interviews and transactions between said Hagaman and said Peabody.

That defendant may recall Charles E. McNulty, as a witness, to be examined respecting the testimony of Earl R. Peabody, a witness for plaintiff, relating to certain interviews and transactions between said McNulty and Peabody; also respecting the testimony of Jesse N. Greene, another witness for plaintiff, relating to certain interviews and transactions between said McNulty and said Greene.

That defendant may recall S. J. Nottingham, as a witness, to be examined respecting the testimony of Francis M. King, a witness for plaintiff, relating to certain interviews and transactions between said Nottingham and said King.

That defendant may recall James W. Wilkins, as a witness, to be examined respecting the testimony of Elizie H. White and William G. Walker, witnesses for plaintiff, relating to certain interviews and transactions between said Wilkins and one John F. Whitley and themselves.

That defendant may recall B. F. Jones, as a witness, to be examined respecting the testimony of John W. Culver, a witness for plaintiff, relating to certain interviews and transactions between said Jones and said Culver; also respecting the testimony of John Moise, another witness for plaintiff, relating to certain interviews and transactions between said Jones and one Charles Heno.

That defendant may recall Clinton G. McCarthy, as a witness, to be examined respecting the testimony of John R. Stuckey, a witness for plaintiff, relating to certain interviews and transactions between said McCarthy and said Stuckey.

That defendant may recall Henry J. Ritayik, as a witness, to be examined respecting the testimony of John Moise, relating to certain interviews and transactions between said Ritayik and one Charles Heno.

That defendant may recall H. E. Starring, as a witness, to be examined respecting the testimony of William Heim, a witness for plaintiff, relating to certain interviews and transactions between said Starring and said Heim.

That defendant may recall Charles S. Rogers, as a witness, to be examined respecting the testimony of Martin A. Kessell, a witness for plaintiff, relating to certain interviews and transactions between said Rogers and said Kessell.

That John Wilson, a defendant salesman (not before a witness in the case) may be called as a witness by defendant to testify respecting the testimony of Ralph E. McCorkle and L. S. James, witnesses for plaintiff, the same as if said McCorkle and James had been examined as witnesses for plaintiff when taking its testimony in chief, with full scope for direct and cross-examination, as if said Wilson has been called as a witness for defendant when taking its original testimony.

That this order is made without prejudice to the right of plaintiff to object to the relevancy, pertinency, or competency of the evidence so to be introduced, and the determination of all questions raised by such objections at the final hearing, the same as if this order had not been made; also reserving to plaintiff the right to take testimony in re-rebuttal, to traverse, meet, explain, or confront, any new matter set up by defendant in its sur-rebuttal taken and introduced under this order; and that any testimony taken by defendant under this order must be closed forty-five days from the date hereof.

This order is made reserving to the defendant the right to urge at the final hearing any and all objections taken on the record to any part or parts of plaintiff's

testimony in rebuttal; and also its right to move to strike out any and all parts of plaintiff's rebuttal evidence as to which notice to strike out was given on the record.

So ordered.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Agreed to:

E. W. BRADFORD,
Counsel for Plaintiff.

FRANCIS RAWLE,
Counsel for Defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1914. No. 1355.

IN EQUITY.

THE ELI LILLY AND COMPANY, a corporation,
Plaintiff,

vs.

WM. R. WARNER & COMPANY, a corporation,
Defendant.

DEPOSITIONS OF WITNESSES FOR PLAINTIFF.

Washington, D. C., November 7, 1917.
2 p. m.

Depositions of witnesses on behalf of plaintiff taken before Charles E. Riordon, Special Examiner, at

the offices of said Charles E. Riordon, in the Washington Loan & Trust Bldg., Washington, D. C., commencing Wednesday, November 7, 1917, at 2 o'clock p. m.

Met pursuant to notice and agreement of counsel.

Present:

MR. E. W. BRADFORD, on behalf of plaintiff.

MR. FRANCIS RAWLE, on behalf of defendant.

SAMUEL H. BELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Are you the same Samuel H. Bell, who has heretofore testified in this case as a witness for the plaintiff?

A. I am.

Q2. Have you read the deposition of Mr. S. J. Hagaman, given on behalf of defendant in this case, under date of June 8, 1917, in Philadelphia?

A. I have.

Q3. In this deposition Mr. Hagaman denies a number of the statements made by you in your deposition on behalf of plaintiff, given in the city of New York on June 23, 1916. What have you to say in reference to these denials and the statements by Mr. Hagaman that in soliciting orders for items at your store he did not state that his articles as named would be good substitutes for corresponding articles of another house. I call your attention specially to his answer to Q24 as well as to the other parts of the deposition?

By MR. RAWLE: Defendant's counsel here notes his objection to the taking of any evidence

at this stage of the case, and gives notice of a motion to strike out the same with costs. The ground of the objection is that the evidence now sought to be taken all formed part of plaintiff's *prima facie* case, necessary to sustain the averments of the bill, the same being not after-discovered evidence and because this witness has already been sworn in the case,—plaintiff's Record, p. 661—and having then been examined specifically as to statements testified to by Hagaman, as to which statements it appears the witness is now being called again for the purpose of further examination, after he had already been fully examined on the same subject.

This objection is general to all the depositions and specific to this question and like questions.

By Mr. Bradford: It is agreed by counsel for plaintiff that the objection as above stated may stand as to each deposition taken on behalf of plaintiff until the conclusion of the additional testimony which it is proposed to take in re-rebuttal. These depositions are taken in accordance with the understanding of the scope and purpose of the Order of the Court, particularly the last paragraph of said order, made following defendant's motion for leave to introduce sur-rebuttal testimony on May 1, 1917.

A. I will repeat. That which I had said concerning the soliciting of orders by Mr. Hagaman is absolutely the truth. That was one of Mr. Hagaman's main arguments in soliciting orders, that I could substitute any of his articles which he was representing from the house of Wm. R. Warner & Co., against any other pharmaceutical house, to a like drug and article, and Mr. Hagaman speaks the untruth when he says that he did not refer to any other pharmaceutical house, and referring to question number 24 I will repeat the same as

to its being absolutely true. Right here I will say that Mr. Hagaman's conduct attending a salesman was so disgusting to me that on two or three occasions knowing him to be in the store while I was in my office and in order to avoid him I would go out the back way. He remained such a length of time that other business demanding my attention, prompted this move. I think I have given prior evidence of his entire method in soliciting. I don't think that, I know that I have, that his soliciting of all orders was based on substituting.

Q4. Mr. Hagaman testified that on his last visit to you, you told him that you were sick and tired of the drug business and that you thought that you would sell out. Is this true?

A. It is not. Mr. Hagaman and I never had a conversation along those lines.

Q5. I ask you to read Q31 and Mr. Hagaman's answer thereto and state whether or not Mr. Hagaman stated facts in said answer?

A. Mr. Hagaman's visits to my store were very obnoxious. That is why I did not give him an order. And much less did I say anything to him as to selling out attending the death of my wife and that I was all broken up. All such remarks are ridiculous on the part of Mr. Hagaman.

Q6. Are they true?

A. They are not true.

Q7. When was the last visit to you by Mr. Hagaman at your drug store in Reading?

A. It may be bordering on two years at this date.

Q8. Has he called on you since the time when you testified for plaintiff in New York?

A. He has not.

Direct-examination closed.

Cross-examination without waiver of objections.

By Mr. Rawle:

XQ9. When did you have that talk with Hagaman at your store?

A. What talk?

Q10. The talk which Mr. Hagaman testified to and as to which you have just testified to?

MR. BRADFORD: Objected to as the witness has not testified as to any special talk with Mr. Hagaman.

A. We did not have a talk.

XQ11. If you will pardon me for asking a question I will ask you whether it is true or not that at the time of one of these Hagaman calls on you your wife had recently died?

A. My wife died April 21, 1911, and I do not know of Mr. Hagaman being in my store closely following the death of my wife.

XQ12. What length of time would you indicate by "closely following"? Weeks or months or years?

A. That could best be referred to by Mr. Hagaman's own business diary.

XQ13. (Question repeated.)

A. I repeat my former answer.

XQ14. Are you unable to answer the question yourself?

A. I am, due to the fact that it may have been weeks, months or a year.

XQ15. You do not like Hagaman, do you?

A. I have no ill feelings against him. I have always treated him with business courtesy, but did not like his methods, suggested to me, in the purchasing of his line as a general substitute for other lines. And I consider the remarks of Mr. Hagaman attending the remarks I was to have made referring to my wife who had died that I would destroy my life. Those remarks I consider venomous from the lips of Mr. Hagaman, as life to me is too sweet.

XQ16. Did Hagaman solicit your trade on an A. B. S. & I. pill made by Warner?

A. He did.

XQ17. In testifying previously in this case (p. 652,

Q10) you said in effect that he told you that "their A. B. S. & I. pill would be a good pill to replace the Lapactic pill of Sharpe & Dohme." Was this testimony of yours true?

A. That is true.

XQ18. And you testified that "their elixir pepsin and caffeine comp. to replace Sharp & Dohme's panpeptic elixir". Is that true?

A. That was his mode of selling, yes.

XQ19. And was that his mode of selling other articles as you stated in answer to other questions on page 662?

A. To replace that article as a good substitute.

XQ20. Now I ask you specifically to recall an instance in which he was soliciting your trade on Warner's A. B. S. & I. or Warner's Elixir Pepsin and state the words which he used in soliciting your trade on those articles? I ask you to put no word in his mouth that you do not remember came out of it. I expect you to state what he said and not what inference you drew.

MR. BRADFORD: The question is objected to as entirely unwarranted both in form and substance, also in purpose; for the further reason that it is not cross-examination respecting anything the witness has testified to today, but is a mere continuation of the cross-examination fully developed at the time the witness was originally examined on June 23, 1916, in New York, and in fact the question is based upon testimony given at that time, and not upon testimony given today.

MR. RAWLE: Question withdrawn.

XQ21. Did Hagaman say to you that you could replace some of the competing articles with his corresponding article?

A. He said that I could substitute.

XQ22. How many times did he interview you at your store, soliciting your trade?

A. Mr. Hagaman may have been there possibly a dozen or more times.

XQ23. Can you give the exact words that he used at any one of these interviews?

A. As to his methods in soliciting orders?

XQ24. Yes.

A. Well I have already answered that. The soliciting of his orders was based along the line of substituting.

XQ25. Did he talk the same talk every time?

A. Every time along the same line; yes, sir. That was one of his chief characteristics.

XQ26. Did he talk the same kind of talk in regard to a good many of his articles which he urged you to buy?

A. I repeat my former answer to that.

XQ27. What was your former answer?

A. Regardless of the fact of what questions you may ask me, his motto was substitution.

XQ28. Along his entire competing lines?

A. It was. I would like to name some of the articles that I can recollect. I made a note of some of them, for example he urged me to buy Oriena to use in place of Azurea; Hobson's Hair Dye in place of Hambleton's Hair Dye; Hobson's Eczema Ointment in place of Cuticura Ointment; Derma Zema Soap in place of Cuticura Soap; Syrup of Figs in place of California Syrup of Figs; Castoria in place of Fletcher's Castoria; Triloids in place of Lilly's Diamond Antiseptic Tablets; A. B. S. & I. Pills Pill Peristaltic in place of Pill Laptactic S-D; and Elixir Pepsin and Caffeine Compound in place of Panpeptic Elixir S-D. Each of these articles Hagaman said that I could substitute for the originals named.

XQ29. But you just testified that Hagaman said to you that you could use each of those articles in place of the corresponding article and when you were testifying before you testified that he said that his articles could replace the competing articles. Which expression did he use?

A. Neither, that I could substitute.

XQ30. Can you add any other articles that he recommended to you in addition to the list that you have furnished, or state that there were a good many of them?

A. If I had their list I could.

XQ31. Can you without a list state that there were a good many of them that he recommended in the same way.

A. That just partly covers the list. He had Hobson's Rat and Roach Paste I recall very distinctly I could replace or substitute for Mauer's Rat and Roach Paste. Quin-Coco was one for Coco-Quinine.

XQ32. Who asked you to come here to testify today?

A. Mr. Bradford, by letter.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ33. In answer to XQ10 by Mr. Rawle, you said "We did not have a talk". Will you kindly explain this answer in view of your other testimony showing that you did talk with Mr. Hagaman when he was soliciting your orders?

A. Our conversation was only that pertaining to an order and nothing personal. That is what I meant.

Deposition closed.

Samuel H. Bell.

Ellis Walker Howard, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

had me compare them by placing one upon his handkerchief and the other upon mine. After quite a lengthy conversation he convinced me that they were identical and due to the fact that his preparation was offered at less than half the net cost of the other I purchased from him one eight ounce bottle of Garden Bouquet Extract. Next he called to my attention a preparation known as Oriana which he stated was the same thing as Azurea Extract. We then went into details as to other toilet preparations which he claimed were identical with preparations I carried in stock, of which I do not recall all these different preparations. I purchased also one eight ounce bottle of Orienna perfume along with some other extracts in his line sufficient to make what he called his best price shipment. We then, through Mr. Hagaman's suggestion, went into the prescription department and he in detail went through our stock and called my attention to a number of preparations and articles which we carried in stock bearing the manufacturer's name of which he could offer, as he stated, identical items and preparations at far better prices. The first of these called to my attention by Mr. Hagaman was a pill in appearance and by formula being identical with Parke Davis & Co., Alophen pills. Mr. Hagaman stated that a number of druggists on whom he called were buying these pills from Wm. R. Warner and using them both in prescriptions and in small retail quantities wherever Alophen pills was specified and called for. He then named over a number of other pills, one of which is known as Lapactic pills under the trade name Sharpe & Dohme, the formula being Alloin, Strychnine, Belladonna and Ipecac. Mr. Hagaman had with him a sample of these pills, poured some of them in my hand, then a few Lapactic pills, and asked me if I could tell the difference. I then gave him an order, as I best recollect, for one thousand of these pills. He then called to my attention a preparation, as he stated, I could buy cheap-

er and use as a substitute for a preparation put out by Sharpe & Dohme, known as Elixir Panpeptic. His preparation I believe he called Elixir Pepsin and Caffeine Compound. He then mentioned a preparation largely used by us and manufactured by Reed and Cornick, known as Elixir Peptenzyme. This attracted his attention because we used this preparation largely and bought it in five gallon quantities and at that time it was quite expensive, but due to the fact that the physicians prescribing this preparation were unusually familiar with it and as I told Mr. Hagaman I deemed it unwise to undertake to use any substitute for this preparation. He then mentioned several other preparations on our shelves among which was Coco-Quinine. He took this preparation up in detail and laid special stress upon its identity to a preparation of which he had a sample known as Quin-Coco. Mr. Hagaman told me repeatedly that druggists over his territory were using Quin-Coco very largely in substitution for Coco-Quinine and wherever Coco-Quinine was specified or called for. He took his sample of Quin-Coco and asked me to make comparison between it and Coco-Quinine and if I could tell any difference he would not ask me to buy any of his preparation but would make me a present of the best hat in town. He then mentioned taking an order for some of this preparation to be delivered in the fall with special dating as at that season preparations of this class were not in demand.

My purchases from Mr. Hagaman were composed of patent preparations and toilet articles mostly, possibly including a few pharmaceuticals, but I do not recall which ones or the quantity.

Q9. Was the young man who was with Mr. Hagaman at the time introduced to you?

A. Yes, sir.

Q10. Was his name Wilson?

A. I would not be positive that it was, but to my

with Mr. Nottingham was in the early fall of 1914, at Waycross, Georgia, while operating Howard's Pharmacy.

Q23. Nottingham, during the deposition before referred to, in answer to Q10 stated: "I never offered him or any one else Quin-Coco as a substitute for Coco-Quinine." Again, in answer to Q20, he said: "I never suggested to King or any other witness that he use Quin-Coco as a substitute for Coco-Quinine." What have you to say as to these statements?

Same objection.

A. As I stated before, I did not know anything as to the identity of Quin-Coco to Coco-Quinine until Mr. Nottingham called it to my attention, and he did state that it was identical and suggested that I use it as a substitute for Coco-Quinine, for the reason of a better price.

MR. RAWLE: The latter part of the answer is objected to, unless the witness states the language of Nottingham.

Q24. Do you know anything about a preparation put up by Wm. S. Merrill Company and called Choc-Quin, and the extent of its sales in North Georgia? If so, please state.

A. I do not recall ever having seen this preparation, and, in fact, I have been through the prescription department of a large per cent. of the retail druggists in North Georgia within the last few weeks, and none of them had this preparation in stock, nor did they mention it in their conversation with me, and, in fact, generally this preparation is not known nor is it offered as a rule by Merrill.

Q25. Do you know a druggist by the name of Louis Davis, of Temple, Georgia, and if so, can you give any reasons why he could not respond to our request to be here to testify to-day?

Objected to as irrelevant.

A. I was in Mr. Davis' store last Friday, at which time I knew nothing of this suit, or Mr. Davis being requested to come here to testify, but do know that Mr. Davis was drafted by the United States Army, and only a few days prior to my visit to him he obtained a discharge, and that during his absence his drug business was closed up, and, in fact, while I was there he closed his store to go to lunch and asked me if I knew of any druggist I could suggest to help him out, as he was in a tight place and had to have a man. He did not have any clerk, and his store was the only drug store in that community, and he had no ready means of obtaining the services of a relief man.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ26. Did Mr. Hagaman, in speaking of these articles in his line, tell you substantially that they were identical in formula or similar medicinally, or similar pharmaceutically, or what?

A. He emphatically stated that they were identical, and that I could safely use them wherever similar preparations were specified.

XQ27. As he went down his line of competing articles did he tell you the same thing in regard to each of them?

A. Some articles he did not lay special stress upon, but wherever he undertook to demonstrate the identity of these preparations he always stated that they were identical, and as I have stated he insisted that I could safely use them wherever similar preparations were specified.

XQ28. When Nottingham and Hagaman went through their lines did they work from a demonstration book having labels pasted in it?

Objected to as immaterial.

XQ37. When Mr. Hagaman called on you this year and solicited your order for his preparation to replace Coco-Quinine, and you said he took this preparation up in detail and laid special stress upon its identity with Quin-Coco, in what words did he do so?

A. Mr. Hagaman did not represent Quin-Coco as replacing Coco-Quinine, but as he represented it to me it was the same thing as Coco-Quinine, and as to the words he used he did not state anything regarding the ingredients of his preparation, but laid stress on and insisted that we make the demonstration. In fact, Mr. Hagaman went into quite a lengthy conversation with me regarding methods of using some of these substitutes where similar preparations were specified, and made me some suggestions along that line, one of which was that I did not have to leave some of such preparation where everybody could see them.

XQ38. He was trying to sell you various articles that were in competition with articles of other houses that you were carrying, was he not?

A. Mr. Hagaman took these articles one at a time and undertook to show me how and why I could use them in substitution of like preparations.

XQ39. Question repeated.

A. He represented them as being identical with other preparations.

XQ40. Can not you tell me whether or not Hagaman was trying to sell you Warner articles that were in competition with similar articles made by other houses which you had in stock?

A. He did not represent them so.

XQ41. Was he not trying to sell you competitive articles?

A. He did not represent them to me as being competitive articles, but in fact he led me to believe all the way through our interview that he could sell me a substitute for the preparation mentioned at better prices.

XQ42. That is about the substance of what he said to you, is it, boiled down?

A. I would not undertake to boil down Mr. Hagaman's conversation, as it covered a very broad field, and as I stated in the preceding question, he left the impression on me that he could sell me his substitute for better prices than I was paying.

XQ43. And is that the impression that Nottingham left on you?

A. Mr. Nottingham was the first man that brought to my attention that Coco-Quinine had a substitute, and he certainly left that impression with me.

Deposition closed.

E. W. HOWARD.

R. H. GREENE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Are you the same R. H. Greene who has previously testified in this case on behalf of the plaintiff?

A. I am.

Q2. Do you know a Mr. Wilson, John Fielding Wilson, Jr., a traveling salesman for Wm. R. Warner & Co.?

A. Yes, sir.

Q3. What is your present employment?

A. Owner and proprietor of Greene's Pharmacy, Fairburn, Georgia.

Q4. In answer to XQ80 in a deposition on behalf of defendant by Mr. Wilson on July 5, 1917, he testified: "I do not suggest substitution." Substantially the same statement was made by Mr. Wilson in answers to a number of other questions. Are there any facts within your knowledge bearing upon this matter, and if so, will you please relate them?

MR. RAWLE: Objected to because the matter inquired of forms part of the plaintiff's *prima*

facie case, and the evidence is inadmissible at this stage. Notice is given of motion to strike out, with costs.

A. There are. In two perfumes, namely Marv Garden and Azurea, to use for them Garden Bouquet and Oriena.

Q5. What do you mean by this answer?

A. I mean that I was offered Garden Bouquet and Oriena as a substitute for Mary Garden and Azurea.

Q6. By whom?

A. By Mr. Wilson.

Q7. When?

A. It was sometime within this last summer.

Q8. What part of the summer?

A. The latter part.

Q9. Where?

A. At Fairburn, Georgia.

Q10. What did Mr. Wilson say to you when he offered you Garden Bouquet perfume?

A. Here is a real imitation of Mary Garden that is much less in price.

Q11. Did he make any demonstration or use any other argument to induce you to buy, and if so, will you please explain?

Objected to as leading.

A. No.

Q12. What did he say to you when he offered you Oriena?

A. About the same as he did when he offered me Mary Garden, with the exception of showing me a sample on his handkerchief to smell.

Q13. What did he say that Oriena was a substitute for or imitation of?

The question is objected to as leading and grossly improper.

A. Azurea.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ14. Where and in whose drug store are you working now?

A. My own, in Fairburn, Georgia.

XQ15. How many drug stores there?

A. One.

XQ16. How far from Atlanta is it?

A. About nineteen miles.

XQ17. Who invited you to come here?

A. Mr. Bell, the Lilly salesman in the Atlanta district.

XQ18. Personally or by letter?

A. Neither; by phone.

XQ19. When did you leave home, and when will you get back?

A. I left home yesterday at 9.10 A. M. and don't know when I will get back, but at the earliest possible moment.

XQ20. At whose request did you testify in April, 1915?

A. Mr. John H. Vinson, representative of the Eli Lilly Company in the Macon territory.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ21. In your experience as a retail druggist, both as proprietor and as clerk, what can you say respecting the sale or demand for Merrill's Choc-Quin in the Georgia territory?

Objected to as irrelevant.

A. I have never had any experience with the above named, neither have I ever seen any.

RDQ22. How many retail drug stores have you been employed in in Georgia?

A. Four, Millageville, Macon and Marietta, and in Fairburn now. In Macon I was in the employ of Taylor Bayne Drug Company that had six stores there.

Deposition closed.

ROBT. H. GREENE.

Adjourned to meet Thursday, November 8, 1917, at 9.30 A. M.

Washington, D. C., Nov. 8, 1917, 9.30 A. M.

Met pursuant to adjournment.

Parties present as before.

W. R. BELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Are you the same W. R. Bell who has heretofore testified as a witness in this case on behalf of the plaintiff?

A. I am.

Q2. Are you acquainted with Mr. John Fielding Wilson, a traveling salesman for Wm. R. Warner & Co.?

MR. RAWLE: Objected to as not admissible at this stage of the proceeding, testimony having been given on behalf of plaintiff (such testimony itself being out of order) covering alleged acts or statements of Wilson, and Wilson having been called to state his version; all further testimony being therefore inadmissible and notice of motion to strike out is given.

A. I am.

Q3. How long have you know Mr. Wilson?

A. About seven years, first when he was engaged in the retail drug business in Athens, Georgia, a point in my territory that I frequently work. After leaving Athens I knew him as a clerk in various stores in Atlanta, Georgia; later as a representative of Wm. R. Warner & Co.

Q4. When called as a witness for defendant on July 5, 1917, Mr. Wilson testified in answer to XQ61: "I do not go around in the prescription room to see what a man has." Have you knowledge of any facts bearing upon this subject, and if so, please relate them?

MR. RAWLE: Same objections and further, that the question is irrelevant, inasmuch as the answer of Wilson referred to was immaterial and was brought out on cross-examination, and cannot be rebutted by plaintiff.

A. I have. On several occasions I have found Mr. Wilson behind the prescription counters soliciting orders. One specific occasion in College Park Pharmacy, at College Park, Georgia, I walked in the store, going directly to the prescription room. As I approached I heard two voices, one stating: "This is exactly the same as—" a sentence that was never completed, because at that moment I appeared behind the counter. The two people present were Mr. Wilson and Mr. Adams, the proprietor of the store. Mr. Wilson had in his hand a sample bottle that I did not recognize. I saw him replace it in his sample case. This would seem to show that he was in the act of soliciting business behind a man's prescription counter. His order book was open at the time.

Q5. Did you recognize the voice uttering the sentence which was not completed, and if so, whose voice was it?

A. Yes, I recognized Mr. Wilson's voice.

Q6. Mr. Wilson, in his deposition above referred to, in many of his answers, both direct and cross-questions, places special stress upon Merrill's Choc-Quin as a preparation which he frequently referred to among others as similar to Quin-Coco. In answer to XQ8 he stated that he never referred to Lilly's Coco-Quinine without including the rest. That lots of time he never referred to Coco-Quinine at all, and "lots of buyers in Georgia used Merrill's, physicians and druggists." What do you know about the extent of use of Merrill's Choc-Quin in the drug stores in your territory?

MR. RAWLE: Same general objection repeated. Also because the question is irrelevant and for the special reason above given that the testimony of Wilson referred to is immaterial and was developed on cross-examination and therefore cannot be rebutted on behalf of plaintiff.

A. I have never seen a package of this product on the shelf of a drug store in my territory. Neither have I seen it nor heard of it in stock of the wholesale drug houses. Until about two months ago I did not know this product was manufactured. It certainly has no sale in my territory. Inquiry of the wholesale drug houses in Atlanta, in my territory, develops the facts that they do not even stock the product, showing also that there is no demand for it.

Q7. Have you any evidence in reference to the demands for this product at the jobbing houses in Atlanta, and if so, will you please state?

A. I have a letter from each of the pharmaceutical buyers of the two jobbing houses in Atlanta, that from the Lamar & Rankin Drug Co. being as follows:

"Atlanta, Ga., Nov. 5, 1917.

"Mr. W. R. Bell,
Rep. Eli Lilly & Co.,
Atlanta, Ga.

Dear Sir:—

Answering yours of Nov. 2nd, will state that we

do not carry in stock Merrill's Choc-Quin, as the demand for this item has never been sufficient to warrant us in stocking it.

While we have bought less than five gallons of this preparation, these purchases were made to fill orders turned in to us by the representative of the Wm. S. Merrill Chemical Co.

Very truly,
Lamar & Rankin Drug Company,
By H. G. Hollingshead,
Pharmaceutical Buyer."

The one from John B. Daniel is as follows:

"Atlanta, Ga., 11-5-17

"Mr. W. R. Bell,
Representing Eli Lilly & Co.,
Atlanta, Ga.

Dear Sir:—

In reply to your letter of recent date will say that we have practically no demand whatever for Merrill's Choquin. We only carry in stock a very small quantity of this product to fill orders turned to us by Wm. S. Merrell & Co., representatives. We do not recall ever having had any volunteer orders for this item.

Very truly yours,
Jno. B. Daniel Inc.
J. M. Perdue,
Pharmaceutical Buyer."

These letters are signed by the pharmaceutical buyers respectively of these jobbing houses. I requested them to swear to the contents before a notary public, which was done, and I now hand these letters to you.

Mr. Bradford: The letters referred to are offered in evidence and marked "Plaintiff's Exhibit, Letter from Lamar & Rankin Drug Co." and "Plaintiff's Exhibit, Letter from Jno. B. Daniel Inc." respectively.

MR. RAWLE: The offer is objected to for the reasons last above given, and for the further reasons that they are inadmissible and hearsay, and because the letters have been copied into the record without copying into the record the affidavits attached to each letter.

Q8. In answer to XQ78 Mr. Wilson stated: "I am not very familiar with Coco-Quinine, only in the fact that it contains two grains of quinine sulphate." What have you to say as to this?

MR. RAWLE: Same general objections which have been previously made.

A. I should think Mr. Wilson would be very familiar with Coco-Quinine, from the fact that he was engaged for some time in the retail drug business, where he necessarily came in contact with Coco-Quinine in filling prescriptions for it. I am quite sure, although I have not access to my records, that Mr. Wilson bought Coco-Quinine from me. By his own admission in his testimony he must have, and did stock this product in Athens, Georgia, where he was engaged in business.

Q9. Is your recollection clear that you did call upon him while he was in the retail drug business at Athens, Georgia, and solicit orders and sell him goods in your line, and if so, how many times, if you remember?

Same objections.

A. I remember very clearly calling on Mr. Wilson and selling him some goods, rarely ever failing to get an order when I solicited it. I cannot state positively the exact number of times I called on him, but I made the territory about every six weeks and called on him on each trip while he was in business.

Q10. Is it the usual or unusual thing for a traveling salesman for drug houses to go behind the prescription counters of the retail drug stores from which they are soliciting orders?

Same general objection, and as irrelevant.

A. It is certainly the general custom and practice of pharmaceutical salesmen to solicit business from behind the prescription counter. At least, this is the case in the southern territory, with which I am familiar. It is very difficult to get an order without doing this.

Q11. What do you know about the extent of the sale of H. K. Wampole's chocolate quinine preparation in your territory?

Same general objection.

A. There is practically no sale for it at all in my territory. I do not recall ever having seen a package of this product in my territory.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ12. Are you a salesman in the employ of Eli Lilly & Co., defendant?

A. I am.

XQ13. How long have you been such?

A. A little over seven years.

XQ14. Have you had the same territory substantially all that time?

A. Yes, for five years I worked the entire Northern Georgia territory, for two and a half years the city of Atlanta, Georgia, and suburbs only.

XQ15. In the last two and a half years has your territory been coterminus with that which is worked by Wilson?

A. Yes; Mr. Wilson works the city of Atlanta and suburbs, as well as surrounding country territory.

XQ16. Does Wilson work any territory which you do not?

A. Yes.

XQ17. How many drug stores are there in your present territory?

A. About one hundred and sixty or seventy.

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XQ18. How many drug stores were there approximately in your territory prior to two and half years ago?

A. At that time there were about two hundred and fifty.

XQ19. On the occasion when you saw Wilson behind a druggist's counter, you have said that an order book was open. Describe it?

A. I would not attempt to describe it. Having in mind the ethics of the traveling salesmen, I immediately left the store, giving Mr. Wilson the opportunity to solicit his order. It is customary for one traveling man to give the first man there a clear field.

XQ20. Tell me what you can about the order book which you said you saw?

A. As stated, I will not attempt to describe it, having only seen what appeared to be an order book close to Mr. Wilson's sample case, where it would most likely be were he writing an order.

XQ21. Was it a book in which he appeared to be entering orders?

A. He was not in the act of entering an order, but was in the act of soliciting an order.

XQ22. Why is it, if you saw his order book, you cannot give any idea of what you saw?

A. The only order book I am interested in is my own, and I have never had any occasion to examine one of Wm. R. Warner & Company's salesmen order book.

XQ23. Is that the only answer you can give?

A. Yes, and the fact that I did not stay long enough, nor did I make any effort to examine closely Mr. Wilson's order book.

XQ24. Is it possible that "lots of buyers in Georgia use Merrill's, physicians and druggists," without your knowing it?

A. It is hardly possible that I would not discover at least an occasional package of this product if it were

carried in stock. I certainly make every effort to see my prospective customer's line of goods, and I believe it would not be difficult to find this product if it were stocked.

XQ25. But you have testified that you never covered South Georgia, and that for the last two and a half years you have covered only Atlanta and suburbs?

A. I have not testified that I had never covered South Georgia. I did testify that I have only covered Northern Georgia for Eli Lilly & Co.

XQ26. For whom did you cover South Georgia and when?

A. For two years prior to my connection with Eli Lilly & Co. I covered part of Southwestern Georgia and the city of Macon, Georgia, for Lamar, Taylor & Reilly Drug Company, jobbers at Macon, Georgia.

XQ27. Referring to the two letters produced by you and read into the record, was there not appended to each an affidavit by the person who signed the letter?

A. There was.

W. R. Bell.

Edmund Francis O'Connell, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q1. Please state your name, age, residence and occupation?

A. Edmund Francis O'Connell; age, 41; Providence, R. I.; salesman for Moore & Company of Worcester, Mass., traveling salesman for pharmaceuticals and non-secrets.

Q2. Did you formerly travel as a salesman for Wm. R. Warner & Co., defendant herein, and if so, covering what period and what territory?

A. Yes; starting, as I remember it, January 14th,

1914, I worked for them until January, 1917. The first territory I had was Vermont and Western Massachusetts. Later I took on the State of New Hampshire, starting at Keene, N. H., and then later the State of Maine. Then when I was put on my regular territory permanently, Rhode Island and Western Massachusetts.

Q3. Do you know Mr. S. J. Hagaman, sales manager for Wm. R. Warner & Co.?

A. Yes, sir.

Q4. In what way did you make his acquaintance and what experiences have you had with him?

MR. RAWLE: Objected to because the matter inquired in is part of plaintiff's *prima facie* case and because the examination of the witness thereon is inadmissible at this stage of the proceedings.

A. My first meeting with Mr. Hagaman was at the Sloane's Liniment plant in Boston, Mass., where he, with another gentleman by the name of Mr. McNulty, hired me to go on the road for Wm. R. Warner & Co. My next meeting with Mr. Hagaman was in Springfield, Mass., at the Kimball Hotel, where he started out and worked with me for one week in the city of Springfield, demonstrating the Wm. R. Warner Company's line.

Q5. In his testimony in this case Mr. Hagaman has stated that he does not, when soliciting an order from a druggist, talk to him about what he has in stock or about items of other houses or whether he has items manufactured by other houses on hand, etc. (See Qs. 9, 10 and 11, sur-rebuttal.) Please state your knowledge of Mr. Hagaman's methods in soliciting orders for the Warner line, so far as they are consistent or inconsistent with his said testimony.

Same objection.

A. Mr. Hagaman generally went into a store carrying along with him what I would term a sample

case, a good deal like a dress suit case. This case contained the Pfeiffer package goods, perfumes, and a catalogue containing Sloan and Kickapoo line, Dr. King's and other patents. In starting in to sell the line he generally starts on the pharmaceuticals, either using the liquids or pills or tablet samples. For instance, pill Alloin, Strychnine, Belladonna and Ipecac, displaying them to the druggist at a certain price, to take the place of Lapactics sold by Sharpe & Dohme. A pill known as pill phenolpthalein compound, known as Pill 541, displayed to take the place of a pill made by Parke, Davis & Co., called Alophen pills. Coco-Quinine, made by Eli Lilly & Co., displaying Quin-Coco; Gray's Glycerine Tonic Comp., displaying Glycerine Tonic and demonstrating to the druggist the same taste and appearance for these items, and so on.

Q6. I call your attention to Plaintiff's Exhibit, Thurman Copy of Document No. 3, and ask you if you had such a document while working for Warner & Co., and if Hagaman used such a document in his work with the druggists, what the document was used for and what it was commonly known as?

Mr. Rawle: Same general objection and because the popular name of the exhibit is immaterial.

A. I did have such a document. Mr. Hagaman did use such a document in his work with the druggist. This document was used to demonstrate the Warner lines, to show similarity of their goods with other well-known makes. It was commonly known as the Blue List, that is the way I always understood it.

Q7. Taking the item near the bottom of page 1, starting with Coco-Quinine, please state what Mr. Hagaman would say to the druggist, and what use he would make of this list, if any, in selling that item?

Same general objections.

A. Mr. Hagaman would compare the price of Quin-

Coco with Coco-Quinine, and also would show the druggist the savings between the two preparations and their similarity.

Q8. Did he state to the druggist on what kind of orders he could sell Quin-Coco or what disposition he could make of the product if he bought it?

MR. RAWLE: Same general objection and also because the question is leading.

A. The way that I understood in demonstrating Coco-Quinine and Quin-Coco to the retail druggists and also the way the druggist would take it from him, that he could refill his former prescriptions calling for Coco-Quinine with Quin-Coco.

Q9. What were the instructions received by you from Mr. Hagaman in reference to the general policy of the house in selling goods?

Same general objections.

A. To get the business in the territory by using all means with catalogues, samples and I might also say using the Blue List.

Q10. Did the house send out letters frequently, and what was the nature of these letters?

Same objections.

A. Yes. Each letter generally taking up some individual preparation, giving the selling points and also various ways to dispose of the goods. For instance, Garden Bouquet perfume, to show the druggist by demonstrating the odor with an atomizer furnished by the Wm. R. Warner & Co., and matching it up with Mary Garden. Mr. Hagaman has done this in my presence; also Mellier's Vogue. We had a small card giving a list of the names of the popular odors or perfumes on one side, numbered, and a list of our perfumes on the other side as mates or matches or substitutes under corresponding numbers, and difference in prices.

Q11. In selling a druggist for example the War-

ner A. B. S. & I. pill, how would Mr. Hagaman solicit an order from a prospective customer?

Same objection.

A. By taking a sample from his pill case and pouring some right out into the palm of his hand and having the druggist get some of the Lapactic and comparing the two together.

Q12. Respecting the pill phenolpthalein compound No. 541, what do you know in reference to the sale of this pill to take the place of a pill manufactured by another house, if anything?

Same objections, and as irrelevant.

A. During the year 1916 I had an occasion to call on a customer in Springfield, Mass., and at that time phenolpthalein was at a very high price and hard to get. The druggist that I have in mind wanted some of the phenolpthalein comp. pills, which we could not furnish at the time, and he wanted to know from me whether or not he could not have these pills made up, eliminating the phenolpthalein and substituting some other drug to take its place, which I submitted to the house and their pill man or chemist made up a pill. These pills, formerly pill phenolpthalein comp., pill 541, he had sampled the neighborhood with them and he wanted to still hold the business.

MR. RAWLE: The answer is further objected to because the witness does not state facts within his knowledge and as vague.

Q13. What other items, if any, do you have in mind that were pushed as replacers or substitutes for popular items of other houses; just name the leaders?

MR. RAWLE: Objected to on the general grounds above given and as irrelevant.

A. Solution of peptonized iron and manganese compound for Gude's Peptomangan, Fluid Viburnum Compound S. & H. for Hayden's Viburnum Compound,

Triloids for Lilly's Bichloride Diamond Antiseptics; Akresol S. & H. for Lysol. There are quite a few others that I can remember, but I guess these, with those before mentioned, are the leaders.

Q14. Have you as a salesman personally sold Quin-Coco for Wm. R. Warner & Co.?

A. Yes, sir.

Q15. What was your sales talk to the druggist in soliciting an order for Quin-Coco?

Same general objection repeated.

A. The first point that I demonstrated was that I did not think that the difference between the two preparations, Quin-Coco and Coco-Quinine, was any. The second that it was a good saving for the druggist, and the third that the physician or patient I did not think could tell the difference.

Q16. Was the item a good selling item in your territory?

Same general objection.

A. In some towns it was. In other places, of course, we did not sell so much. In points like Springfield, Mass., and Pawtucket, R. I., I had sold quite a little of it.

Q17. What was your sales talk to a druggist when seeking an order for Triloids?

Same objection and as irrelevant.

A. As I remember it, Lilly's Diamond Antiseptics were selling at the time for $2.25 a dozen. Triloids were selling at $1.50 a dozen, and a druggist by buying three dozen Triloids would get one-half dozen free, and also that the bottle on account of the shape compared pretty near the same as Lilly's, which would give him a chance to push and sell the Triloids in the place of Lilly's.

Q18. How many times did you travel with Mr. Hagaman?

A. Quite a few times, working with him at Portland, Maine; Springfield, Mass.; Worcester, Mass.; Providence, R. I., and Pawtucket, R. I., and New Bedford, Mass.

Q19. What was the substance of your sales talk when soliciting from a druggist an order for Garden Bouquet Perfume?

Same objection and as irrelevant.

A. In selling Garden Bouquet perfume I would get the druggist to produce if I could his Mary Garden and demonstrate by wetting a small blotter with Garden Bouquet and also Mary Garden, comparing the two together and also swapping the blotters around trying to get him if he could to tell which was which, and also using the atomizer demonstration.

Q20. I hand you a series of letters and ask you whether or not these are original letters received by you from Wm. R. Warner & Co.?

MR. RAWLE: Same general objections.

A. They are.

MR. BRADFORD: The letters referred to are offered in evidence and marked respectively Plaintiff's Exhibit, O'Connell Letters No. 1 to No. 30."

MR. RAWLE: Same objection to exhibits.

Q21. In selling goods as testified to by you did you or did you not follow the instructions and the example of Mr. Hagaman?

General objections repeated and especially because the question calls for a general statement instead of for facts.

A. Always.

Direct-examination closed.

"PLAINTIFF'S EXHIBIT, O'CONNELL LETTERS NOS. 1 TO 30."

"O'Connell Letter No. 1"

Philadelphia, 11/17/15

Subject: Sales Department.
Friend O'Connell:

Our Mr. Hagaman will have the pleasure of working with you two days, Monday and Tuesday, Nov. 22nd and 23rd. Immediately on receipt of this letter, write Mr. (S. J.) Hagaman direct, C/o Parker House, Boston Mass., where he can meet you either Saturday night Nov. 20th or Sunday Nov. 21st. We would very much like to have you meet Saturday evening as Mr. Hagaman's stay will be rather short and naturally we are anxious to have you get all the benefit possible from it. In the meantime, make a memorandum of everything you wish to take up with him, so that the ground can be covered thoroughly.

Truly yours,
WM. R. WARNER & CO.,
H. Pfeiffer, Prest.

"O'Connell Letter No. 2"

No. 352
Date Jul 2, 1914

Subject Matter QUIN COCO, S & H.
Dear Traveler:

Record of Purchases of
Quin Coco S & H
By
Jacobi Drug Co., Dyersburg, Tenn.
Mr. DeVall's Customer.

3/5/8	2 gal	Personal
6/4/9	1 "	"
8/11/9	1 "	"
8/26/9	2 "	"
11/19/9	2 "	"

3/30/10	2 "	Mail
8/10/10	2 "	"
9/17/10	2 "	Personal
12/1/10	2 "	"
1/7/11	2 "	"
8/24/11	2 "	Mail
10/24/11	3 "	Personal
2/6/11	2 "	"
4/26/12	2 "	"
8/21/12	2 "	"
11/22/12	2 "	Mail
2/22/13	5 "	Personal
10/13/13	4 "	"
4/10/14	4 "	Mail

The above is evidence how *Quality Repeats.* Quality repeats for about the same reason that "Honesty is the best policy."

In the case of Quin Coco, each teaspoonful contains two grains Quinine Sulphate (Highest quality) in its original unchanged form, so you see, if Quinine Sulphate is a good medicine, Quin Coco S. & H. is bound to be. The only difference between the two is, children don't like Quinine Sulphate and fuss and fume when forced to swallow it, but they *love* Quin Coco S & H, and gladly take it. What a comfort to mothers! Only a mother can tell.

What a valuable item to the Doctor! Makes him popular with the little folks. You know it pays the doctor to stand in with the babies, just as it pays you to stand in with the clerk.

Remember, Quin Coco spells "quality", and quality repeats.

Send us your orders,

WM. R. WARNER & CO.,

H. PFEIFFER, *Prest.*

"O'Connell Letter No. 3."

Date Oct. 14, 1915

Subject Matter SEASONABLE ITEMS.

Dear Traveler:

With but few questions, for practically everything we carry, there is a demand in all seasons. However, the following is a list of those items which are particularly seasonable now and deserve your special attention.

Dr. Hobson's Eczema Ointment and all Salves
Tolu Lung Balsam and all Cough Syrups
Dr. Hobson's Laxative Fig Syrup and all other Laxative
Dr. Hobson's Cold Tablets and other Cold Remedies
Japanese Methodine
Sloan's Liniment and all other Liniments
Plasters, all kinds
Hobson's Wine Ext. Cod Liver Oil with Malt & Hypophos
Chocolate Quinine
Dr. Hobson's Soothall and Catarrh Remedies
Dr. Hobson's Sore Throat Gargle
Pitcher's Baby Brant Castoria
Dr. Hobson's Bronchial Wafers
Dr. Hobson's Throat Lozenges
Dr. Hobson's Camphor Ice
Sloan's Fever & Distemper Remedy
Corn Husker's Lotion
Dr. Hobson's Fragrant Toilet Cream and all other creams
Dr. Hobson's New Life Blood & Rheum. Remedy and all Rheumatic Remedies
All Perfume and Toilet Articles
Haywood's Antiseptic Eye Water and all Eye Remedies
Guaiatonic
Tritica

Quinaton
Syr. Tolu & Heroin Comp., Special
Tonics
Cold Preparations
Elixir Salicylic Comp.
Digestants
Lithia Tablets
F. L. T.'s
Anti Congestus Comp. Rx. A
Plasticum
Alka-Men-Thym
Thymenthol

Cordially,
WM. R. WARNER & CO.,
H. Pfeiffer, Prest.

"O'Connell Letter No. 4"

Date 4/1/15

Subject "Quin Coco, Lilly vs Warner"

Dear Traveler:

Eli Lilly & Co. have filed suit in Federal Court against Wm. R. Warner & Co., to stop the manufacture and sale of Quin Coco, alleging that Quin Coco is dispensed by the trade for "Lilly's" Coco Quinine and that this is done at the suggestion, urging, advice and instructions of our firm through our travelers and agents. That our travelers suggest, urge, advise and instruct the trade to dispense Quin Coco when "Lilly's" Coco Quinine is prescribed or called for, is unthinkable and we do not believe they can establish such fact.

Eli Lilly & Co., have hope to establish a perpetual and exclusive right to make and sell a chocolate mixture of Quinine. If successful, this will mean they will stop all manufacturers who now supply such a product, and they can prevent anyone, including the retail druggist from making such mixture or even the

doctor from prescribing (except "Lilly's" Coco Quinine) such a mixture.

Eli Lilly & Co. base their claim for such rights on the fact that they were the first to make a chocolate Quinine mixture, and that chocolate is not an essential ingredient as a disguiser of the bitter Quinine taste.

We cannot conceive of the courts granting such a perpetual monopoly. It would be a tragedy to the manufacturer, doctor, druggist and consumer. While we are opposed to law suits, the nature of the suit and allegations were such as to prevent adjustment out of court, and we must defend the drug trade, our travelers, the product and ourselves. To do this successfully, we need the help of the dispensing and prescribing doctor, the druggist and yourself. A part of what we desire to establish is

1. That you and all our travelers offered and solicited orders for Quin Coco, as Quin Coco, or a sweet chocolate quinine mixture or syrup.
2. That you did not suggest, urge, advise or instruct the trade to dispense Quin Coco upon calls or prescriptions for "Lilly's" Coco Quinine.
3. That the druggists who purchased Quin Coco differentiated between Quin Coco and "Lilly's" Coco Quinine, dispensing EACH when specified on calls or Recipes, and dispensing EITHER upon calls or prescriptions specifying Chocolate Quinine or Syrup of Quinine or sweet Quinine.
4. That general knowledge of "Lilly's" Coco Quinine is limited to the physician and drug trade and that "Lilly's" Coco Quinine is not generally known either by name, or package to the general consumer or laity.
5. That QUIN COCO is used and dispensed by the dispensing doctor.
6. That QUIN COCO is prescribed under the name Quin Coco by the prescribing doctor.

a. We desire to locate and put in evidence original prescriptions for Quin Coco.

7. That QUIN COCO has been sold to parties who had never previously used "Lilly's" Coco Quinine.
8. That Druggists dispense Quin Coco labeled Quin Coco, or labeled Syrup Quinine, Syrup Chocolate Quinine or Sweet Chocolate Quinine.

The purpose of such evidence is in part to prove a legitimate market for Quin Coco and a sweet chocolate syrup of Quinine, and that neither Quin Coco nor other chocolate Quinine mixtures depend upon dispensing these on calls or recipes for "Lilly's" Coco Quinine for their sale. We desire this information as soon as possible, and we will appreciate

1. Names of doctors who dispense Quin Coco, or Chocolate Quinine mixtures other than "Lilly's" Coco Quinine.
2. Names of doctors who prescribe Quin Coco or Chocolate Quinine mixtures, other than "Lilly's" Coco Quinine.
3. Names of druggists who have filled prescriptions for Quin Coco or chocolate Quinine mixtures other than "Lilly's" Coco Quinine.
4. Names of druggists who have calls for Quin Coco or other chocolate quinine mixtures other than "Lilly's" Coco Quinine.
5. Also whether you know or have reason to believe such parties would be willing to testify to these facts.

In connection we hold no ill will against Eli Lilly & Co. This suit is one to establish a principle, and not to embarrass or annoy a competitor. Eli Lilly & Co., in our opinion, stand in this suit favoring monopoly; we in our opinion, stand for competition. That a person or firm should have perpetual monopoly on a

product by reason of having first introduced said product, or because of a color, flavor or any ingredient in the product, seems unthinkable. We believe Eli Lilly & Co., are entitled to a monopoly and protection on their brand—"Lilly's" Coco Quinine, but not the exclusive and perpetual monopoly on all sweet chocolate quinine or syrups.

Further, to the writer, Lilly's suit is an indictment of the drug trade, our travelers and ourselves, and we hope to protect each. In connection we request that you do not talk about the suit other than what is necessary to obtain data and facts requested in this letter. This information we will appreciate at your earliest convenience.

We also avail ourselves to express our full confidence in your integrity and sales method and do not for a moment believe you are guilty of the allegations, that you willfully and repeatedly suggested, advised, urged or instructed the trade to dispense Quin Coco when "Lilly's" Coco Quinine was called for or prescribed.

Trusting we can successfully defend, we are,

Yours truly,

WM. R. WARNER & CO.

H. Pfeiffer, Tres.

"O'Connell Letter No. 5"

PRACTICAL POINTS No. 26

TRILOIDS.

Dear Travelers:

Triloids are rapidly becoming one of our best selling items, and is a preparation, that has great possibilities. Recently, a salesman, very successful in selling Triloids, visited the House, and gave us the talking points which enabled him to interest and sell his customers.

His general plan to sell Triloids was, to convince

the druggist that 90% of this class of preparations was sold directly to the consumer, as a retail article and not through the physician, or on prescription. Bearing this point in mind, his specific talking points are as follows:

1st: The name Triloids, as being better for a retail package, than the word Antiseptic Tablet, and removes any possibility of embarrassment a lady customer might have in calling for Antiseptic Tablets.

2nd: Shape and color of bottle. He calls special attention to the fact that it is impossible to pick up the Triloid bottle, without feeling the rough, safeguarding edges of the bottle. Try and pick up the bottle. This, with the blue color, makes it doubly proof against errors.

3rd: The net price of $1.28 per dozen, which our offer accords the druggist, realizes him over 14c. profit on every bottle sold. His method in quoting prices, was not to figure the price per bottle, per dozen, but to impress the dealer that he gave him the gross price on three dozen lots, and then, as special bonus, included ½ doz. free.

4th: The fact that Triloids are compressed, instead of molded. It rather surprised the writer, and may surprise you, that this salesman succeeds in selling Triloids, just because they are hard and compressed, instead of being molded and disintegrating quickly. This point, however, is well taken. Being a compressed tablet, it retains its shape until completely dissolved, thus if the mixture is used before the tablet is completely dissolved, it is only possible to apply as an antiseptic solution. While if the tablet is molded, it would disintegrate quickly, and if shaken, might be used before the Corrosive Sublimate was entirely dissolved. In such a case, if used either as a douche, or a wound-dressing, it is possible to cause infection, and produce mercurial poisoning.

Every doctor and druggist with whom he uses this

argument, fully agrees with him, and he overcomes entirely, the objection some buyers have made to Triloids.

We consider turning a point, apparently against you, into a selling argument, the finest quality of salesmanship, and we believe every traveler who hasn't used this argument, can do so to advantage.

Triloids is one of those preparations, combining all points of a successful item:—The House likes to see it sold; it gives perfect satisfaction; it increases the salesman's order; druggists realize a large profit, and the consumer is better satisfied and served.

Triloids merit your effort. See that you have them on every order, for they are sure to please your customer, and repeat.

"O'Connell Letter No. 6"

Date 11/25/14

Subject Triloids.

Dear Traveler:

In some trade and cosmopolitan papers, with the view of causing vomiting and preventing fatal results, suggestions have been made to add an emetic to Bichloride Tablets. This plan would be effective only when the tablet is dissolved. If the tablet is taken whole, the poison would be absorbed before the emetic properties of the tablet would cause vomiting, and would not be effective on the ordinary form of Bichloride Tablets, such as Bernays, which can be swallowed whole; it would however, be effective on such tablets as Triloids, which owing to their size and shape, must of necessity, be dissolved before being taken.

Investigation proves that Triloids as now made, tend to produce vomiting. We have two specific instances of persons who attempted to commit suicide by taking Triloids, vomiting as soon as they had taken the mixture, and completely recovering, seemingly none the worse of their experience.

This vomiting tendency is due not only to the cor-

rosive Sublimate itself, but also to Muriate Ammonia, which has as you know, expectorant properties, and has a tendency to raise phlegm. While there is no certainty that Triloids will so act in every case, the only direct cases of poisoning by Triloids brought to our attention, were the two in question, and in both of these the effects were as above stated.

We give you this information as it may further assist you in placing and increasing your sales of this product. In connection, we also copy letter from one of our salesmen who has been especially successful in selling Triloids, outlining his selling points. If you have any special plan which you have found particularly effective, kindly advise us so that we can pass the information to your brother travelers.

"In selling Triloids, I have found that the points that influenced the sale (apart from our bonus offer—which by the way should be strongly presented, giving cost difference down to the bottle) were, more rapid solubility, in either hot or cold water (with or without stirring) than any other tablet on the market, including various citric acid tablets. This is especially good with the physicians—likewise less irritation to the hands, and less corrosive for instruments, and a clear blue solution. Also with the physicians, the impossibility of picking up a mercurious granule on cotton when dressing a wound and depositing same in the sore, which is very probable with a disintegrating tablet when it has not dissolved, but impossible with a Triloid, because it retains its shape until entirely dissolved.

We also have a better package—better protected with label, cap, neckband and shape of tablet and bottle, than the various styles on the market; also the possibility of the customer (who might accidentally, or otherwise take the tablet internally) vomiting on account of the emetic properties of Ammonia Chloride, when taken in large doses."

Truly yours,
WM. R. WARNER & CO.
G. A. Pfeiffer, Tres.

"O'Connell Letter No. 7"

Date Jun 2 1914

Subject Triloids
Dear Traveler:

As evidence of merit we give below testimonial received through our Florida traveler. In connection permit us to add that the sale of Triloids is increasing. This we consider due to your efforts and the fact that the product is right in every way—shape, finish, color, style of package and merit of the product. You do your customer a favor every time you induce him to stock.

Truly yours,
WM. R. WARNER & CO.
G. A. Pfeiffer, Trea.

Dr. H. McMullan, of Morriston, Fla., writes:—

"I will never use any other antiseptic tablets but 'Triloids'. I gave the S. A. L. agent some of P. D. & Co. tablets to use as a wash in smallpox and his wife gave him one in a pint of warm water, misread the directions. My stomach pump was broken, so I had to get an assistant from adjoining town and it was a miracle I saved his life."

"O'Connell Letter No. 8"

Date 7/28/15

Subject 29 BOTTLES IN 4 DAYS.
Dear Traveler:—

29 bottles in 4 days:—$29.00 per day, is Friend Whitlock's record with "GARDEN BOUQUET". This record OUGHT TO HOLD THE TRAVELER who's constantly bemoaning that perfume trade has left the drug stores.

This record OUGHT TO MAKE THE TRAVELER who hasn't sold a bottle of Garden Bouquet sit up and at least open his eyes to the fact THAT THE TRAVELER WHO DOESN'T KNOW PERFUME *CAN NOT* BE SOLD—SELLS IT.

THIS RECORD OUGHT TO MERIT YOUR TAKING GARDEN BOUQUET, smelling of it, letting lady friends smell it, creating a salestalk, and getting a bottle or two on every order.

"GARDEN BOUQUET" is a universal odor. It appeals to both MEN AND WOMEN—YOUNG OR OLD—BLACK OR WHITE.

"GARDEN BOUQUET" JUSTIFIES THE DRUGGIST'S DRIVE.

Think of the price, $4.00 per 8 oz, as against $8.00 and $12.00 and over asked by other manufacturers for a similar odor.

Do you know we are NOT BEGINNING TO GET THE PERFUME BUSINESS our prices and offers entitle us to and as perfume is strictly a salesman's proposition, we can't for the life of us BLAME ANYONE BUT OUR TRAVELERS.

Perhaps you don't know it, but we have the 3 BEST ODORS IN THE WORLD. These three odors cover the entire perfume demand.

"VOGUE"
"ORIANA"
"GARDEN BOUQUET",

Can you beat them, and the price is right on every one.

Then think of our offer:

Sell 1 bottle each of these, add 1 White Rose, 1 Violet, then give the druggist a bottle of LOCUST BLOOM free. Figure out the dealer's profit. There isn't a logical reason why he should turn you down, and remember—

GARDEN BOUQUET
29 bottles in 4 days
$29.00 per day—spells:
GARDEN BOUQUET POSSIBILITIES

that mean perfume success for you, for us, and for the druggists.

Truly yours,
WM. R. WARNER & CO.
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 9"

Date Dec 9 1915

Subject Matter MELLIER'S GARDEN BOUQUET.

Dear Traveler:

Why is it we can sell Mellier's Garden Bouquet at $4.00 per 8 oz. while many other perfumers are getting double and more than double for a similar odor?

Is there a difference in the quality? Make comparisons, and rest assured you will find Mellier's quality is the best.

Why then the difference in price? There is only one answer, namely, manufacturer's profit. We based the selling price of Mellier's Garden Bouquet on "value giving" basis, not on how much we thought we could get for it.

The Mellier and Alfred Wright Perfume lines give the retail druggist full value—quality in every drop, supplied to the retailer at a logical cost.

Our reasonable price on that high quality odor, Mellier's Garden Bouquet, clearly demonstrates this full value policy. Make the most of it—sell Garden Bouquet on every order and use it as a leader to introduce the many other value giving odors you have to offer.

Always start out to sell at least a 10 bottle order. In any event, insist on a 5 bottle assortment, and in either assortment include—

MELLIER'S GARDEN BOUQUET
MELLIER'S VOGUE
The Twin Repeaters.

Cordially yours,
WM. R. WARNER & CO.
H. Pfeiffer, Prest.

"O'Connell Letter No. 10"

Date Dec 23 1915

Subject Matter
MELLIER'S GARDEN BOUQUET.

Dear Traveler:

Mellier's Garden Bouquet seems to be popular

with practically *everyone*, which is another way of saying—

MELLIER'S GARDEN BOUQUET

is a hit—a ten strike—a synonym for popularity.

Now is the time to cash in on this popularity,

Now is the time for you to sell Garden Bouquet to the dealer.

Now is the time for the dealer to sell Garden Bouquet.

We are convinced the possibilities with this odor are extraordinary. We can sell $50,000.00 per year of this odor and then not reach the limit, nor at that overload anyone.

It will pay you to give Mellier's Garden Bouquet some careful thought. Develop live selling plans, demonstrate the odor, get it on every order, and always include a supply of its Twin—

MELLIER'S VOGUE

They are both repeaters.

Cordially yours,

WM. R. WARNER & CO.

H. Pfeiffer, Prest.

"O'Connell Letter No. 11"

Date Mar. 9, 1916

Subject Matter MELLIER'S GARDEN BOUQUET.

Dear Traveler:

Just to illustrate how a good thing repeats:

Record of Purchases by
F. C. Hess, Villa Grove, Ill.
11/15/15 1-8 oz. Personal
1/18/16 1-8 " Mail
2/25/16 1-8 " "

Record of Purchases by
Becker's Phcy. Calexico, Cal.
11/ 8/15 1-16 oz. Personal
1/31/16 1-16 " Mail

Record of Purchases by

A. E. Olle, Kenosha, Wisconsin.
11/22/15 1-8 oz. Personal
2/23/16 1-8 " Mail

Are you making a leader of this up-to-date odor? Analyzed from any standpoint it is an ideal item to push.

Quality—Repeats
Fascinating——Isn't it great?
Popularity—Appeals to most everyone and anyone.
Fashionable—Yes indeed!
Price—Its only low feature.
Style of Package—Inviting.
Seasonable—Now is the time to sell perfume.
Market—Every retail druggist in the U. S.

Mellier's Garden Bouquet is one of those happy chords in perfume which are only occasionally struck,—take advantage of it.

Sell at least an 8 oz. bottle to every druggist, and sell some 16 oz. bottles too.

Sure you can do it. Some ordinary salesman might not do it, but YOU can. We know it.

Cordially yours,
WM. R. WARNER & CO.
H. Pfeiffer, Prest.

"O'Connell Letter No. 12"

Date Jun 8-1916

Subject Matter: SALESMAN'S LETTER.

Dear Traveler:

How is your imagination? Have you developed the faculty to picture to yourself possibilities—for example, can you visualize what you can do with Garden Bouquet? Can you see yourself selling at least one bottle of Garden Bouquet each day—that would mean 312 in a year; total $1248.00.

But doesn't your imagination carry you a step

farther? Surely two bottles each day isn't many—624 in a year—$2496.00, not a bad amount for one odor.

But why not give still more scope to the imagination say at least 1-8 oz to every druggist you visit whose credit is good. That would be, well anyway five each day—1560 per year $6240.00 of one odor. Some commission for you on that kind of business.

But you say "Stop, why day dream?"

Listen, take the dream out of a business, and it stops growing. Certainly, dreaming alone won't get the business, but dreams of big things, backed up by work, work, WORK, will land the dreamer at the goal of success.

Picture to yourself what YOU can do with Garden Bouquet, then DO it.

No question about the repeating qualities of the odor. Here's Mr. Fly over in Carrier Mills, Ill., of whom Mr. Baldwin writes, "there are no 'flies' on him". He started in last November and bought 1-8 oz.—since then has purchased three more, a total of 4-8 ozs. within a few short months.

Then there is the Wentzelmann-Gilman Drug Co., Sedalia, Mo. Friend Brown was there the other day. Including their first purchase last November, they have bought to date 6-8 oz. bottles.

Mellier's Garden Bouquet possesses that something which makes it repeat. It is an order-opener for your perfume department.

Make an earnest effort to sell to every dealer you call on, and always try to include a good assortment of other bulk odors—a ten bottle offer, or at least a fine bottle offer.

Cordially yours,
WM. R. WARNER & CO.
H. Pfeiffer, Prest.

"O'Connell Letter No. 13"

SALESMAN'S LETTER.

Date Mar. 5, 1914

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

Do you believe in mental telepathy? Personally I am not prepared to talk much about it, but just a few minutes ago I had an example of something very much akin to that much talked of phenomena.

I was just starting to write you a letter about Mellier's Vogue and was thinking of what Mr. K. D. Mellier told us when we bought the Mellier line from him and his associates. While I was thinking the telephone rang and much to my surprise Mr. Mellier was on the other end of the wire. I answered his "Good Morning" by telling him that I was just thinking about him in connection with Mellier's Vogue. He replied by pointing out that Mellier's Vogue is an odor the public does not get tired of.

We must all recognize that perfumery is a matter of fancy, it appeals to people's fancy; for instance, a lady uses Violet for a few months and then her fancy changes and she wants a Rose, and so on. But Vogue is an exception—there is some appealing quality to it which puts it in the class of "once used always used". In other words, as a general thing, when a lady starts the use of Mellier's Vogue she will continue to use it. She may occasionally try some other odor, but she will always come back to Mellier's Vogue.

Mellier's Vogue is no experiment. Years ago Mr. Mellier from his long experience with it had reached the conclusion that it was the Star Odor to push. He did his level best to impress this fact on us when in 1904 we took charge of the business, and the present sales of Mellier's Vogue prove he was right. Today Mellier's Vogue is one of the biggest selling odors in the retail drug stores of the United States.

We ask your daily push back of Mellier's Vogue, because we know the odor justifies it—we know it is a repeater. Take our word for it—we are not guessing.

Start in today with renewed Vogue effort, and keep it up every day this year.

Cordially yours,
WM. R. WARNER & CO.
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 14"

SALESMAN'S LETTER.

Date Mar 12, 1914

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

When Mr. Mellier 'phoned me the other day he invited me to lunch with him on Thursday and our conversation during lunch naturally turned to Mellier's Vogue. We would talk about other things, but get back to that interesting subject.

Mr. Mellier attributes the great popularity of Mellier's Vogue to the fact that it is a perfect blend, no elemental odor predominating—as he expressed himself, "it's just Vogue".

The constituents of Mellier's Vogue are so artistically balanced as to bring out the best of each, yet each is submerged in the whole. In short, Mellier's Vogue is one of those happy hits of a life time

Boys, if you want to build up your perfume business you can't do better than to enthuse your customers and their clerks with Mellier's Vogue. By inducing them to push and demonstrate Mellier's Vogue they not only will develop a good Vogue business but at the same time rejuvenate their entire perfume department.

Suggest when demonstrating Mellier's Vogue to the trade you also make clear the big profit for them in handling and pushing it. Mellier's Vogue retails at 75c. per oz., and many dealers are selling it for $1.00. At the former price a 20 oz. bottle shows the Druggist

$9.00 profit on an investment of $6.00 or 150%. At $1.00 an oz., the Druggist's profit is $14.00 on an investment of $6.00, or 233-1/3%. What is there a Druggist can sell which will show him a better profit, and do you know of anything more pleasant and easier for a Druggist to handle than perfume?

Cordially yours,
WM. R. WARNER & CO.,
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 15"

SALESMAN'S LETTER.

Date Apr 2, 1914

Subject Matter Mellier's Vogue.

Dear Traveler:

2½ gal. Mellier's Vogue at $18.00.....	$ 36.00
11-20 oz. Mellier's Vogue at $6.00.....	66.00
Total.....	$102.00

Yes, the above represents the sales of ONE of our travelers.

No, not for 3 months, nor 2 months, nor 1 month, but for just 1 week.

No, this week wasn't several years ago, nor last year when conditions were different, but just last week, ending March 31, 1914.

No, this salesman's territory is not the easiest in which to sell goods—the fact is, it is quite a difficult territory, a territory where the consumption of perfume is not any too great and where competition is several times legion.

Yes, the man who made these sales knows how to sell Perfume—there is no question about that after noting the above sales of one odor only.

Well, you say, "Who did it, and where is he?" Brother Whitlock in Southern Iowa is the man and the territory.

And what he has done gives you an idea of the possibilities with this wonderful odor. Boys, determine to

place Mellier's Vogue in every store in your territory, and after placing it leave the dealer and his clerks enthused with the idea of pushing it.

It CAN be done!

Cordially yours,
WM. R. WARNER & CO.,
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 16"

SALESMAN'S LETTER.

Date Apr 9, 1914

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

There are two requisites for a good odor—
Fragrance,
Permanence.

The truth of this statement is self-evident.

Mellier's Vogue meets these requirements. We know YOU believe this and we know you can prove it to your trade. Be sure and take advantage of every opportunity to do so.

Mellier's Vogue is the corner stone of the foundation on which the retail druggist can build a profitable perfume business. And it is your duty to awaken the perfume conscience of the druggists in your territory—the quickest way to do this is to sell them Mellier's Vogue and enthuse them with the idea of demonstrating it to their customers.

One of the boys took exception to our mentioning in a recent letter that Mellier's Vogue appealed to the ladies. He writes, "Ladies, men, girls and boys use Vogue", and of course he is right. We suggest you give this little hint to the druggists—advise them to demonstrate Vogue to gentlemen as well as ladies, young and old.

Cordially yours,
WM. R. WARNER & CO.,
G. A. Pfeiffer, Treas.

P. S. One of the boys from Texas writes as fol-

lows: "My total sales of Mellier's Vogue for week ending March 21st were $9.00. My total sales of Vogue for Monday 3/23 were $12.00. How is this for special effort?" Surely he made the right kind of a start on Monday.

W. R. W. & Co.

"O'Connell Letter No. 17"

SALESMAN'S LETTER.

Date Aug 27, 1914

Subject Matter MELLIER'S VOGUE.

An Instance.

The customer had a rack of 8-1# "Blank & Blank" odors, each bottle equipped with an atomizer, all well filled. "Any bulk perfumery today?" "No! No! Stocked for five years." I quickly saw that he only had flower odors and I knew to wake up his Perfume Dept. he needed a blend, of which class Mellier's Vogue is the prize.

I gave him a demonstration which *"Impresed"* him. I said you are *"Impressed"*, now you in turn can impress YOUR CUSTOMER and when you do, you will sell him. You may not sell every one Mellier's Vogue, but in most every instance you will make a sale of some odor, and I contend that Mellier's Vogue is well worth its cost as an *"Impressor"*. Get your customer to thinking of perfumery, and you will sell him.

In fact, ask yourself this question. Do you think of eating until you are impressed by hunger? Do you ever think of drinking (water) until you are impressed by thirst? Do you ever think of resting until you are impressed by a tired feeling? And all down the line I enumerated these impressors of life and I sold him 1-20 oz. Mellier's Vogue, Atomizer, etc. He was a German customer and very conservative, but I left him satisfied he had made a wise purchase.

Very cordially,

Texas Moore.

We may not all agree with Brother Moore concerning eating and drinking. For instance, some people whenever they see a double swinging door, want to drink, but we do all agree that Mellier's Vogue is a real "Impressor", an attention getter, a perfume department awakener, a real perfume.

Mellier's Vogue pleases the people.

Sell it to them.

WM. R. WARNER & CO.,
H. Pfeiffer, Prest.

"O'Connell Letter No. 18"

SALESMAN'S LETTER.

Date Oct 5 1914

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

For almost ten years we have been pushing Mellier's Vogue—believed in it—recognized it as a winner—and the marvelous way this wonderful odor is selling proves our confidence has not been misplaced. It has stood the fire test of time and IS a big SUCCESS.

By the way, do you know Brother Whitlock of Iowa? We call him "Whit" for short—we guess his trade call him "Vogue". Look what he did in Des Moines in one September week.

5-½ gals	Vogue	$90.00
5-20 oz.	"	30.00
7- 9 oz.	"	21.00
		$141.00

In addition he sold 7-½ gal. bottles of other odors.

Yes, Mellier's Vogue sells in big towns, medium size towns, and in little towns. For instance, did you ever hear of Deer Lodge, Mont.? Sounds wild and woolly, doesn't it? But in a little over 2 years the druggist out there has bought 4-½ gals. Mellier's Vogue. Brother Hinton just sold him again the other day.

Brother, are YOU pushing Mellier's Vogue? If so, we compliment you—keep up the good work. If not, start in TODAY and no longer turn a deaf ear to opportunity, who stands knocking at your door with a beautiful bouquet of flowers, the odor of which is called Mellier's Vogue.

Cordially yours,
WM. R. WARNER & CO.,
H. Pfeiffer, Prest.

"O'Connell Letter No. 19"

SALESMAN'S LETTER.

Date Oct 22 1914

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

Record of Purchases of
Mellier's Vogue
By
Carl J. Agee, King City, Mo.
Salesman Connell's Customer.

1/18/09	1-9 oz	$3.00	Personal
3/6/11	1-9 "	3.00	"
12/14/11	1-9 "	3.00	"
2/13/13	1-20 "	6.00	"
8/13/13	1-20 "	6.00	"
5/11/14	1-20 "	6.00	"
9/26/14	½ gal.	18.00	"

When a Vogue customer REPEATS like above there isn't much room left for doubt. Repeat orders speak louder than words. The many repeat orders we receive for Mellier's Vogue PROVE its quality.

Take the hint from the above illustration, take advantage of the Vogue possibilities in YOUR territory. Right NOW begin pushing Mellier's Vogue every day.

Cordially yours,
WM. R. WARNER & CO.,
H. Pfeiffer, Prest.

"O'Connell Letter No. 20"

SALESMAN'S LETTER.

Date May 20 1915.

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

(COPY)

Chicago, Ills. 4/13/15.

Pfeiffer Chemical Co.,
St. Louis, Mo.

Gentlemen:

Please send me ½ gal Vogue Perfume (Mellier's).

Carl J. Klocker,
301 S. Halsted St.,
Chicago, Ills.

RUSH

Do you get that *RUSH*?

Chicago isn't very far from St. Louis, but Mr. Klocker wanted the Vogue he ordered rushed, and we want to tell you Mr. Klocker is no stranger to Mellier's Vogue. He has handled it since 1910, heretofore in 20 oz bottles—

He knows something of the possibilities with Mellier's Vogue,

He knows it repeats,

He knows its a quality odor,

He knows its a money maker for him.

Brother Huyck who calls on him don't have to hammer these facts into Mr. Klocker's head—Mr. Klocker *KNOWS* from experience.

And there are a lot of retail druggsts throughout the United States who KNOW. For instance, Mr. E. P. Whinrey, Muncie, Ind., Brother Gates' customer. Look what he has done with Mellier's Vogue in a few short years:

11/10/11	1-20 oz	$6.00	Personal
3/15/12	1-20 "	6.00	"
5/8/12	1-9 "	3.00	"

7/5/12	1-20 "	6.00	"
10/23/12	1-20 "	6.00	"
12/18/12	1-20 "	6.00	"
12/21/12	1-20 "	6.00	"
2/13/13	1-9 "	3.00	"
4/8/13	1-20 "	6.00	"
5/30/13	1-20 "	6.00	"
8/4/13	½ gal	18.00	"
8/9/13	1-20 oz	6.00	"
11/28/13	1-20 "	6.00	"
1/29/14	½ gal	18.00	"
5/4/14	½ gal	18.00	"
3/13/15	1-9 oz	3.00	"
4/28/15	½ gal	18.00	"
TOTAL	483 oz	$141.00	

Considering the retail price at $1.00 per oz., the income from the above is.....$483.00
Cost 141.00

Profit $342.00
% Profit 242.5

Yes, $342.00 or 242.5% profit on one odor. Shows what can be done with Mellier's quality. But it can't be done if the dealers don't buy it and dealers in your territory aren't likely to buy it unless YOU push it.

You see, Mr. Vogue Salesman, it is up to you to get that business today. This summer day, tomorrow's summer day and the many summer days coming are the days to get the Vogue business.

Summer Weather is Mellier's Vogue Weather.

The hot perspiring days are the heavy perfume consuming days:

Yes, we know they are the days the sleepy eyed druggist cocks his feet up on his desk and complains that there is "nothing doing", but not so with the wide-awake dealer—he is up in the front of his store, keeping his stock in nice snappy shape, picking up good

selling plans, prepared to demonstrate his perfumes and other live merchandise to prospective customers who come into his store. Yes, sir, the live Ph. G. will get many a shekel from his Perfume Department during the hot summer days—he will if he *TRIES!*

Cordially yours,
WM. R. WARNER & CO.,
G. A. Pfeiffer, Treas.

P. S.—Sell the ½ gal. bottle—it means $18.00 on one line of your order blank.

W. R. W. & Co.

"O'Connell Letter No. 21"

SALESMAN'S LETTER.

Date Jun 3 1915

Subject Matter MELLIER'S VOGUE.

Dear Traveler:

The way Mellier's Vogue repeats proves its selling power. Take for instance Brother Stevenson of Los Angeles, one day last week he sold two different customers ½ gal. each, both of which customers previously had purchased Vogue, one in 9 oz. and the other in 20 oz. quantities. Such dealers are not taking hold of a fad or getting a cat in the bag, but on the other hand are buying an odor they know something about.

Of course, Mellier's Vogue will not sell itself—no perfume will. Mr. Druggist must demonstrate it, bring it to the attention of customers, who enter his store, etc.—that's the way he earns his profit (over 255% when bought in ½ gal.). Vogue quality brings the customers back for more—that's the way he reaps the benefits of good-will and builds up a permanent business.

Listen, any live druggist who will buy a ½ gal. of Vogue can make it a real factor to build up a profitable perfume business not only on Vogue but other odors

as well. The point is, a ½ gal. bottle Vogue will attract attention to the entire Perfume Department.

Cordially yours,
WM. R. WARNER & CO.,
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 22"

William R. Warner & Company.

Sales Department. Date Aug 6 1914

Subject POSSIBILITIES OF CLUB "C" OFFER.

Dear Traveler:

We are certainly getting enthusiastic about the Club "C" Offer because the more we study and analyze it, the greater the possibilities are.

In making a calculation, there is not a druggist in the United States, who can not use during the year, at least $100.00 worth of our combination, and as there are over 48,000 druggists in the United States, it would mean a business of over four million, eight hundred thousand dollars. When you calculate, there are nearly one hundred million people, that only means a consumption for each person of four and four-fifths cents worth of all the different medicines we manufacture per year, and you will all concede that this is a very small consumption compared with the amount they consume of the different medicines we manufacture.

In order to still assist you further in succeeding and placing the Club "C" offer, we authorize you, where you feel it is to the advantage of the druggist and of the firm of selling on the basis of:

One fourth of the invoice to be paid in 30 days
One fourth of the invoice to be paid in 60 days
One fourth of the invoice to be paid in 90 days
One fourth of the invoice to be paid in 120 days.

Under this arrangement, if the druggist will take an interest and put his push on the goods, he can simply run his business on our capital, for he can take

more than enough money out of the goods to make his monthly payment, and in that way, you can readily see he has no investment, but the secret of it is up to you, to enthuse the druggist by convincing him that he is losing money by not taking advantage of the liberal prices and terms, to make it possible to take advantage of Club "C" Offer.

You can readily see that the entire proposition is altogether in favor of the retail druggist and you as salesman, for you know that any druggist, who felt disposed to do it, could buy a large per cent. of his entire medicine purchases through us and in no way work any hardship on his customers.

Now when it comes to such items as Perfumes, he could sell ours exclusively without any disadvantage. He can also handle more than four-fifths of our line of pharmaceuticals and profit-paying patents.

By Club "C" Offer we mean any general assorted order over $48.00.

On receipt of this letter, make an effort to make the week commencing August 17th, a Special Club "C" Offer Week, for we feel it will work to your advantage in every way. It will prove to you, that no offer ever has been made to the retail druggist of the United States, that from every stand-point is as logical and profitable to the trade.

The sooner your eyes are open, the sooner you commence making extra commissions.

Cordially yours,
WM. R. WARNER & CO.,
H. Pfeiffer, Prest.

"O'Connell Letter No. 23"

Date Sep 10 1914

Subject Make Hay While the Sun Shines.

Dear Traveler:

SEASON:—

Yes, why certainly business is good. Why shouldn't

it be with our combination and the large variety of goods we manufacture and distribute? Besides, this is the best season in the year for business; the weather is pleasant, people are returning from their vacations, and druggists are planning to put in their winter supply and generally stocking up. But it is up to you boys, to take advantage of all these conditions and produce as many large orders as possible.

OUR PRICES:—

From the information we have, other pharmaceutical houses have advanced prices on many items that we have not advanced, and all of them standard sellers. We are trying to prove through you, to retail druggists that we are their friend and are going to avoid advancing prices on account of the war, as long as we can. The more you increase your business, the longer we can continue our old prices, as the increased business will, in a measure, absorb the increased cost of material. So you see it is important for you to demonstrate your samples thoroughly and explain to the retail druggist, the amount of money he is losing by not trading with us.

SIZE OF ORDER:—

Considering the season, there is no occasion for taking small orders, as you can not overstock any druggist in your territory on our Club C Offer, and the big advantage to the druggist is, the probabilities are the next time he buys, he will pay more money. So you see the druggist has everything to lose by not placing the order, but you must prove to him that our position is right in every way.

COMMISSIONS:—

This is where you come in. The more you take advantage of the present conditions, the more business you do by putting in six full days each week, looking for new customers that you never could touch before, and harvesting the orders that await you, the more

commission you will get. We are doing everything in our power to assist you, but it is up to you to do your level best in every way. We often feel that some of our men are not beginning to realize their possibilities. For instance, we have two men with adjoining territories; one salesman produces double the business of the other one, with the same line, same prices and same terms. We can only feel that the man who is not producing business is not onto his job.

Analyze yourself to see where your weakness is, and overcome it if possible. You can do it, if you try.

Yours for increased business,

WM. R. WARNER & CO.,

H. Pfeiffer, Prest.

"O'Connell Letter No. 24"

Date 10/8/14

Subject Seed That Grows.

Dear Traveler:

Stop and think.—Don't 80% of your sales consist of ITEMS previously sold and to DEALERS previously sold? That means every time you place a new item or sell a new dealer, you are sowing seed;—sowing seed that counts; seed that will produce from thirty, sixty, yes, a hundredfold, just in proportion to how thoroughly you have cultivated the soil, or in your case, how well you have demonstrated the possibilities to the new customer, or of the new item.

Think what this means. Every time you place a new item it automatically starts working for you, starts making business for your next trip. It becomes an industrious little business helper for you, and the more of these "little business helpers" you place the greater your possibilities. Really, your possibilities are as limitless as the sea. Isn't the wide ocean composed of little drops of water, and the great plains and mountains, of little grains of sand? Just so is our business composed of little helpers. In your and our case, these

little helpers are the various items we supply the different dealers we sell. Individually perhaps each isn't big, but collectively, what a grand total! Each unit is important. Make every one work for you. They are all at your service, ready and willing workers.

Analyze in your own way, the advantages of placing new items, of making new customers, of sowing this kind of seed. Figure out how these little helpers will increase your commission check. Then make your plans you have as a little helper, every item we supply, and every druggist and dealer in your territory. Doing so will make that commission check of yours so big, that you will hardly recognize it, but after you realize that it's yours, that it was your efforts that earned it, you will dance for joy.

To paraphrase,—Let the little helpers do your work.

Truly yours,
WM. R. WARNER & CO.,
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 25"

Date 12/10/14

Subject The Boys Ahead.

Dear Traveler:

Next to getting orders and collecting past due accounts, perhaps the most interesting thing right now is the Year End Prize, and we know you are all interested in knowing the progress made by the different travelers. As a matter of interest, we give below in rotation, the seven salesmen who have made the largest increase in dollars and cents; this doesn't necessarily mean that the same rotation holds good when figured on the percentage basis:

1. S. J. Nottingham
2. J. Ralph Emery
3. C. T. Dill
4. V. M. Moon
5. A. H. Klinka
6. C. S. Rogers
7. H. P. Johnson.

Those of you who were with us last year remember some of these names as head prize winners, which shows undoubtedly they liked the taste of last year's prize, and that in final analysis, is what enables the man to get more. To get some of this Year End Prize money, first you must want it and want it bad; second, you must put forth the effort to enable you to supply this want. There isn't a man on the force, who isn't able to win some prize money, if he will just make up his mind he is going to have it and then go after it with the right kind of effort and determination.

Remember your increase in sales for the period is compared with one month and not with 1½ times your monthly average. That means that you have a month and a half to make your increase. If it happens that you haven't shown any increase to date, that is no reason why you should be discouraged or give up. You still have the greater part of December before you, and while a good start is highly advisable, getting your second wind, and coming in strong on the home stretch is equally important. Remember from whatever standpoint considered, winning some of this Year End Prize money is to your advantage; 1st, the direct prize check; 2nd, the prestige this gives you; 3rd, the increase in your regular commission check; 4th, opening new accounts; 5th, bigger variety of goods with your present buyers; 6th, winning in what you set out to accomplish.

Make up your mind you will consider nothing but success in this Year End Prize Check, and remember the bigger the check you draw the better you please the house, and the higher your standing as a salesman.

With best wishes, we are,

Truly yours,

WM. R. WARNER & CO.,

G. A. Pfeiffer, Prest.

P. S. The above report is based on the last two weeks of November.

"O'Connell Letter No. 26"

Date 9/2/15

Subject Saleman's Letters.

Dear Traveler:—

In future you need not return Saleman's letters unless we especially request or you use for replying. Instead we suggest you file the letters containing special instructions or information for future reference, carefully destroying all others.

The purpose of Saleman's letters makes it necessary to give information regarding our goods and policies, and while they contain nothing that would compromise us in any way, they do contain data, etc., we do not wish our competitors to know. Your cooperation therefore in disposing of these to avoid their falling in the hands, of others, will be appreciated.

Truly yours,

Wm. R. Warner & Co.,
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 27"

Date 4/27/16

Subject May Prize Offer.

Friend O'Connell:—

Our interests are mutual—your ambition and our ambition is the same. We both are aiming to make this year 1916 show a substantial increase over the year 1915.

A year is made up of units—month units, week units, day units, hour units. The way to make the whole 1915 show an increase is to make each unit show an increase, from the smallest to the greatest. Every hour in every business day can be a factor in the success of 1916. The hour unit, though not large can not be ignored.

Successful hour units build up successful day units.

Successful day units build up successful week units.

Successful week units build up successful month units.

Now we are at the approach of a new month unit—May, 1916.

Let's pull together and make it a record breaker.

In view of having the advantage of the "Club G" Offer, we believed we can make the month of May show an increase over March, but of course, it is going to require had pulling on the part of each and every one of us to accomplish this result.

As an evidence of our appreciation of your special efforts for May, we will award you a prize of a total of 25 Gold bonds, divided as follows if married—15 Gold Bonds to you and 10 Gold Bonds to your wife; if unmarried, the Gold Bonds will be undivided. Award based on the following conditions:

That your personal sales during the month of May, of orders we accept for shipment, total $2,700.

Notice:—For each full $100.00 you add to this total, we will award an extra three Gold Bonds.

"Sales" as here used, means personal orders sold to retail druggists, physicians and general stores at regular trade prices—does not include special formulas, etc.; also does not include orders taken with deferred shipping dates.

In order to make every one of your business days in the month of May count on this offer, we will compile your total from the orders you actually sell in May from the first to the last, and which we accept for credit.

From every angle, it is to your advantage to win this May prize. If you win—and we feel you will—here's what you accomplish:

Improve your sales ability.

Collect that past due account, to insure new order being passed for shipment.

Lay foundations for future business.

Increase your and your family's interest in your work.

Increase your cash income for the month of May.

Increase your commission at the end of the year.

Write your name among the winners.

Prove yourself a success.

We have a big stock of Gold Bonds on hand—heres our best wishes that you win a pocket full.

Cordially yours,

Wm. R. Warner & Co.,

H. Pfeiffer, Pres.

This prize is on early Monday morning, May 1st. Plan to get a good start;—then keep it up.

"O'Connell Letter No. 28"

Date 5/11/16

Subject

Dear Traveler:—

Your mind is You, and my mind is me. The color of our eyes, or the size of our feet don't count—the mind is the thing.

Mind is another word for intellect, faculties, opinion, judgment, temperament, humor, disposition. Listen our minds are our whole works, and our minds are a power we can use to bring happiness and success.

Right now we are in the midst of the May Prize Contest. If you let your mind be convinced that you can win the prize set aside for you, and more, you surely will do it. Notice, I said surely. There is no chance about it, you can do it if you will.

Take my word for it, and put your mind at work on this thing. When a timid buyer talks about poor business, you'll convince him he needs your goods. When a know-it-all buyer gives you a cold shoulder, you'll prove to him that he must have your goods. You will turn defeat into victory. You can do anything with that mind of yours, if you will give it latitude.

Think positive—never negative.
Think constructive—never destructive.
Think success—never failure.
Do—Act—Work
Be a leader
Win the Prize.

You have the tools with which to do it. By this we mean, you have the territory; you have the customers; you have the goods, the offers, deals, etc., and you have our co-operation. It is all up to your mind.

Take your choice—win. I believe you will win, and I believe you agree with me.

Cordially,

H. Pfeiffer, Prest.

"O'Connell Letter No. 29"

Date 13/9/16

Subject New Edition Salesman's Confidential

Dear Traveler:

We are revising Salesman's Confidential. This booklet is intended for the salesman exclusively, and we want the new edition to be perfect. To help make it so, send us your suggestions of the additions and changes you would make if you were selected to superintend the revision.

The purpose of the Salesman's Confidential is to give information, which taken in connection with the Epitome, enables you to know your line and quote prices intelligently and quickly. The salesman's Confidential should be:—

1. Neat and legible.
2. Simple and concise.
3. Specific and clear.
4. Easy and quick of reference.
5. An answer to every question, either a salesman or customer might or will ask.

Your suggestions will help make it so. Send them in at once. We are now revising.

Truly yours,

Wm. R. Warner & Co.,
G. A. Pfeiffer, Treas.

"O'Connell Letter No. 30"

Date Sep 28 1916

Subject Matter

Dear Traveler:

This particular letter is primarily intended for our representatives who travel in the South, but we are sending it to everyone of our representativs, because the facts are interesting to those of you who travel in the North, as well as the South; besides, the present prosperity is not confined to the South—it is universal, north, south, east and west.

We received a letter the other day from a gentleman residing in the South, who keeps in close touch with farm conditions. The following is an extract:

"The South, as a whole, is in good shape—cotton crops short, but prices the Highest in over 20 years, and what is more, the Farmers are Getting the High Prices. The South will receive fully 200 million *more* for this cotton crop than for any previous crop. Lumber is also good marked, and *everybody employed.*

Kind regards, etc."

Gentlemen, you know how it is when things look dumpy. We picture to ourselves the big things that we would do if crops were good and the mills and factories running, etc.

Listen! That golden opportunity is here right now; there is no need of waiting for a better combination of circumstances under which to do business. Now is the time—now is the best opportunity most of us have ever had in our lives before, and may be it is a better one than we will have again for sometime.

This being the case, it most certainly behooves us to put forth our very best efforts and make every moment count for business.

All together, let's "reap while the reaping's good."

With best wishes.

Cordially,

Wm. R. Warner & Co.,
H. Pfeiffer, Prest.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ22. When Mr. Hagaman was travelling with you about how long did it usually take him to go through his lines?

A. Ordinarilly where he could get a man's attention from an hour to two hours. Sometimes a little longer.

XQ23. About how many items were there in all of his lines that he usually tried to sell?

A. That would be a pretty hard question for me to answer. There would perhaps be from five hundred to seven hundred items. There would be a great many more than that if you took the lines all through.

XQ24. Of these five hundred or seven hundred items were not most of them competitive goods with other houses?

A. Three quarters of them might be.

XQ25. And in respect of these your object as a salesman was to induce the druggist to take on your article in place of or in addition to the corresponding article of another house? Is that correct?

A. Why certainly it was my object.

XQ26. And you had at least five hundred items that you were especially pushing more or less which were matches to corresponding items and similar items, medicinally speaking of other houses. Is that correct?

A. I would not want to say, there may have been more and there may have been less.

XQ27. These were matches or similar medicinally to corresponding items of another house?

A. Yes, sir.

XQ28. Take the Warner Pill A. S. B. & I., which you said was "displayed to take the place of Lapactic pill by Sharpe & Dohme." When you got to this item what did you say to the druggist in order to induce him to buy your pills?

A. I displayed the sample that I had as a substitute for the Lapactic, which was the same weight, same color and same coating, and also the same formula.

XQ29. What I asked you to state is what you said to the druggest?

A. Simply as I said before I displayed these pills in my hand and told them where they could be substituted for the lapactic, they would get the same medicinal effects from the same formula that they would vice versa.

XQ30. I ask you again to state what you said to the druggist?

A. I said "Now here is a pill that we are making, at a good deal less price, same formula, and you can use it to replace the lapactic." That is the best I can answer that question. I sold a good many hundred thousand of them too.

XQ31. When you came to the item of your pill No. 541 which you have testified was displayed to take the place of a pill made by Parke, Davis & Co., called Alophen pills, what did you say to the druggest?

A. To the best of my knowledge on the price at the time for this pill mentioned we were getting at that time either $1., or a $1.25 a thousand where the original pill of P. D. & Co., was $2.25 a thousand and as a replacer, same formula, same shape. My object was to procure an order to demonstrate to the druggest that they could be used in the place of P. D. & Co.

XQ32. But what did you say to the druggist. Give your words as you did before in the other case?

A. I could not cover the question any more fully, I simply said that it was a substitute for the alophen pill P. D. and that it was a saving to the druggest in the price.

XQ33. You testified in answer to XQ30 in respect to what you said in selling your A. S. B. & I. pill that you said to the druggist, "You can use it to replace the lapactic." You now say that in trying to sell your pill No. 541 you said to the druggist that it was a "substitute for the alophen pill P. D." Do you mean to say that in selling the one pill you used the word "replace" and in selling the other pill you used the word "substitute."

A. What is the difference between a substitute and a replacer, they are both for the same purpose.

XQ34. When you were selling your Triloids against Lilly's Diamond Antiseptics, what did you say to the druggists? Give your exact words?

A. Well, in selling Triloids to the druggist the first point was the style of the bottle, the shape of the tablet and first the price which was so much less than Lilly's that they could be worked off at a larger profit than the original.

XQ35. Then when you sold your A. S. B & I. in competition you used the word "replace." When you sold your pill 541 you used the word "substitute." When you sold your Triloids in competition you used the words "worked off." Was that your practice? Or did you consider "worked off" the same as "substitute" and "replace"?

A. Yes, sir, I might have used the term to apply to any of the terms mentioned, using different tales talk at different times, depending upon the buyer that I had to handle.

XQ36. But always with the same meaning substantially?

A. Yes, sir.

XQ37. I take it that your main object was to demonstrate to the druggist the similarity of your article in each case to the article with which it was in competition. Is that correct?

A. Yes, sir.

XQ38. You were with the Warner house for three years. Was your sales talk substantially the same throughout?

A. Yes, sir.

XQ39. And it was the same as Hagaman's talk substantially, was it?

A. My talk has always been the same with my customers throughout. Hagaman's talk has changed, for the fact that Mr. Hagaman or the house had eliminated the Blue List and also that the trade are pretty wise at the present time about these different preparations.

XQ40. Were Warner's Triloids the same physical shape as Lilly Diamond Antiseptics?

A. As I remember them, yes, sir.

XQ41. Give me the shape of each.

A. They were three cornered shape tablets.

XQ42. That is you mean that Warner's were three cornered shape tablets?

A. Yes, sir.

XQ43. Now what was the shape of Lilly's?

A. As nearly as I remember they were the same.

XQ44. If Lilly's were triangular in section why did Lilly call them "Diamond" antiseptic. Is it not likely that Lilly's were diamond shaped?

A. I don't know why they did it.

XQ45. Are you absolutely certain that Lilly's were not diamond shaped in section, being called diamond?

A. I did not say they were not diamond shaped, I said they were the same style tablet as the Triloids, exactly, as I remember it, and the bottle was practically the same shape and style. I have seen enough of both to be able to draw them exact.

XQ46. Are not Lilly's tablets called Diamond tablets?

A. Yes, sir.

XQ47. And were they not diamond shaped in section?

A. Yes, sir.

XQ48. And were not Warner's Triloids triangular shaped in section?

A. Yes, sir.

XQ49. Have you a perfectly clear recollection of the shape, size and style of the respective bottles? Describe them? Describe Warner's bottle?

A. Both bottles held the same amount of tablets.

XQ50. Was not the Lilly bottle a little taller than the Warner bottle?

A. Not enough to be noticed at all.

XQ51. And was not the Warner bottle triangular in horizontal section while the Lilly bottle was almost diamond shaped in section, except that the front under the label was rounded slightly?

A. That was not my sales talk on selling them.

XQ52. I am asking you to describe the respective bottles and to say whether the Warner bottle was not triangular while the Lilly bottle was substantially diamond shaped?

A. That is right on the style of the bottle.

XQ45. And the Warner bottle was blue while the Lilly bottle was brown, is that correct?

A. Not always as I remember.

XQ46. What were the respective colors of the bottles as you remember?

A. As I remember the bottles that I had seen were always of a bluish color.

XQ47. By "bluish" do you mean "blue"?

A. Yes.

XQ48. And was the Lilly bottle brown in color?

A. That one in your hand is the first one that I remember ever having seen of that brown color.

XQ49. What colors do you remember as to the Lilly bottles?

A. The same as the Triloid bottles, the same color.

XQ50. Did not the Warner bottle have a red label with white lettering?

A. If I was to remember the color, the style of the bottle of every preparation and package out of thirteen or sixteen different companies this I could not do.

XQ51. Do not most of the large houses sell bichloride of mercury tablets?

A. Yes, sir.

XQ52. And are they not mostly put up in bottles that have some similarities but some differences?

A. No, sir.

XQ53. What shape of bottles are used by the other houses than those two houses we have been talking about?

A. Round bottle.

XQ54. Are bottles that are serrated on the edges common in the trade for poisons?

A. That is the only thing that I know of that are put up in that kind of a bottle.

XQ55. I take it, from your appearance and manner that you are an educated man and honest. Will you tell me whether you endeavored to sell Warner's Triloids to druggists by telling them that the shape of the bottle "compared pretty near the same as Lilly's which would give him a chance to push off and sell the Triloids in the place of Lilly's."

A. On account of the serrated side of the bottle and angular shape of the bottle I could not see under the methods that they were selling other goods of ours why this could not be done.

Q56. I ask you whether you in substance pointed out to the druggist the similarity of the Warner bottle to the Lilly bottle and told him that that would enable him to push and sell the Warner Triloids in place of Lilly's diamond antiseptics?

A. Yes, sir.

XQ57. And did you distinctly tell the druggist that they could impose upon their customers and pass off on them the Warner Triloids when they called for Lilly's Diamond Antiseptics.

A. Yes, sir.

XQ58. Do you think that that was honest?

A. On account of the style of the bottles and the same amount of corrosive that I could not see why it could not be done, and have in mind several cases in Massachusetts where I have sold to dealers after displaying the Triloid package grosses where there were one and three dozen buyers.

XQ59. I asked you whether you thought it was honest on your part to try to persuade your customers that they could buy Warner's Triloids and pass them off on customers who called for Lilly's Diamond Antiseptics. Will you please answer that question. I take you to be honest as I told you and therefore believe that that is not what you did.

A. As it seemed to be the style with other goods that I have testified in regard to here today and as Mr. Hagaman was demonstrating these tablets and other goods I used the same methods to produce business which the house demanded.

XQ60. If you tried to persuade your customers to buy your triloids and to pass them off on customers calling for Lilly's Diamond Antiseptics, tell me just what you said to your customers, giving your exact words?

A. I have repeated that about fifteen times, I will do it again if I can. Demonstrating the package to the buyer, the difference in price, and the package being so near as Lilly's, taking into consideration the difference in his profit I could not see why it would not be a good proposition to push these goods instead of Lilly's.

XQ61. In answer to Q15. in regard to Quin-Coco

you testified that you first demonstrated that there was no difference between it and Coco-Quinine and second that it was a good saving to the druggist, and third that you did not think that the "physician or patient could tell the difference." I ask you to state on the record the exact words in which you told the druggist that you did not think that the physician or patient could tell the difference beween those two articles?

A. Using as an illustration a druggist I have in mind in the State of Rhode Island, we compared Lilly's Coco-Quinine with Quin-Coco and in looking over the same by tasting, appearance of preparation we could not possibly detect the difference and through this I made a sale. My great fighting point on this as well as other preparations in the liquid form that I carried in my sample cases was to always show the druggist when I could where he could make more money than by using the original.

XQ62. In working this Blue List how did you work it?

A. I would go into a man's store and find out if I could what popular preparations he was selling, naming a few and compare in prices and what samples I had with me by demonstrating, and also compare the different makes, ours and the other fellows, and nine chances out of ten would get an order by using a little sales talk.

XQ63. When you were working for Warner and when you first started, did you have a copy of the Salesman's Confidential?

A. Yes, sir.

XQ64. Did you read it?

A. Yes, sir.

XQ65. Pretty carefully?

A. Well, I read it over a few times, yes.

XQ66. There was some business teaching at the end. Did you read that?

A. Yes, I think I did.

XQ67. Who was the first person connected with Lilly company to mention to you this controversy between Lilly and Warner?

A. The first I heard of it was through a letter I received while in the employ of the Wm. R. Warner & Co. The first person connected with the Lilly company to speak to me on the subject was Mr. Bradford. Mr. Bradford called on me at my home in Providence last summer and talked to me about this case. The letter I referred to as received from Warner and Company was one of the saleman letters that I have produced here this morning.

XQ68. Have you come all the way from Providence or New England to testify in this case?

A. I left my territory at Springfield, Mass., to come here to testify.

XQ69. Why did you do so? Was it not a loss to you?

A. Eli Lilly Company agreed that if I would come on here they would pay my expenses and also for my time lost.

XQ70. Did you part perfectly good friends with Warner & Co., when you left them?

A. In working for the Wm. R. Warner & Co., Mr. Pfeiffer the president of the company, seemed to think that I should produce more business, notwithstanding the fact that we parted in all good friends and that as I was taken sick with sugar diabetes I could not continue farther on account of the weight of the bag, and so I would not lose what commissions I had earned during the year I finished the year out. Now Mr. Pfeiffer during the year 1916 called me to their office at Philadelphia and wanted me to resign my position which I did, but continued the year out.

XQ71. When you travelled for Warner did you carry with you a demonstration book with labels pasted in it?

MR. BRADFORD: Objected to as immaterial.

A. Yes, sir.

XQ72. When you were trying to sell Quin-Coco to druggists did you tell them that they could refill their former prescriptions calling for Coco-Quinine with Quin-Coco?

A. Yes, sir. Also that it could be as I said before used as a substitute for Coco-Quinine. It was generally understood when a sample was displayed what it meant also for the druggist would not buy it only as a matter of making more money.

XQ73. What do you mean by "refilling his former prescriptions calling for Coco-Quinine with Quin-Coco?"

A. Why for instance if he had received a prescription and that prescription had been formely filled with Coco-Quinine and it was brought back to the store to be refilled he could use Quin-Coco in the place of Coco-Quinine.

XQ74. And you told all your druggists they could do that?

A. I did not tell them all that, no. Absolutely I did not tell them all that. But I did tell them that there was absolutely no difference between Coco-Quinine and Quin-Coco. I was not going into every store and using that because there are some druggists that won't substitute, but there was a whole lot of them that will. That is the truth of that story.

XQ75. I hate to think that you were dishonest with the dishonest druggists and only honest when dealing with the honest druggists. Is that the case?

A. It seemed to be a policy of the house to sell goods wherever they could be placed and as the line was demonstrated to me at the beginning through Mr. Hagaman in order for me to hold my position I had to use every means at my hand.

XQ76. Did you find dishonest means inculcated in the Salesman's Confidential?

A. Not that I can remember.

XQ77. You have produced here some twenty-five salesman's letters sent you by the house. Did you find any dishonest methods inculcated in those letters?

A. There is one there on that Garden Bouquet perfume. I will read from a letter of July 28th, 1915:

> "This record ought to make the traveler who hasn't sold a bottle of Garden Bouquet sit up and at least open his eyes to the fact that the traveler who doesn't know perfume *can not* be sold—sells it."
>
> "Do you know we are not beginning to get the perfume business our prices and offers entitles us to and as perfume is strictly a saleman's proposition, we can't for the life of us blame anyone but our travelers."

XQ78. Any others?

A. There is another one there in that bunch of letters that speaks about leaving the odor in the store, that has Garden Bouquet, that it means an order on the next trip to replace the Mary Garden.

I read from a letter dated Dec. 9, 1915, this paragraph—

> "Why is it that we can sell Mellier's Garden Bouquet at $4. per eight oz., while many other perfumers are getting double and more than double for a similar odor."

In a letter dated December 23, 1915, is this suggestion—

> "It will pay you to give Mellier's Garden Bouquet some careful thought, develop live selling plans, demonstrate the odor, get it on every order, and always include a supply of its twin Mellier's Vogue. They are both repeaters."

XQ79. Any others?

MR. BRADFORD: This line of questioning is objected to on the ground that the letters have been introduced in evidence and are available to the Court and are their own best evidence as to what they contain. The witness' opinion as to whether they are honest or dishonest is absolutely immaterial.

A. That is all I can think of.

XQ79. What was meant in your business by "repeaters?"

A. By "repeaters" I mean that if a customer should come to a store and had previously purchased Mary Garden the bottle could be refilled with Garden Bouquet and not be detected. I have known some druggists that would take a preparation known as burnt sugar or carmel and would use about one drop in a bottle just arrived to give it the identical color of the Mary Garden which the Garden Bouquet would have after standing a short time.

MR. RAWLE: The last part of the answer is objected to as volunteered and irrelevant and as not affecting the defendant.

XQ80. I do not want you to testify to something you do not mean. Do you not remember that by "repeater" is meant an article bought by a druggist that was so acceptable to him that the salesman would have no trouble on a subsequent visit in getting him to repeat his order for that article?

A. As I understand with my experience in the retail drug business and also as a salesman that a repeater or a repeated prescription is one that is brought back to the store to be refilled.

XQ81. That may be true as to a "repeated prescription" but is it not also true that your house in using the word "repeater" to its salesmen meant that the salesmen should so well satisfy the customer on articles sold to him that when the salesman came back

later on he would have less difficulty in another order for such articles. Is not that what your house meant by using the word "repeater"?

A. The term "repeater" as applied to an order is where you go back and get another order for the same thing, but the term that I have applied "repeater" to a prescription or perfume is where something else is sold in place of the original.

XQ82. Don't you mean that a repeater on a prescription is where the customer comes back and has the prescription refilled?

A. Yes, sir, and also where there may be a substitute used.

XQ83. Referring to Q12 did you analyze the pill that the chemist made up?

A. Simply by its color, appearance and shape, but analyze it I could not do it.

Deposition closed.

EDMUND FRANKS O'CONNELL.

Adjourned subject to further notice.

Indianapolis, Ind., December 3, 1917.

Met pursuant to agreement and notice.

Present:

MR. E. W. BRADFORD, on behalf of plaintiff, and

MR. FRANCIS RAWLE, on behalf of defendant.

It is also noted that MR. FRANK R. ELDRED, Chief Chemist for Eli Lilly & Company and LEWIS E. WARNER, Chief Research Chemist for Wm. R. Warner & Co., are present.

JAMES H. BEAL, a witness called by and on behalf of the plaintiff, having been first duly sworn deposes and says as follows in answer to interrogatories propounded to him by counsel:—

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. James H. Beal; age, 56; Urbana, Illinois; present occupation director of pharmacy research State University of Illinois.

Q2. Please state the character and extent of your education, work and experience that would qualify you to testify as an expert in cases requiring knowledge of chemical anl pharmaceutical subjects?

A. My first employment was that of a drug clerk; I had about seven years experience at Uhrichsville, Ohio, and at Akron, Ohio. The last four years of which was as head of the prescription and manufacturing department of what was one of the largest retail and prescription stores of Ohio at that time. My education in chemistry and pharmacy was gained at Scio College and Mount Union College, Ohio, and the University of Michigan. Shortly after my last graduation I became instructor in chemistry at Scio College, Scio, Ohio. Several years later was made professor of pharmaceutical chemistry and pharmacy at Scio College, and later dean of the School of Pharmacy of Scio College. I continued in that position for approximately twenty-five years. While in that position I was also elected to the professorship of theory and practice of pharmacy in the Department of Pharmacy of the University of Pittsburg, which position I held for approximately ten or twelve years with intermission of about two years. I retired from that position to accept the editorship of the Journal of the American Pharmaceutical Association and also that of general secretary of the American Pharmaceutical Association, which po-

sition I retained until my failure in health about four years ago. During my occupation at Scio and at Pittsburg I was also either one of the acting chemists or one of the consulting chemists of the Food and Dairy Department of the State of Ohio, doing such work as my other occupations would permit. For about a year I was chief drug inspector of the Food and Dairy Department of the State of Ohio.

My services at Scio and Pittsburg were concurrent except for about three years towards the close when I gave up my Scio position.

My services with the Food and Dairy Department of State of Ohio was also concurrent. I simply rendered such services as my college duties would permit.

Q3. What positions have you held, if any, in State or National societies or associations having to do with chemical and pharmaceutical work?

A. I am a member of the American Chemical Society, American Association for the Advancement of Science, the American Pharmaceutical Association, the United States Pharmacopoeia Convention and honorary member of a number of State pharmaceutical associations. I was president of the Ohio State Pharmaceutical Association; served on many of its committees, such as committee on adulterations and the practice of pharmacy. I have been president of the American Pharmaceutical Association; was chairman of the Council of the American Pharmaceutical Association for a number of years. I was general secretary of the American Pharmaceutical Association and editor of the Journal of the American Pharmaceutical Association for about three years. I am chairman of the Board of Trustees of the United States Pharmacopoeia. I have been chairman of that board since 1910. Prior to 1910 I was acting chairman for two or three years.

Q4. On the table before you are a number of ex-

hibits that have been introduced on behalf of plaintiff in this case, consisting of a bottle of Coco-Quinine, plaintiff's product, a bottle of Quin-Coco, defendants' product, a number of bottles of experiments known as "Bibbin's Experiments", a bottle of syrup stated in the evidence to be Coco-Quinine with the chocolate or cocoa omitted (Complainant's Exhibit, Bottle No. 1) and a bottle containing Coco-Quinine with the yerba santa omitted (Complainant's Exhibit, Bottle No. 2). I ask if you have had an opportunity to observe or examine these exhibits and if so to state the extent of the examination you have made and when it was made?

MR. RAWLE: The question is objected to as inadmissible and irrelevant and because the testimony sought to be brought out is part of plaintiff's case in chief and testimony on that subject was herein produced at the opening of plaintiff's case by Dr. Eberhard, J. K. Lilly, Dr. Thorburn and others. Also like testimony was introduced in rebuttal by Bibbins and this further testimony is irregular and inadmissible.

Notice is given of a motion to strike out the entire deposition with costs.

MR. BRADFORD: Counsel for plaintiff agrees that this objection may stand to the entire deposition with the same force and effect as if repeated following each question.

A. I first saw these exhibits on Saturday afternoon last. I have known of the existence of Coco-Quinine and Quin-Coco in a general way for some years but have not had any personal experience with their use. My examination has been confined to general inspection, tasting and smelling of the samples which are here on the table.

Q5. Dr. George M. Beringer, when called as a witness in surrebuttal on behalf of the defendant, stated the result of certain examinations he had made of

these Bibbins samples, and expressed his opinion in respect to each. In respect to Specimen No. 2, which I now hand you, he stated (in answer to Q30), that in his opinion the preparation in this bottle would not be pharmaceutically satisfactory, palatable, perfect, or marketable.

I ask you whether or not you agree with Dr. Beringer's opinion as expressed in this answer, giving in full your reasons for your answer?

MR. RAWLE: A further objection is noted that if the witness is asked to testify in reply to Dr. Beringer it is essential that he should base his testimony upon the same bottle contents as to which Dr. Beringer testified.

MR. BRADFORD: It is noted that at the beginning of the examination of Dr. Beringer, just prior to his answer to the question referred to, the record shows that the samples on which Dr. Beringer based his opinion were taken from the bottles now on the table by Mr. Pfeiffer and Mr. Rawle and counsel for defendant is therefore asked if his objection is intended to suggest any change in the preparations before Dr. Beringer examined them. If not it is believed that the objection is without point.

MR. RAWLE: I really do not understand what plaintiff's counsel has in mind. I, therefore, have nothing more to say.

A. In my opinion No. 2 is a quite satisfactory pharmaceutical preparation of quinine sulphate, so far as I am able to judge from its physical appearance, its odor, and taste. I would say that it is satisfactory so far as appearance is concerned, because I observe only slight tendency to a separation of the suspended solids. The odor is fairly agreeable, considering that the preparation contains, or is said to contain, fluid extract

of yerba santa. I would consider it satisfactory as to taste for the reason that to me no evidence of bitterness is present until after the preparation has been on the tongue for several minutes. I would not give it as my opinion that the preparation is a perfect one. I do not think a perfect preparation of a suspended salt of quinine has ever yet been prepared, but on the whole, in my opinion, this is to be regarded as a very fair and pharmaceutically acceptable preparation of a suspended salt of quinine.

Q6. Dr. Beringer when asked about the taste of this particular preparation (Q28) answered

"The taste was decidedly bitter."

I infer from your previous answer that you do not agree with his opinion in this respect.

(Same special objection.)

A. In my opinion it is not decidedly bitter. I do not obtain any bitterness at all until after the preparation has been in contact with the tongue for several minutes. It is too much to expect that any preparation of quinine sulphate in a suspended mixture will not produce the sensation of bitterness after it has been in contact with the nerve endings of taste in the mouth.

Q7. He also stated in answer to Q29 that the appearance was not that of a homogeneous or satisfactory pharmaceutical preparation. Will you express your opinion as to this answer?

(Same special objection repeated.)

A. In my opinion its appearance as to homogeneity is as good as any preparation of quinine sulphate suspended in liquids I have ever seen. If presented to me by one of my students as evidence of his ability to manufacture a suspended quinine preparation I would accept it as a satisfactory preparation.

Q8. I now show you Bibbins Sample No. 4, Dr. Be-

ringer testified respecting this sample in answer to Q41, as follows:

"It was not palatable. There was still another change which takes place in the presence of coffee, which was not shown in the other samples presented. Coffee contains caffe-tannic acid, which precipitates out part of the quinine, and I have no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate, so that the quinine is subject to reactions in two different directions by this preparation."
Please state your opinion of this answer?

MR. RAWLE: It seems unnecessary to restate my special objection every time and I shall state it once for all.

A. In the first place I do not observe any sediment in this sample and do not recall having seen any sediment in this sample when I first saw the preparation on Saturday last.

The question of palatability is a relative one. A syrup might not be considered as palatable for use as a food when it would be considered as quite palatable in the case of a medicine which in some other form is very bitter or has an otherwise disagreeable taste. In my opinion this preparation can fairly be said to be more palatable than the average of liquid mixtures containing quinine sulphate in suspension.

In considering the question of palatability in my opinion the presence of caffe-tannic acid would be beneficial rather than otherwise. The less quinine sulphate there is in solution the less bitter the preparation will be.

Caffe-tannic acid would therefore tend to render the preparation less bitter than it would be if this compound were not present.

Q9. In answer to Q43 Dr. Beringer testifying in respect to this sample No. 4, stated

"In my opinion this specimen is not pharmaceutically perfect, but is unstable, not satisfactory, is not palatable and could not be successfully marketed."

Please state your opinion of this answer?

A. In my opinion so far as I can judge from appearance, odor and taste, this preparation can fairly be denominated as a satisfactory pharmaceutical preparation of quinine sulphate in a state of suspension. It is satisfactory in appearance, satisfactory to me in odor and in taste. I can see no reason why it should not be successfully marketed. There are many pharmaceutical preparations on the market much less pleasant in odor and taste that enjoy a wide repute and are largely used. The question of stability is one of fact which is best determined by an examination of the sample itself. I understand that this sample is approximately one year and eight months old and that it has been repeatedly opened and exposed to the air while portions of its contents were being removed from the container. A preparation of quinine sulphate in a suspended liquid, largely aqueous, which will endure this treatment without showing evident signs of deterioration can be considered as very satisfactory from the standpoint of stability.

Q10. I now show you Bibbins Sample No. 5. Dr. Beringer in testifying respecting this sample beginning in Q44 and continuing for several questions following stated that its taste was decidedly bitter; that there was decided evidence of precipitation on the sides of the bottle; that the sides of the precipitation consisted in part of the quinine separated out as well as part of the mucilaginous material; that it is not a suitable color for a pharmaceutical preparation; that it was not a stable or palatable preparation or one that could be successfully marketed. What have you to say respecting Dr. Beringer's opinions of this sample thus expressed?

A. The matter of color in a pharmaceutical preparation like that of flavor and odor is a question of taste. Some people admire green in a pharmaceutical preparation and others prefer some other color. I do not know of any fundamental superiority of one color over another. The separation on the surface of the bottle of this sample is not any greater than that of some of the other samples on the table and is materially less than in the case of some of these samples. I am unable to say from my observation that the separated particles on the sides of the bottle positively do consist of quinine sulphate and of the suspending material. Only a chemical or microscopical examination would justify a positive opinion in one way or the other. I do not observe any bitterness whatever in the case of this preparation until after it has been on the surface of the tongue for some period of time. In my opinion it is much more palatable than the average of liquid preparations containing quinine sulphate in suspension. I can think of no reason why a preparation of this character should not be marketable successfully. There are certainly numerous preparations on the market which have been successful and which are less palatable than this particular sample. I do not observe any sediment whatever in this bottle. The question of permanent even distribution in this or any other similar preparation is a question which can properly be determined only by a careful chemical examination of portions taken from different levels of the liquid after it has been permitted to stand on the shelf undisturbed for a considerable period of time. Judging from my experience it is not possible to prepare a liquid preparation of quinine in suspension which will never show any separation, provided the liquid is permitted to rest undisturbed for a sufficient length of time.

Q11. As to sedimentation and separation; compare the sample No. 5 with Coco-Quinine or Quin-Co-

co and state which shows the most judging from observation?

A. These samples speak for themselves. In both Coco-Quinine and in Quin-Coco there is plainly apparent a very much heavier deposit of solid matter on the sides of the container than is apparent on the sides of the bottle containing Sample No. 5.

Q12. Is or is not the same thing true of the other samples you have examined?

A. The same can be said of the other samples which I have had in my hands.

Q13. I now hand you Sample No. 6 and ask you to observe the same. Dr. Beringer in testifying respecting this sample, beginning in Q59 stated: That it was of uneven thickness and showed the separation of gelatinous like masses; that it was decidedly acid and quite bitter to the taste; that there were separated Irish moss jelly and quince-seed mucilage in different masses which were apparent even on the surface of the glass bottle as well as under the miscroscope; that in his opinion this preparation has so many defects that it would not be pharmaceutically satisfactory, would not be palatable, could not be successfully marketed and that not the least objectionable feature is the use of benzaldehyde as a flavoring.

Please express your opinion of Dr. Beringer's testimony respecting this sample thus summed up?

A. In the body of this liquid I do not observe any visible evidence of a separation of the quinine sulphate. On the surface of the bottle above the liquid I observe a heavier deposit of solid matter than is evident in samples 2, 4 and 5, but not nearly so extensive or dense a deposit as is shown in these two bottles of Coco-Quinine and Quin-Coco. I do not venture any opinion as to the nature of these separated portions on the sides of bottle No 6 above the surface of the liquid. I do not think their constitution could be determined positively except by either chemical or micro-

scopical examination. I can see no objection whatever to the presence of benzaldehyde as a flavoring agent. It is a flavor which is especially agreeable to me and is liked by a great many people. It would also be calculated to act somewhat as a preservative in this sample. Benzaldehyde is quite commonly used. It is the flavoring which we recognize in the cherry and in the peach and in various other stone fruits. It is the same as is commonly known as bitter almond flavoring.

Q14. As to the four samples Nos. 2, 4, 5 and 6, which you have testified about, how do they compare as to bitterness with the bitterness present in Coco-Quinine and Quin-Coco?

A. I cannot perceive a great deal of difference in the degree of bitterness of these six preperations. In every case there is some degree of bitterness after the preparation has been in contact with the surface of the tongue for some period of time. Based on my experience in the making of suspended quinine preparations, I would say that all of these can be considered as satisfactory from the standpoint of palatability. All the quinine preparations where the quinine sulphate is in suspension that I know of will cause a bitter taste after a period of contact with the surfaces of the tongue, and mouth.

Q15. Dr. Beringer was asked when he was testifying respecting Bibbins Sample No. 2 (XQ159), whether or not this was more bitter than Coco-Quinine. He answered "Very decidedly". What have you to say of this answer by Dr. Beringer?

A. I can perceive no evidence of greater bitterness in the one sample than in the other.

Q16. I will ask you a general question relating to the other six Bibbins samples before you, without asking you to go into details as to each, that is, as to Nos. 1, 3, 7, 8, 9 and 10. Did you on Saturday make any examination of these samples, and, if so, what conclusions did you reach respecting their respective merits

as pharmaceutical preparations? Bearing in mind particularly the efficiency of the suspending agent used and the character of the preparations as to appearance, smoothness and homogeneity?

A. I made the same examination of these as of the other preparations which I have spoken upon, that is, I observed their appearance to the naked eye, their color, flavor, and extent of deposit on the sides and bottoms of the respective containers. I observed a difference in these various qualities, that is, some are more agreeable in appearance as regards smoothness of the mixtures; some are more agreeable in odor, and some are less bitter in taste than other of the samples. As regards homogeneity, there is nothing in the appearance of any one of these samples to condemn them from a pharmaceutical standpoint. If these preparations had been submitted to me by a member of a graduating class in the college of pharmacy as evidence of pharmaceutical skill in the compounding of preparations containing quinine sulphate in a state of suspension, I would have accepted them as satisfactory so far as appearance and homogeneity are concerned. I find two of these Samples No. 1 and No. 9, in which the quinine bitterness is well disguised. The bitterness is fairly disguised in all of them. I would state that so far as palatability goes the worst tasting of these preparations is as good if not better than the average mixture of quinine sulphate in suspension dispensed extemporaneously on a physician's prescription. As regards appearance the samples speak for themselves. As regards evenness of distribution of the medicated agent throughout the liquid, as I stated previously, this can properly be determined only by a careful chemical examination. So far as their appearance to the naked eye is concerned there is nothing to indicate to me that there is more quinine sulphate in one part of the liquid than in any other part of the liquid.

Q17. Considered as experiments to make a phar-

maceutical of the character we are discussing, what have you to say as to the success of Mr. Bibbins in the production of these ten samples, considered as compared with ordinary pharmaceutical experience in making new preparations?

A. If I understand the question, his experiments can all be regarded as successful. Certainly none of these preparations could be classed as failures in the effort to make an active preparation of quinine sulphate in suspension in an aqueous menstrom. Some of the efforts are very much better than others. The distribution of the quinine so far as I can judge from the naked eye observation has been successfully accomplished in all of the samples. The principal differences I find in the matter of palatability. In samples 2, 4, 5 and 6, the bitterness of the quinine is well disguised. In samples 1 and 9 fairly well disguised, and in none of the samples is the bitterness of the quinine sufficiently apparent to condemn the preparation as a satisfactory pharmaceutical preparation.

The question of permanence in my opinion can be determined only by preserving the preparations for a sufficient length of time under ordinary conditions and then observing any changes which may have taken place.

Q18. Compared with usual pharmaceutical experience would you consider it satisfactory to obtain even four satisfactory results out of ten experiments in such a preparation?

(Objected to as irrelevant.)

A. I would consider four successful experiments out of ten in the case of such a preparation as eminently satisfactory.

Q19. Assuming that some of the samples have developed more or less bitterness since they were made is it probable or possible that by further experimentation in the laboratory such faults might be overcome?

(Same objection.)

A. Oh, yes, quite possible.

Q20. What is the significance to a pharmacist of a "shake well" label on a bottle such as you find on the neck of the bottle of Coco-Quinine and Quin-Coco before you?

A. This is a common and accepted practice among pharmacists in the case of liquid preparations containing solid matters in suspension, so as to insure an even distribution of the suspended matters throughout the liquid at the time of dispensing. In all such liquids the suspended matter is likely to separate more or less on long standing. I doubt if it would be possible to manufacture a preparation of this character which would not show some separation after standing for a long period of time.

Q21. Dr. Beringer when testifying for defendant (Qs. 81 and 82) was asked to state whether or not the quinine must be distributed evenly throughout the liquid in its natural or powdered state in order to constitute a successful and stable pharmaceutical preparation of a syrup of quinine. He answered:

> "The homogeneous suspension of the quinine is essential to the preparation of a pharmaceutically perfect tasteless quinine syrup."

What have you to say as to this?

A. If by his statement Dr. Beringer means that the quinine compound should be evenly distributed throughout the liquid I would be inclined to agree with him. If he means by his statement that the quinine must remain in the form of sulphate unchanged in order to make a bitterless or palatable preparation, then I am compelled to dissent from his answer. In my opinion it is not essential that the sulphate remain unchanged in order to make a palatable, active, pharmaceutically acceptable, suspended preparation.

Q22. Assuming that Dr. Beringer meant that the quinine crystals must remain evenly distributed

throughout the mixture, regardless of the length of time the bottle may stand, so that in administering from the bottle and without shaking the bottle, a uniform quantity of quinine would pour out with each teaspoonful, then what would you say as to his opinion?

A. I could not agree with that opinion. If Mr. Beringer's opinion as stated is correct then a successful and satisfactory preparation of quinine sulphate in suspension has never been prepared. In my opinion, as I have stated previously, there will be some separation on standing in all such preparations. That is perfectly well understood in pharmacy and medicine and it is to correct this settling out that the shake label is employed on such a large proposition of preparations.

Q23. Dr. Beringer was asked by Q95 to state if there is anything to be said about the use of three ingredients in any preparation where one would be equally good by itself. He replied that the use of two or more articles where one would answer the purpose is objectionable because prone to introduce two articles of different composition which may start decomposition *per se* between themselves or render one or the other subject to change. He added "As an example I may cite that it is well known that mixtures of oils become rancid much more quickly than the pure oils themselves."

Dr. Beringer was considering in this testimony the use of two or more ingredients by Mr. Bibbins in making up his samples in place of the cocoa or chocolate used in making Coco-Quinine and Quin-Coco.

Will you please express your opinion on this point?

A. Of course simplicity is always desirable in pharmacy as well as in mechanics. It does not follow however that we gain simplicity by the use of a small number of the named ingredients. In the example referred to we have in cocoa a comparatively complex

substance. It contains a number of distinct ingredients. A cocoa mixture in water without the addition of preservative substances would on standing at proper temperatures ferment and decompose. On the other hand we can frequently secure stability in a preparation by multiplying the number of ingredients. When we add a preservative which has no other function than preserving we are increasing in the number of ingredients. In other words whether a number of ingredients is desirable or not is a question which must be decided in each particular case by the conditions present.

Q24. In answer to XQ144 Dr. Beringer stated that he determined the degree of acidity in these various Bibbins samples by their reaction on lithmus paper. What have you to say about this as a test for acidity in these preparations?

A. In my opinion this is a very unsatisfactory method of determining degrees of acidity. Only within a very limited range of cases can lithmus be relied upon to show the comparative degree of acidity. Lithmus is properly used to determine the presence of acidity and not its degree.

The degree of acidity can properly be determined only by measuring the amount of alkali which a given weight or volume of the acid liquid will neutralize.

Q25. In answer to XQ146 Dr. Beringer stated "tragacanth swells practically indefinitely". What have you to say as to this?

A. If I understand Dr. Beringer's statement I can not agree with him. Tragacanth mixtures are commonly made in pharmaceutical laboratories. I think every pharmacist will agree that tragacanth will stop swelling as soon as it has reached full saturation. I cannot agree that it would continue to swell indefinitely.

Q26. In XQ147 Dr. Beringer was asked what acid is formed when tragacanth and quince-seed decompos-

ed. He replied that the acid is most likely acetic acid. What have you to say about the decomposition of tragacanth and quince-seed mixture.

A. Acetic acid may be among the substances produced in the decomposition. It seems to me likely however that other acids would predominate judging from the odor of decomposed mucilages. I have never examined decomposed mucilages chemically.

Q27. Is the odor of decomposed quince-seed readily detected?

A. Yes.

Q28. In any of the Bibbins samples do you find any evidence of decomposition or of fermentation or of "spoiling" by any other process.

A. No, I have not observed any such evidence of decomposition.

Q29. Would a mixture of chocolate and water ferment and decompose at ordinary room temperature?

A. It would unless some preservative were present.

Q30. In answer to Q85 Dr. Beringer stated that as to benzaldehyde as a flavoring it: "is subject to the very serious objection that it is apt to be oxidized, being reduced to benzoic acid and losing its flavor entirely, so this is accepted as a satisfactory flavoring for very few preparations indeed." What have you to say as to this?

A. I must object to the use of the words "oxidized" and "reduced" in the sense in which Dr. Beringer seems to have used them. They are words of opposite significance. When a substance is oxidized, oxygen has been added to it. When it is reduced oxygen has been withdrawn, or an equivalent change has taken place. It is true that benzaldehyde, in a partially filled bottle or in a bottle which is frequently opened and exposed to the air, will in course of time show some deposit of benzoic acid. I consider it quite improbable that such an oxidation of benzaldehyde would oc-

cur in a mixture filled with reducing agents such as seem to be present in this mixture No. 6. Even if it should all be oxidized to benzoic acid, which I consider very improbable the amount of benzoic acid produced could not be regarded as objectionable in this particular mixture. In my experience the flavor of benzaldehyde, or what is commonly known as bitter almond or cherry flavor is frequently used not only in the flavoring of such medicinal preparations as emulsions of cod liver oil but in popular beverages such as soda water.

Direct-examination closed.

Cross-examination without waiver of objections.

By Mr. Rawle:

XQ31. As these ten Bibbins sample bottles stand before you do you consider that they have been shaken well, or do you know anything about it?

A. I do not know whether they have been shaken prior to my seeing them this morning or not.

XQ32. What is your belief on the subject as an expert?

A. I cannot say that I have any belief, it depends altogether on whether the suspending agent is of such a nature as to permit a rapid subsidence of the suspending matter.

XQ33. Why do you say "rapid"?

A. Because if the subsidence was rapid it would manifest itself on the table where we could see it.

XQ34. As they are now were they so when you first saw them on Saturday?

A. As nearly as I can perceive they are practically the same. I observe no difference at this time.

XQ35. I understood you to say that your work in life or at all events in late years has been largely or chiefly teaching work. Is that correct?

A. My principal occupation has been that of teach-

er or professor of pharmacy say for from twenty to twenty-five years.

XQ36. Has your attention before this last Saturday been called specially to sweet quinine syrup preparations?

A. No, not specially, but the manufacture of suspended quinine preparations is one of the usual problems submitted to classes of pharmaceutical students. We consider the successful preparation of mixtures of this class as evidence of having profited from the instruction received in the college of pharmacy.

XQ37. You have been sitting at the table with twelve bottles before you, ten of them Bibbins bottles and have tasted most of them. This tasting is rather a new thought to me. Is it not true that the taste lingers for some time and that accurate tasting, to be accurate, between two drugs should be separated by an interval of some length, perhaps an hour?

A. It is true that by the successive tasting of bitter mixtures the delicacy of the sense of taste becomes more or less blunted and that for the most delicacy of the sense of taste some interval of time should elapse when it is desired to distinguish between mixtures having closely similar tastes. I have tried to meet this in some respect by frequent washing of the mouth with water. I can only say that I have expressed my sensations to the best of my judgment in each case.

XQ38. But you would consider that your "sensations" would have been truer if you had allowed a greater interval between the tasting?

A. Undoubtedly the sense of taste would have been more delicate.

XQ39. And is it not true that you tasted a number of these preparations one after the other with a slight interval only and only with the use of water between tastings?

A. I tasted these several preparations as they were handed to me for that purpose and washed out

my mouth with water before tasting in every case in which I expressed an opinion.

XQ40. In your answer to Q21 you say that in your "opinion it is not essential that the sulphate remain unchanged in order to make a palatable, active pharmaceutically acceptable suspended preparation". Please explain further?

A. If I understand your question the only explanation I can add is that by remaining unchanged I meant to say that it is not essential that the quinine sulphate should continue as quinine sulphate in the preparation. It might have been converted to tannate or to some other form by the other ingredients and the preparation still remain practically bitterless or at least palatable.

XQ41. But if it passes into some other compound is it not necessary that it should be an equally insoluble compound?

A. That would depend in a large measure upon the other associated ingredients.

XQ42. If the quinine passes into solution will the preparation then continue to be a pharmaceutically acceptable preparation?

A. If the quinine passes into solution the mixture would leave the class of suspended preparations.

XQ43. Then if the sulphate changes is it not necessary that it should not change in the direction of solution in order that the preparation should remain pharmaceutically acceptable.

A. If the solution is equally palatable because of the associated ingredients I can see no reason why it should be considered less acceptable than when the quinine is in its solid form.

XQ44. Is it not true that chocolate or cocoa is in the drug business a common and very well known suspending and flavoring agent?

A. It is.

XQ45. In your answer to Q9, in speaking of Bib-

bins Bottle No. 4 you say that "there are many pharmaceutical preparations on the market much less pleasant in odor and taste that enjoy a large repute and are largely used". This might easily include a preparation of asafoetida. Will you please state what preparations you had in mind when you so spoke.

A. I did not have any specific preparation in mind but it would be easy to give examples of such preparations, for example elixir of iron, quinine and strychnine phosphates, the various syrups of iron, quinine and strychnine phosphates, quite a number of mixtures of the U. S. Pharmacopoeia, such as Brown mixture, syrup of squills and so on. All of these I have mentioned would in my opinion be more objectionable in taste than the particular sample I was then examining.

XQ46. In your answer to Q16 you said that so far as palatability in these Bibbins samples the "worst tasting" of these samples is as good if not better than the average mixture of quinine sulphate in suspension dispensed extemporaneously on a physician's prescription. What had you in mind when you made this comparison and how could you have possibly any such broad knowledge of filling prescriptions as you there assume to have?

A. To the first part of that question I had in mind such prescriptions as physicians frequently write where they prescribe the quinine, the suspending agent, the flavor, and the vehicle, and the preparation is extemporaneously compounded by the pharmacist.

To the second part of the question it is the business of one who teaches the compounding of prescriptions to familiarize himself as much as possible with the nature of prescriptions of the period today. It has been the principal part of my business for many years to teach students the art of compounding and the filling of prescriptions. As a part of this instruction sample prescriptions were sought in medical and phar-

maceutical literature and obtained by the examination of prescription files in drug stores. Every professor of pharmacy receives frequent requests for advice from the druggists of his community as to the compounding of prescriptions especially those of a difficult nature. It is customary in such cases when the professor is not able to answer the question submitted from his own information to attempt to solve the problem by practical experiments in his laboratory. I am the author of a book devoted to the special subject of prescriptions and compounding which has passed through two editions and which is now out of print and of which I am now preparing a revised edition. The title of the book was "Prescriptions and Compounding," in the first edition. In the second edition it was known as "Magistral Pharmacy".

XQ47. I assume that the druggists referred to in the first part of your last answer commonly uses such suspending agent, flavoring agent and vehicle as he deems best in connection with a prescription for quinine sulphate. Is that correct?

A. Yes, when the physician fails to prescribe these ingredients and the nature of the prescription indicates that the druggist is expected to make use of his technical knowledge.

Cross-examination closed.

Re-direct-examination.

By Mr. Bradford:

RDQ48. You were asked by counsel for defendant if your attention had been called specially to quinine syrup preparations. Have you any knowledge of certain experiments conducted by a committee on revision of the National Formulary on this subject?

A. My information is confined to that contained in the report of the National Formulary Committee and to expressions I have heard made by one or more members of that committee.

RDQ49. Dr. Beringer in his testimony expressed the opinion that it was entirely proper for that committee if it could to duplicate the formula for example of Coco-Quinine, or any other successful specialty of a manufacturing house, and publish that formula in the National Formularly. Have you any opinion on this subject and, if so, will you state it?

MR. RAWLE: Objected to unless the question specifies whether the opinion is to be legal or ethical or what.

MR. BRADFORD: The witness is advised that the question contemplates an answer based upon the ethics of the profession or business.

A. That is a delicate question for me to answer. I give it as my personal opinion and belief that the framers of the National Formularly are justified in including in that volume formulas which are equivalent in therapeutic effect to successful proprietary specialties. I do not consider it justifiable to simulate or imitate in National Formularly preparations successful specialties to such an extent that they might be palmed off on the innocent purchasers or physicians when he desired to obtain the original proprietary specialty. It is admittedly wrong for a pharmacist to substitute one of his own preparations in a prescription when it is evident that the prescribing physician intended the preparation of some particular manufacturer, putting such a formula in the National Formularly would not make such a practice correct, if it would be incorrect when practiced by an individual.

RDQ50. Is it in your judgment ethical practice for one manufacturer to duplicate a successful preparation of another manufacturer not only in therapeutic value but also in physical appearance and taste so that his preparation may be substituted for the preparation of the original manufacturer?

MR. RAWLE: Special objection made to question as irrelevant and immaterial and calling for opinion evidence on a moral question, which is for the Court.

A. If his intentions are to make a preparation which he believes can be successfully palmed off for the preparation of another manufacturer then I would consider such action as quite unethical.

RDQ51. On the subject of tasting—you tasted these Bibbins samples on Saturday as I recall. Were the results of your tasting today the same as those obtained Saturday?

A. Yes, as nearly as I can determine.

RDQ52. For reliability in comparing the taste of one preparation to another which method would you consider the most efficient, to taste one preparation and then wait for a sufficient period of time for the result of that taste to entirely disappear from the mouth before tasting the other, or to follow the method which you followed today and taste at comparatively frequent intervals, washing the mouth between tasting of each sample?

A. I am in doubt as to which would yield the most accurate results. In tasting the mixtures successively one has the advantage of a recent memory of the sensations produced. If tasted at large intervals apart one should taste each preparation a sufficient number of times to create in his mind a distinct memory of the sensation produced before he attempted to compare it with the taste of another substance.

RDQ53. Do you consider it an advantage or a disadvantage in such a preparation for the quinine sulphate to be changed into tannate?

A. Where the intention is to produce a bitterless preparation I think some advantage would be gained by such a change.

RDQ54. What pharmaceutical preparations are

you acquainted with in which chocolate or cocoa is used as a suspending agent?

A. Cocoa and chocolate are frequently used in pharmaceutical preparations, such as physicians' prescriptions and in proprietary specialties, but I believe they are more commonly used for the purpose of flavoring or as coatings for tablets and pills than as suspending agents.

RDQ55. What proprietary specialties in liquid form are you familiar with in which cocoa or chocolate is used as a suspending agent?

A. At this moment I only recall the name of two liquid quinine preparations of proprietary character which contain chocolate as the suspending agent. These are Coco-Quinine and Quin-Coco.

Re-direct-examination closed.

Re-cross-examination without waiver of objections.

By Mr. Rawle:

RXQ56. Then you do not know that there are five or ten other such preparations on the market, do you, and so testified to in this case?

A. I am aware that such preparations are to be found in the price lists of manufacturers, but I do not recall their particular names.

RXQ57. Are not chocolate or cocoa quite frequently used in connection with various drugs for suspension purposes?

A. I think they are mainly used for the purpose of flavoring and coloring. The suspending powers of chocolate are not equal to many other well-known substances. The nature of the suspending agent employed will of course vary with the character of the substance to be suspended. As to what may be the best agent in a particular case must be determined by experiment.

RXQ58. If a formula were discovered satisfac-

tory to the officials or committee in control of additions to the National Formulary or to the U. S. Pharmacopoeia, is it your opinion from the knowledge you have on the subject, that such formula would be incorporated into one or the other of those standards and so be thrown open for common use?

A. That is a matter which would rest entirely within the discretion of the respective revision committees of these two books. As a matter of fact a majority of the medicaments used by practicing physicians in their daily practice are not to be found either in the National Formulary or the United States Pharmacopoeia. They are very largely proprietary specialties. The important drugs in such specialties may be recognized by the National Formulary or Pharmacopoeia, but the particular form in which they are exhibited very frequently differs from the forms given in these two official volumes.

RXQ59. But I thought you said that the addition to one or the other of these standards of an approved formula for a chocolate syrup of quinine had been under consideration by the committee for some years, did you not?

A. It is my understanding that such a formula has been considered. My understanding is based upon information contained in circulars of the National Formulary Committee. I do not assert the correctness of my information. I do not know it as an absolute fact.

RXQ60. If such a formula were put into such a standard would it not be thereby standardized for common use?

A. In so far as the Formularly is capable of establishing a standard, it would be. The same is true of the U. S. Pharmacopoeia.

RXQ61. And in such a case the preparation made under this standardized formula could be put on the market by any drug house under the appropriate

standard name, provided the labels on the container made it clear to the purchasers as to the particular drug house which manufactured it?

By MR. BRADFORD: Objected to unless the question makes it clear as to whether opinion is asked as to the ethical or legal aspect of the case.

A. It seems to me that this is a question of law rather than a question of ethics. I would prefer not to express any opinion on that point.

RXQ62. Referring to RDQ50 do you not know that thousands of drugs which are similar in therapeutic value and in physical appearance and taste more or less are put on the market by various drug houses in competition with each other so that the preparation sold by one house could easily be passed off by a dishonest druggist for the preparation of another house? And do you not know that the whole drug business is based upon an active competition in the manufacture and sale of similar and competing goods?

MR. BRADFORD: Objected to as immaterial and as not cross-examination.

A. I am aware of the fact that some manufacturers put out preparations which are apparently intended as imitations of the preparations of other manufacturers. I do not know how many such cases exist. I do not consider such a practice as representing good professional ethics.

RXQ63. How many drug manufacturers sell some brand of mineral oil for internal use such as Squibb's Petrolatum?

Objection repeated.

A. I do not know.

RXQ64. Do you not know that there are at least twenty-five such houses?

Same objection.

A. I have never made any attempt to count them.

RXQ65. Do you or do you not believe that a large number of the drug houses put out such an article?

Same objection.

A. I am aware that there are a number of such preparations or forms of this preparation. I do not pretend to know the proportion as compared to the whole number of manufacturing pharmacists and wholesale druggists.

RXQ66. Assume there must have been one house that was the first to put out such a mineral oil preparation and that the other houses put out a similar preparation. On that assumption do you consider such a practice as not representing good professional ethics on the part of the other houses?

Same objection.

A. In the case of liquid petrolatum we have a distinct chemical entity having well-known poperties. It could hardly be said that a second brand of this chemical entity put out in distinctive form can be regarded as an imitation of the first one. In the particular case stated I would not consider it a violation of professional ethics for two or more competing houses to deal in the same drug each one sold under a distinctive title and label. The sin in my estimation in these cases is where one manufacturer designs his preparation purposely, that is gives it purposely such a form as to render it liable to be mistaken for the preparation put out under another brand. It is simply a question of professional and commercial honesty. If the practice is not honest it is not good ethics.

RXQ67. Then do you consider from your standpoint of the business that if a drug house mixes two or three chemical entities and market it that drug house has the monopoly of mixing those two or three chemical entities and marketing them no matter how

clear the label is on the container distinguishing the two products?

MR. BRADFORD: Objected to for the reasons before given and for the further reason that it calls for legal opinion.

A. Not necessarily so. Any one accustomed to dealing with the public is aware of the fact that the purchaser relies more on the appearance and other characteristics of the preparation than upon the label.

RXQ68. But if the two or three chemical entities when mixed necessarily produce a given appearance and characteristic of the product who is responsible for that fact, nature or the drug house?

Same objection.

A. Nature is responsible for the reaction produced. The drug house is responsible for the discovery of the reaction and of the combination.

RXQ69. Take Listerine. Is that what you call a proprietary specialty?

Same objection.

A. Yes.

RXQ70. Is it not true that a whole lot of the drug houses make a similar preparation and compete with Listerine?

Same objection.

A. In so far as they attempt to simulate in their preparations the character of Listerine to such an extent that the purchaser may be deceived, the practice is a bad one in my estimation.

RXQ71. Pardon me, but do you not observe that you have not answered my question, and that possibly your answer as given might be subject to the criticism of being a little partisan?

Same objection.

A. I answered the question in the sense in which

I understood it. Referring to the question once more I will say that it is my understanding that various houses do put out preparations similar to Listerine and possibly the same as Listerine compositions. I can see no ethical objection to this form of competition provided there is no desire or attempt to create confusion in the minds of the purchaser, or to deceive him as to the origin of the preparation.

RXQ72. Now is it not true that a very large number of drug preparations, pharmaceutically similar, are put on the market by numerous drug houses in competition to each other. I place emphasis on the words "very large number."

Objected to as entirely immaterial and irrelevant.

A. I believe that is true. I can see no objection to competition as long as it is honest, and carried out in good faith.

RXQ73. And is it not true, in your opinion that as to any of these preparations a dishonest druggist, if there be such on the earth, could manage to pass off the preparation of one house when that of another house was called for, the two preparations being similar pharmaceutically?

Same objection.

A. It is unfortunately true that some druggists dishonestly substitute one preparation which yields them a greater profit for another which they have reason to believe is the one desired. This practice is entirely indefensible and I believe that manufacturers in putting out their preparations, provided they are of a character known as specialties, should, as far as possible, give them distinctive character, color and flavor in order to discourage dishonest substitution on the part of a druggist who may be unscrupulous.

RXQ74. Do you consider that this bad practice

is more reprehensible ethically speaking in the case of what you call specialties than in the case of ordinary standard chemical entity drugs, assuming that the compared specialties are pharmaceutically similar?

Same objection.

A. It is a question of the intent to deceive. If the physician orders specifically a given brand of salicylic acid he has the right to expect that he will receive that particular brand and no other, and any attempt to substitute another brand without the physician's knowledge or consent is in my estimation unethical and dishonest. If they are sold on their own merits I can see no ethical objection whatever to any one placing on the market a competing article.

RXQ75. You will observe that you have not answered my question. I repeat it.

Same objection.

A. I want to answer your question, but to answer it in such a way that my intention may not be misconstrued. If the practice is dishonest in the case of a chemical entity the ethics of the transaction is on the same grade as the same practice in the case of complex mixtures.

RXQ76. Then as a teacher of pharmacy for many years and a trainer of probably hundreds of young druggists, you firmly believe that it is an exceedingly immoral act for a dispensing druggist to pass off one drug or preparation on a customer whether over the counter or to one holding a physician's prescription when another drug or preparation is called for, and you have so taught your pupils since you have been responsible for their ethical training, is that correct?

Same objection.

A. Decidedly so, unless the customer's consent has been obtained to the substitution.

RXQ77. Is it not your opinion that any druggist

who so practiced and has come to be known as so practicing would probably or certainly speedily break up his business?

Same objection.

A. In the case of a retail druggist I feel sure it would injure him greatly.

RXQ78. On your last Saturday's tasting of these twelve bottles before you did you make any note of the results or carry it in your mind or on the tip of your tongue?

A. I carried the matter simply in my recollection.

RXQ79. If you had to pass upon the relative taste of twelve preparations and your life should depend on your decision, which method would you adopt, the taste and wait method or the taste and wash method?

A. It would depend upon the immediateness of the danger. If the danger were close or immediate I naturally would decide as rapidly as possible. If I had plenty of time I would repeat my tests as frequently as the length of time permitted.

RXQ80. Then if your possible executioner should give you all the time you wanted but insist upon your pursuing one plan or the other to which plan would you be willing to trust your continuance in life?

A. In such a case I think I would try both plans and make up my mind as to which seemed to me to be the most accurate. We are here dealing with sensations. And the sensation of taste is one that is easily deceived, if the difference between the substances tasted is very slight. In some of these preparations which I have tasted there seemed to be practically no difference in the degree of bitterness. Such difference as appeared being due to the different flavors employed.

RXQ81. (RXQ80 repeated.)

A. I have not devoted sufficient attention to this

particular point to be able to give any positive opinion. I think either method would enable me to reach a fairly satisfactory conclusion.

Deposition closed.

J. H. BEAL.

CHARLES E. CASPARI, a witness called by on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Charles E. Caspari, age 42, St. Louis, Mo., chemist.

Q2. Will you please state the extent of your education, work and experience whereby you are qualified to testify as a witness in cases requiring knowledge of chemical and pharmaceutical subjects?

A. I received my training in chemistry at Johns Hopkins University, having graduated there with the degree of Bachelor of Arts, in 1896 and that of Doctor of Philosophy in 1900. Immediately thereafter I taught organic chemistry for one year at Columbia University, New York, and then went to the Mallinckrodt Chemical Works of St. Louis as research chemist in organic chemistry where I remained two years. In 1903 I accepted the position of professor in chemistry in the St. Louis College of Pharmacy and still retain that position. During the last fifteen years I have been until two years ago chief chemist for Meyer Brothers Drug Company, and am at present acting in that capacity for the J. S. Merrell Drug Company, both of St. Louis. Also during this time I have been called

upon frequently to examine numerous chemical and pharmaceutical products.

Q3. Of what associations are you a member and have you been connected with any committees or in any other official capacity with work having to do with chemical and drug affairs of this country?

A. I am a Fellow of the American Association for the Advancement of Science, a member of the American Chemical Society of which I have been Counsellor, a member of the American Pharmaceutical Association, and several times a member of its council. Also have been chairman of its scientific section, and I am a member of the present revision committee of the United States Pharmacopoeia.

Q4. Have you had any experience in testifying as a chemical expert in cases of litigation? If so please state?

A. Yes, I have testified on a number of occasions as a chemical expert in cases involving drugs, pharmaceuticals, patent medicines, foods, and chemicals.

Q5. On the table before you are a number of bottles which have been introduced as exhibits in this case. One is a pint bottle of Coco-Quinine, plaintiff's product; another a pint bottle of Quin-Coco, defendant's product. There are also ten bottles each of which contains a sample of an experiment made by one of plaintiff's chemists, a Mr. Bibbins, and they have been introduced as exhibits and marked "Plaintiff's Exhibits, Sample Syrups Nos. 1 to 10," respectively.

In the testimony they are commonly referred to as the Bibbins' experiments or Bibbins' samples.

We also have another bottle marked Complainant's Exhibit, Bottle No. 1, shown by the evidence to contain plaintiff's product Coco-Quinine except that the one ingredient cocoa or chocolate is omitted. Another bottle marked "Complainant's Exhibit, Bottle No. 2, shown by the evidence to contain plaintiff's product except that it has no yerba santa in it.

I ask you if you have examined these several exhibits and the character of such examination and when it took place?

By Mr. Rawle: The question is objected to as inadmissible and irrelevant and because the testimony sought to be brought out is part of the plaintiff's case in chief and testimony on that subject was herein produced at the opening of plaintiff case by Dr. Eberhard, J. K. Lilly, Dr. Thorburn and others. Also like testimony was introduced in rebuttal by Bibbins and this further cumulative testimony is irregular and inadmissible.

Notice is given of a motion to strike out the entire deposition with costs.

By Mr. Bradford: Counsel for plaintiff agrees that this objection may stand to the entire deposition with the same force and effect as if repeated following each question.

A. I first received samples of these exhibits about the first of October, 1917, here in Indianapolis and took them with me to St. Louis where I made an examiation of them between that time and the end of last week. This examination covered a comparison of these various samples as to taste, with Coco-Quinine and Quin-Coco; also a comparison as to the homogeneity and also as to viscosity and acidity.

Q5. Dr. George M. Beringer, when testifying as a witness in sur-rebuttal for defendant in Philadelphia on June 8, 1917, gave the result of his examination of specimens of these exhibits and his opinion as to the pharmaceutical acceptability of each, and as to their comparative merits when considered in comparison with Coco-Quinine and Quin-Coco. In answer to Q8 he stated that they were examined as to their acidity and as to the test for acidity he took five cubic centimeters of the specimen, shook this up with ten cubic

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centimeters of distilled water, after allowing the sediment to subside that he tested the supernatant liquid with lithmus paper. He stated that these ten specimens were all examined in the same uniform way.

I will ask you first what you have to say as to Dr. Beringer's acidity test applied to these samples and the value of such test in determining the degree of acidity of each?

A. The method used by Mr. Beringer is satisfactory only in so far as it determines whether or not any one of the samples is acid in reaction. For comparative purposes the method is utterly worthless, and it is impossible by means of lithmus paper to compare with any degree of accuracy different strengths of acid solutions.

Q6. Dr. Beringer in his testimony respecting the several Bibbins' samples testified that they were very bitter, or decidedly bitter and that he accounted for this bitterness by the acidity which he testified was present in each preparation. What have you to say as to this?

A. There may perhaps under certain conditions be some connection between acidity and the presence of a bitter taste, but apparently in the case of these ten Bibbins samples as well as of Quin-Coco and Coco-Quinine the relationship between acidity and bitter taste does not exist for the reason that all the ten Bibbins samples as well as Coco-Quinine and Quin-Coco are distinctly acid, yet Quin-Coco and Coco-Quinine are free from bitterness as are also some of the Bibbins samples. I can conceive that if quinine sulphate is partly dissolved in water and by means of a relatvely strong acid more of the salt is made to pass in solution the bitter taste may be increased, and yet there is a limit to the sense of bitterness which the nerve ends of the tongue and mouth can register. On the other hand if quinine sulphate is partly dissolved in such complex mixtures as are represented by the

samples in question I know from experience that the presence of acid does not increase the bitterness, especially if the acid is what might be called a weak acid. So that no conclusion can be drawn as to the relationship between acidity and bitterness in composite mixtures of several ingredients from the relationship that exists between acidity and bitterness in the case of quinine sulphate and plain water.

Q7. In answer to Q83 Dr. Beringer testified that Quin-Coco and Coco-Quinine are both neutral; that is, free from acidity. In answer to XQ200 he testified that he made this determination by the same tests that was applied to the Bibbins specimens as related in a previous question.

What have you to say as to this testimony of Dr. Beringer?

A. I cannot possibly understand how he obtained such results as I have made tests, using his identical method upon the original packages of Coco-Quinine and Quin-Coco which I purchased in the open market in St. Louis and both of which I found to be distinctly acid. As a matter of fact it would be quite natural to suppose that they would be acid as it is a general rule that all vegetable extracts have an acid reaction.

Q8. In answer to Q23 Dr. Beringer stated in testifying about Sample No. 1 that the acidity is due to the rapidity with which the mucilage of quince seed deteriorates and in answer to Q24 that this acidity developed in the specimens brings out the bitterness of the quinine perceptibly.

What have you to say of this?

A. If mucilage of quince seed had undergone decomposition it might perhaps produce a very weak acid which may perhaps have increased slightly the bitterness of the quinine. But there is no evidence in Sample No. 1 that any decomposition has taken place.

Q9. In answer to Q14 Dr. Beringer stated that probably Mr. Bibbins had not given attention to the

aspect of the problem before him that involved the knowledge that quinine suspension is entirely different from purely a mechanical problem of distributing an oil or a fat or suspending an inert powder in suspension.

What have you to say to this?

A. In the first place the suspension of the quinine has nothing to do with the bitter taste. The only reason for suspending the quinine is to insure uniform distribution throughout the mass of liquid and thus insure proper doses of quinine when the liquid is dispensed. As far as Mr. Bibbins having taken cognizance of the special problem of suspending quinine as against suspending anything else, I disagree with Mr. Beringer entirely as there is no special problem involved. The distribution of the quinine is purely mechanical and may be accomplished in a number of different ways.

Q10. In answer to Q's 16 and 17, Dr. Beringer stated that he considered the requirements of the suspending material to be that it must produce a uniform homogeneous liquid that does not separate out; that does not undergo subsequent change; that is not acid when first prepared and does not become acid on keeping, and that remains permanently as a uniform homogeneous suspending liquid even after keeping for some time as necessarily would be done in a package offered in the trade.

Please express your views respecting this testimony?

A. Mr. Beringer is partly right and partly wrong. The object of the suspending medium is to suspend the quinine uniformly and make a homogeneous liquid which shall not separate in a reasonable time, but I know of no suspended matter which will not ultimately separate if allowed to stand long enough but if his criterion is applied to Coco-Quinine and Quin-Coco

then neither of them is a good preparation, because both are acid and both separate on standing.

Q11. In answer to Q20 Dr. Beringer testified that in a number of the Bibbins specimens conditions existed showing that the quinine crystals had partly undergone solution, stating "in one specimen the quinine was practically entirely dissolved, in the others more or less so." In your examinations did you find any evidence that the quinine crystals had gone into solution in any of these Bibbins samples?

A. There has been undoubtedly a certain amount of solution of quinine sulphate in every one of the Bibbins samples as well as in Quin-Coco and Coco-Quinine, just to what extent this solution has taken place I am not prepared to say. But to whatever extent quinine sulphate is soluble in the respective media in which it is found in the Bibbins samples and in Coco-Quinine and Quin-Coco, certainly to that extent it has dissolved.

Q12. Would the absence of quinine crystals be considered proof that the quinine had dissolved?

A. Not necessarily. There are at least two conditions under which quinine sulphate might lose its crystal character and still not be in solution. If for example quinine sulphate was allowed to remain exposed to the air it loses its water of crystallization and gradually becomes amorphous and I can very readily see how an amorphous state might be produced in the once crystalline quinine sulphate after it has been mixed with other ingredients in these various samples. What I mean is that while it might not be possible to see crystals of quinine sulphate under the microscope it might be possible to see the quinine there in some other form in which it was amorphous and in which form it could not be recognized as quinine merely by a microscopic examination.

Q13. I understand from your last answer that in your judgment a percentage of the quinine sulphate is

undoubtedly in solution in Quin-Coco and Coco-Quinine?

A. That is correct.

Q14. Have you observed any evidence of decomposition of mucilage of quince seed in the Bibbins Sample No. 1?

A. I have not.

Q15. In answer to Q26 Dr. Beringer, testifying in respect to Sample No. 1, said, "In this specimen I note further separation and unevenness of preparation indicating some additional decomposition or changes." What have you to say as to this?

A. Of course I do not know whether Mr. Beringer actually saw any separation or not. That would absolutely be no indication of decomposition any more than if you mixed together linseed oil and white lead in the form of a paint and allowed this mixture to stand, the white lead will separate from the linseed oil, but there will be no decomposition. There is absolutely no connection between separation and decomposition.

Q16. In answer to XQ153 Dr. Beringer stated that separation could not be brought about by standing, that is not in a perfect preparation, that that would be evidence of the imperfect suspension. What is your opinion of this evidence?

A. That matter is axiomatic. If a thing is homogeneous the suspended matter is uniformly distributed. If it separated it is not homogeneous. As to a perfect suspension remaining as such forever I believe none exists or ever will exist. Coco-Quinine and Quin-Coco which are apparently the standards in this case begin to cease to be homogeneous the moment they are allowed to stand after having been agitated. In other words, they are homogeneous only while the quinine is uniformly distributed. As soon as it begins to distribute itself non-uniformly the preparation ceases to be homogeneous.

Q17. I ask you to notice Bibbins Specimen No. 2

and I call your attention to the testimony of Dr. Beringer respecting this specimen, beginning in Q27 and ending in Q30. To save repeating I hand you the testimony and ask you to comment on Dr. Beringer's testimony as it appears in his answers to these questions, giving your reasons for your answer or opinion?

A. I differ with Dr. Beringer in some of his statements and agree with him in only one. The one with which I agree is that this preparation has an acid reaction. I have never seen any evidence of separation in Sample No. 2. On the contrary I consider it a very homogeneous mixture, far more homogeneous than Quin-Coco or Coco-Quinine as is evidenced not only by the appearance on standing but also by a quantitative determination of the amount of quinine sulphate at the top and bottom of the sample after it has stood for some time. What Dr. Beringer calls resinous masses on the sides of the bottle may or may not be resinous masses, I do not know. And he has produced no evidence to show that he knows. He says that under the microscope the mucilage is separated in small gelatinous masses and the gelatin in larger globules. He has offered no evidence to show how he knew that what he was looking at was mucilage or gelatin or something else.

I have tasted this sample a number of times and found it not at all bitter. In that respect it is identical with Coco-Quinine and Quin-Coco. In my judgment it is a pharmaceutically satisfactory, palatable, and a marketable product.

Q18. Will you please read Dr. Beringer's answer to Q32 respecting Specimen No. 3 and express your opinion as to the correctness of his views there stated?

A. He says that there was a heavy deposit on the vial. I see no heavy deposit. There are a few particles adhering to the side of the bottle, and practically no sediment on the bottom. In my judgment it is quite a homogeneous liquid. In fact I know it is

homogeneous because I have assayed it at the top and bottom after standing. I agree that it has an acid reaction.

Q19. Please read his answer to Q34 and state whether he is correct in his opinion about the fermentation of acacia and if you discovered any fermentation in this sample.

A. Acacia is a vegetable product and like all vegetable products is subject to fermentation. It would depend upon what kind of fermentation it underwent as to whether or not an acid would be formed, but in this sample No. 3 there is absolutely no evidence of any fermentation.

Q20. Dr. Beringer testified in answer to Q's 35 and 36 that the effect of this acid produced by the fermentation of acacia would be to dissolve the quinine and increase the amount of quinine in solution and consequently increase the bitterness of the preparation. In your opinion is this true?

A. In the first place there is no evidence that fermentation took place and hence there is no evidence that acid was formed and even if acid had been formed it by no means follows that the quinine would have gone into solution. It is much more likely that the acid formed would have precipitated some of the quinine that was already in solution. As a matter of fact, however, it is idle to speculate as to what the acid would do without knowing exactly what acid was in question.

Q21. Will you please observe Bibbins Sample Bottle No. 4 and read Dr. Beringer's testimony respecting this sample contained in his answers to Qs. 41, 42 and 43 and state your opinion of the correctness of Dr. Beringer's conclusions as there expressed?

A. In this instance again I partly agree and mostly disagree with Mr. Beringer. I do not agree that the sample has the flavor of dextrine but has a distinct flavor of coffee, that it is not at all bitter, not in the

least bitter and is very palatable just as much so as Coco-Quinine and Quin-Coco.

In his answer to Q41 Mr. Beringer contradicts himself. He says that coffee contains caffee-tannic acid, which it does, and this acid will precipitate quinine. According to Mr. Beringer if the quinine is precipitated out of solution it takes away from the bitterness of the preparation. So that the precipitation of the quinine by the tannic acid of the coffee according to Mr. Beringer would render the preparation less bitter and it ought to be a good thing for the preparation, especially since quinine tannate is less soluble than quinine sulphate.

Mr. Beringer also states that he noticed additional precipitation evidenced on the sides of the bottle. I do not now nor have I ever noticed any precipitation in this sample. It is about as homogeneous a liquid as it is possible to conceive of. This fact is shown not only by its appearance but by assay after standing.

In my judgment this sample is pharmaceutically stable and palatable and would make an elegant, easily marketable preparation.

Q22. I ask you now to observe Bibbins Sample Bottle No. 5 and to take up Dr. Beringers testimony respecting this preparation as found in his answers to Q's 44 to 58 and express your opinion as to the said testimony of Dr. Beringer and give your own opinion on the various subjects inquired about?

A. I agree with Mr. Beringer that this sample is less viscous than the other samples. In fact it is the least viscous of all the samples. But in spite of its low viscosity I found that the quinine sulphate was uniformly distributed through it even after it had stood six weeks without being disturbed. I never saw any evidence whatever of precipitation either on the sides or the bottom of the bottle, certainly nowhere near as much as appears in Quin-Coco and Coco-

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Quinine and I do not see how Mr. Beringer could possibly tell by looking at the alleged separated mass that he saw that a part of it was crystals of quinine sulphate.

With reference to the sketch referred to I have seen this sketch and examined it and Mr. Beringer has offered no evidence to show that what he saw in the miscroscope was quince-seed mucilage. He apparently saw some round globular masses and having been told that quince-seed mucilage was in this preparation he jumped to the conclusion that what he was looking at was quince-seed mucilage. Mucilage of quince seed has absolutely no structural characteristic by which it can be identified under a microscope.

Mr. Beringer does not like the color of this preparation but that is a matter of personal taste. What he means by coppery green I do not know. I never saw any green copper.

As I have never seen any precipitation in this sample I have never seen an additional precipitation.

To me personally it is one of the most pleasant of the Bibbins samples, as I like the taste of peppermint and the sample is entirely free from bitter taste. I believe it could be readily marketed as a satisfactory, palatable, stable preparation.

As I said before this is the least viscous of all the Bibbins samples and Mr. Beringer says that the effect of its being less viscous would be that it would not hold the quinine in suspension satisfactorily. I have made a determination of the viscosity of this particular sample as well as of the other nine Bibbins samples and samples of Coco-Quinine and Quin-Coco and while this particular sample No. 5 has the least viscosity nevertheless after standing at rest for six weeks it showed a perfectly uniform distribution of the quinine sulphate at the top and bottom of the bottle as determined by chemical assay, so that I am

convinced that the sample is entirely homogeneous, much more so than Coco-Quinine and Quin-Coco.

It is true that unless the medicinal ingredient is equally and thoroughly distributed as a dose is poured out of the bottle or a portion is dispensed on a prescription you would not get uniform distribution of the medical agent. This uniform distribution of the medicinal ingredient is present in this sample No. 5 and the labels of Quin-Coco and Coco-Quinine specifically direct that they be shaken before being dispensed. This is for the purpose of course of bringing about thorough distribution of the quinine.

Q23. In answer to XQ177 Dr. Beringer testified in respect to Specimen No. 5 that it was less viscous than Coco-Quinine and Quin-Coco and would not hold the quinine in suspension satisfactorily. He had explained that he determined the viscosity by comparing the physical appearance by comparison. Will you please state how you determined the comparative viscosity of these various preparations and read into the record the result of your tests on this subject?

A. The method which I used in determining the viscosities of these various samples depended upon the use of the McMichael viscosimeter. I remember the viscosities of some of these samples, but not all, but if permitted to refresh my memory by referring to notes I can give them all to you. I may say that this memoranda of the viscosities was made at the time that the determinations were made.

Bibbins Sample No. 1 had a viscosity of 2.60; Bibbins Sample No. 2, .60; Bibbins Sample No. 3, 2.65; Bibbins Sample No. 4, .85. Bibbins Sample No. 5, .50; Bibbins Sample No. 6, 1.54; Bibbins Sample No. 7, 9.00; Bibbins Sample No. 8, 4.03; Bibbins Sample No. 9, 7.30; Bibbins Sample No. 10, 2.10. I at the same time determined the viscosities of several samples of Coco-Quinine and Quin-Coco, which I will refer to by the lot number as appeared on the label. Beginning

with Coco-Quinne No. 592,800, viscosity 1.19; No. 569,-021, viscosity 1.23; No. 559,052, viscosity 1.25; No. 584,825, viscosity 1.34; No. 579,864, viscosity 1.26; No. 583,811, viscosity 1.56; No. 592,800, viscosity 1.36. Now in the same way I determined the viscosity of the Quin-Coco represented by their lot numbers as appeared on the labels as follows: No. 186,960, viscosity 1.09; No. 171,705, viscosity 1.80; No. 186,004, viscosity 1.98; No. 47,590, viscosity .85; No. 47,471, viscosity 1.12.

Now to give an idea as to what these viscosities mean in comparison with some familiar substance U. S. P. Simple syrup has a viscosity of 1.30, almost identical with the average viscosities of Coco-Quinine and Quin-Coco, while a 49.16 per cent. solution be of weight of sugar gives a viscosity of .11.

I might add that these viscosities were all determined at a temperature of 25 degrees Centigrade the temperature for which the McMichael instrument is standardized.

Q24. Did you also determine the comparative evenness of distribution of the quinine crystals in the several samples and if so how did you make the determination and what were the results?

A. I did make a determination of the uniformity of distribution of the quinine sulphate in the ten Bibbins samples as well as in samples of Coco-Quinine and Quin-Coco, after I had allowed them all to stand for a period of time. The method which I used in this determination consisted in the assay of portions from the top and bottom of the various bottles for quinine. The ten Bibbins samples were allowed to stand undisturbed for six weeks, one sample each of Coco-Quinine and Quin-Coco designated as No. 2 in each case stood for one week. And one sample each of Coco-Quinine and Quin-Coco designated as No. 1 had stood for three months undisturbed. Fifteen C. C. portions were used for analysis. These were removed by careful pipetting with a pipette having a

large orifice from the tops and bottoms of the bottles in each case. The results as I have them expressed are in grains of crystallized quinine sulphate per fluid ounce. They are as follows:

	Top	Bottom
Coco-Quinine No. 1	11.50 gr.	4.30
Quin-Coco No. 1	21.96	0.58
Bibbins Sample No. 6	11.78	11.68
" " 5	11.06	10.98
" " 4	10.94	11.00
" " 7	13.12	12.92
" " 3	9.76	10.66
" " 8	12.96	12.00
" " 2	10.64	10.72
" " 9	11.02	10.88
" " 1	11.54	11.60
" " 10	9.98	10.06
Coco-Quinine No. 2	16.24	3.36
Quin-Coco No. 2	18.56	2.98

Q25. From your tests and experiments what is your opinion respecting the relationship, if any exists, between the viscosity or the degree of viscosity of the suspending agent and the uniformity of distribution of the quinine crystals in the respective preparations?

A. If there is any relationship between viscosity and the distribution of quinine crystals in these various samples it is so obscure that it is impossible to detect it. An analysis of my determination of viscosity taken together with the assay on the various samples will bring this out clearly. For example, the ten Bibbins samples varied in viscosity from .50 to 9.00, and yet each and every one of these ten samples showed a uniform distribution of quinine sulphate after six weeks standing in an absolutely undisturbed condition. While on the other hand Coco-Quinine which showed a comparatively uniform viscosity for different lots shows a very great lack of uniformity in distribution of quinine sul-

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phate even after one week's standing. And the same is true of Quin-Coco.

Q26. In answer to Q57 Dr. Beringer when asked what he meant in speaking of the quinine crystals as being eroded in some of the specimens answered: "The word attacked there I used in the same sense as I might have used the words acted upon by the acidity of the fluid, acted upon, eaten away." What have you to say as to this?

A. I would say that the term "eroded" or "attacked" or "eaten away" is an improper term to use in that connection unless evidence was at hand to show positively that the quinine sulphate had been dissolved by the menstruum. The appearance of the crystals is more likely to have been due to a physical change taking place in them rather than to the solvent action of the menstruum.

Q27. Testifying in respect to Bibbins Specimen No. 6, Dr. Beringer stated that this sample was of uneven thickness, showed separation of gelatinous like masses, decidedly acid, quite bitter to the taste; that under the microscope the crystals of quinine showed that they were acted upon or eroded; were separated, the Irish moss, jelly and quince seed mucilage in different masses; that this was apparent even on the surface of the glass bottle as well as under the microscope; that he illustrated in the Beringer sketch a typical illustration of some Irish moss jelly as found in this specimen; likewise the mucilage of quince-seed; that these separations were unequally distributed throughout the field and showed the lack of homogeneous suspension. Will you please refer to the Bibbins Sample Bottle No. 6, and express your opinion of the testimony thus given by Dr. Beringer respecting its contents.

A. With respect to the homogeneity of this sample No. 6 my assay shows conclusively that quinine sulphate is uniformly distributed throughout even though it stood six weeks. In common with all the

other Bibbins samples as well as the Coco-Quinine and Quin-Coco, it is acid. Its taste is not in the least bitter. There is a deposit of some particles upon the sides of the bottle but these are no more in quantity than are present on the sides of the bottle of Coco-Quinine or Quin-Coco. And as for stating what these particles consist of that is entirely impossible without a chemical examination and it does not appear that Mr. Beringer made such an examination.

With reference to the sketch which he has made of the miscroscopic appearance of Irish moss and mucilage of quince-seed, I would say that it is entirely impossible for any one to identify under the microscope mucilage of quince-seed or mucilage of Irish moss because in preparing these mucilages none of the organic or cellular structure of either quince-seed or Irish moss enters into the preparation. And hence there is no identifying characteristic present. In the preparation of these mucilages the quince-seed or the Irish moss is soaked in water for the purpose of extracting or dissolving the mucilaginous matter from the seed or moss, then this strained and the product which passes through is what is used as the suspending medium. The part which has the characteristic cellular structure remaining on the strainer.

Q28. Answering Q61 Dr. Beringer further stated respecting this Bibbins Sample No. 6 that in his opinion it has so many defects that it would not be pharmaceutically satisfactory, would not be stable, would not be palatable and could not be successfully marketed. He stated further "not the least objectionable feature is the use of benzaldehyde as a flavoring". Will you please give your opinion on these several points inquired about?

A. I can not agree with Mr. Beringer on any statement he has made in that answer. In my judgment Sample No. 6 is a perfectly homogeneous stable, palatable, and marketable preparation. As to the flavor

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of benzaldehyde it is a very popular flavor. It appears as a flavor in many products of the bakeries, notably in maccaroons. The flavor of benzaldehyde being identical with that of bitter almonds. It is also the flavor of the marachino cherry in the seductive Manhatton Cocktail. It is also present naturally in the stones of other fruits such as apricot, peach, and in certain barks, such as that of the wild cherry tree and is the characteristic flavor of that pharmaceutical known as the syrup of wild cherry. It is quite a lasting flavor and under the conditions under which it is used, especially in this Sample No. 6 it would be difficult to conceive how it could be oxidized to benzoic acid because oxygen or an oxidizing agent is required for such a change. The tendency would be rather to keep it in a reduced state in this preparation.

Q29. In answer to Q85 Dr. Beringer stated in respect to Benzaldehyde as a flavor it "is subject to the very serious objection that it is apt to be oxidized, being reduced to benzoic acid and losing its flavor entirely so this is accepted as a satisfactory flavoring for very few preparations indeed". I take it from your last answer that you do not wholly agree with this conclusion. Have you any further opinion to express in view of this quotation from Dr. Beringer's testimony?

A. I do not agree that it is apt to undergo oxidization. Under favorable conditions it may undergo oxidization, that is to say, if a bottle of benzaldehyde which is only partially filled and which is opened frequently thus renewing the air above the surface of the benzaldehyde, there may in two or three years time be formed a fraction of one per cent. of benzoic acid, but under the conditions under which benzaldehyde is used in Bibbins Sample No. 6 no such oxidation would take place. Benzaldehyde as a matter of fact is used quite commonly as a flavoring agent, every housewife using it as a flavoring for cakes, for icings which are even sub-

jected to heat in an oven full of air and still the benzaldehyde retains its flavor.

Q30. Will you please take Dr. Beringer's testimony respecting Bibbins Sample No. 7 beginning in his answer to Q62 and continuing to Q66, consider the same, and express your opinion as to his statements?

A. I have never been able to detect any separation at all in this Sample No. 7. Mr. Beringer refers to a brown deposit upon the sides of the bottle. Of course if you pour a brown liquid upon the sides of a bottle, that portion of the liquid which adheres to the sides of the bottle will of course be brown, but it is of very uniform consistency, shows perfect homogeneity and adheres to the sides of the bottle much less than either Coco-Quinine or Quin-Coco. I have failed to find a deposit or separation of any solid matter at all. Like all the other samples enumerated before it is acid. Upon being tasted it does disclose a slightly bitter taste. As to the appearance of what Mr. Beringer saw under the microscope not a word of evidence is offered to prove that he saw swollen cells of tragacanth or flavoring oil and the fact that he found only six small crystals of quinine is of absolutely no significance. He states that the acidity of this preparation is largely due to the acacia present. The amount of acacia present is necessarily very small and the amount of acidity of the acacia is still smaller. The preparation shows absolutely no sign of having undergone fermentation so the acidity can not have increased. Furthermore as I have shown before the acidity has nothing to do with the bitterness, because Quin-Coco and Coco-Quinine are both acid and free from bitter taste as well as the Bibbins Samples 2, 4, 5 and 6.

In my judgment this preparation would be acceptable pharmaceutically even though it is not as good as Samples Nos. 2, 4, 5 and 6 and even though it is slightly bitter. The thickness with which it pours is not a de-

fect but tends to insure uniformity of distribution of quinine and the dispensing of a uniform dose.

Q31. I will ask you to take Bibbins Specimen No. 8 and refer to Dr. Beringer's testimony respecting the same found in his answers to Qs. 67 to 70, inclusive, and make like answer thereto, as in the last case?

A. With regard to Sample No. 8 in which starch has been used as one of the suspending mediums together with mucilage of tragacanth Mr. Beringer undertakes to say what starch will do under certain conditions. He has not confined himself at all to what starch has done in the sample in question. This sample is perfectly homogeneous as shown to the eye and as shown by assay, the quinine being uniformly distributed throughout it. I see no deposit on the bottle other than that which has adhered from the liquid flowing down the sides of the bottle which is much less aged than in the case of either Coco-Quinine or Quin-Coco.

As to Mr. Beringer's objection to the use of oil of orange as a flavoring agent his objection would be easily removed by using a terpenless oil of orange which would never develop a terebinthimate odor.

He saw again under the microscope things for identifying which he has given no evidence. The fact that what he considered to be crystals of quinine sulphate with knob-like or bone-like shaped points is of no significance. I agree with Mr. Beringer that this sample like all the other is acid. The sample is also somewhat bitter but not sufficiently bitter to preclude possibility of its being marketed as a satisfactory pharmaceutical preparation.

Q32. What is your opinion of starch as a suspending medium and is or is there not starch in the cocoa or chocolate and what function does it perform there?

A. Starch is one of the best suspending mediums that we have at our command. And whatever suspension there may be in Coco-Quinine or Quin-Coco is entirely due to the starch which is present in cocoa, this

varying in different samples of cocoa from eight to fourteen per cent. The excellence of starch as a suspending medium is evidenced in Coco-Quinine and Quin-Coco in that it not only suspends the quinine sulphate but also all the other solid matter of the cocoa including the fat, the tannin, the cellulose, the protein, etc.

Q33. In his answer to Q70 Dr. Beringer stated that starch is not a good suspending material, that when used in mucilaginous form is very prone to decomposition and hydrolysis and fermentation setting in quickly. In answer to XQ195 in which he was asked how he distinguished between decomposition, hydrolysis and fermentation he answered "fermentation would be one of the methods of decomposition. The production of a fungus growth would be another decomposition that might take place in starch. In other words hydrolysis as used there refers to the change which starch undergoes very rapidly in pasty form to certain changes that are formed by dextrose". He was then asked in XQ196 "Which takes place first?" He responded "That would depend upon the conditions which existed. I could not tell. It would depend on the temperature and other conditions which would take place first."

I ask you to consider this testimony by Dr. Beringer and state your opinion and conclusions respecting the matters about which he testified?

A. I think that Mr. Beringer has the subject of fermentation, decomposition and hydrolysis of starch pretty well confused. In the first place there is absolutely no evidence either from his testimony or from my observation that starch has undergone any decomposition in the Bibbins sample in which it was used. Of course starch will undergo fermentation or even putrefaction because it is a vegetable product and all vegetable products are subject to these destructive changes.

However the presence of a suitable preservative will always prevent such fermentative changes taking place. Fermentation can not take place without the presence of an organism to start it and carry it on and fermentation means the decomposition of a substance into two or more simpler ones of more or less usefulness. This decomposition being brought about by an organism. Putrefaction is a similar decomposition in which the products formed are usually useless. Also brought about by an organism. Decomposition means the breaking up of a molecule into two or more simpler ones with or without the aid of organism. Hydrolysis consists in the formation by the addition of water to a substance of a more complex or of two or more simpler substances. Starch as we know is the starting point in the manufacture of alcohol. The starch is changed first by hydrolysis into dextrose and the dextrose is changed by fermentation into alcohol and carbon dioxide. This will illustrate the terms which I have explained. In order for the hydrolysis of starch to take place the starch must be treated and usually heated in the presence of a large amount of water with either a dilute acid or a dilute alkali. Such a condition does not obtain in mucilage of starch or in starch paste. And it is only after the starch has undergone hydrolysis that it can undergo fermentation, and when the fermentation sets in the starch is no longer starch but has been changed by hydrolysis into dextrose.

Q34. What is the nature of the carbon dioxide?

A. Carbon dioxide is what is commonly known as carbonic acid gas and is a gaseous form of matter. One of the means of detecting whether or not fermentation has taken place would be the determination of whether or not carbon dioxide gas was evolved.

Q35. Do you consider it possible for fermentation to take place in the case of either one of the Bibbins samples if contained in a glass bottle and sealed tightly

and maintained in this condition for a period of several months?

A. I know that fermentation has not taken place in these samples by the absence of carbon dioxide in any one of them. Furthermore if fermentation had taken place a pressure of gas would have been noticed when the stopper was withdrawn or even sufficient pressure might have been developed to blow the cork out or burst the bottle, and that has not been the case.

Q36. In answer to Q23, respecting Bibbins Sample No. 1 Dr. Beringer said "The acidity here I think is due to the rapidity with which mucilage of quince-seed deteriorates. That breaks down very readily. I think the acidity in this particular formula was largely due to the decomposition which takes place so readily in mucilage of quince-seed." What have you to say as to this?

A. Mucilage of quince-seed like any other vegetable product will undergo fermentation and consequent decomposition if not protected by some preservative agent. There is no evidence at all that there has been any decomposition or any fermentation in this Sample No. 1 of mucilage of quince-seed or of anything else. Mr. Beringer has been dealing with hypothetical possibilities and not with the facts as represented in this sample. Of course mucilage of quince seed will decompose but it has not in this instance.

Q37. Please take Bibbins Sample No. 9 and consider the same in connection with Dr. Beringer's testimony respecting the same as found in his answers to Qs. 71 and 73 respectively and express your views and conclusions on the points there testified to by Dr. Beringer?

A. This sample No. 9 shows perfect homogeneity as evidenced by appearance to the eye, as well as by chemical analysis after standing. Of course being a thick liquid some of it remains on the side of the bottle which has been wet with it, and Mr. Beringer drew a

very apt comparison when he said it looked like an emulsion of cod liver oil, which is one of the most homogeneous emulsions that we know of. This preparation contains as flavoring agents, oils of cassia, peppermint and wintergreen and if no other preservative had been added to it these three essential oils would tend to preserve it, as they exert a very distinct preservative action. Pharmacists who make their own starch paste commonly add oil of cassia to it to keep it from spoiling. As to its color not being inviting that is altogether a matter of taste. It looks to me exactly like a bottle of Durke's salad dressing which many people find pleasant. In common with all the other samples it has an acid reaction. It has a faint bitter taste.

Mr. Beringer claims to have seen under the microscope yellow grains of gelatin jelly and swollen grains of tragacanth but no evidence is adduced to show that he identified them as such. In my judgment this specimen would be entirely acceptable as a marketable pharmaceutical preparation.

Mr. Beringer further states that the use of gelatin is objectionable because if used in insufficient amount it makes a watery paste insufficiently strong to suspend. In the sample in question, which is very viscous, there is no thin watery paste and there is perfect suspension. Continuing Mr. Beringer says if made strong enough it would separate out in jelly like masses, not being homogeneous. On examining the sample I find that no jelly like masses have separated out and the preparation is entirely homogeneous, showing that Mr. Bibbins used good judgment in selecting just the proper amount of gelatin to accomplish the desired result.

Q38. In this Sample No. 9 the coloring was stated by Mr. Bibbins to be napthol yellow S (Bibbins Deposition Page 1058, Plaintiff's Record, XQ 29). In answer to Q86 Dr. Beringer stated "coal tar dyes as a rule are not directed for medicinal preparations." In answer to Q. 87 in which he was asked "can you quote

any living authority as unfavorable to the use of coal tar dyes in this connection" he answered "There is some uncertainty as to the thereapeutic action of some of these dyes and Allen in his commercial analysis, Alfred H. Allen, one of the celebrated English authorities cautions against the use of at least none of these dyes, namely, napthaline yellow or napthol yellow, which is sometimes used for coloring food articles yellow, because of its marked poisonous character, which makes it very unfit. He states 'That comparatively small doses of napthaline yellow are said to cause asthmatic breathing a considerable rise in temperature, convulsions and ultimate death.' These are among the reasons which I think have rather deterred pharmacists from using coal tar dyes to any extent in medicinal preparations." What have you to say respecting this testimony?

A. In the first place certain coal tar dyes are used by pharmacists for example methylene blue. In the second place Mr. Beringer was asked to quote a living authority and he quoted a dead one. Alfred Allen died several years ago. I have looked up a quotation with reference to napthol yellow in Allen and he quotes a previous investigator, in fact, two of them, one French and one German, to the effect that napthol yellow will produce asthmatic breathing, rise in temperature and ultimate death, and furthermore, that, given to a dog in half gram doses on two successive days followed by a one gram dose of the sodium salt on the third day killed the dog on the fourth day. The weight of the dog was nearly seven thousand grams. This all applies to napthol yellow. Allen further states that napthol yellow S given in four times these amounts produced no bad effect on another dog.

Q39. If you have the book here will you kindly identify the same and refer to the pages on which the quotation you have referred to can be found, and also

name the authorities from which Allen in his work was quoting.

A. This book is Allen's Commercial Organic Analysis, Fourth Edition, Volume 5, page 126, footnote. The authors quoted by Allen are Cazeneuve and Lepine (Comp. Rend., 1885, 1167,) and Weyl (Ber., 1888, 21, 2191).

Q40. Is napthalene yellow or napthol yellow sometimes used for coloring food articles yellow.

A. Napthol yellow has been used for coloring food but its use is forbidden by the Department of Agriculture at Washington, D. C. The use of napthol yellow S however in foods is permitted by the same authority, it being one of the seven so called Certified Colors.

Q41. A part of Dr. Beringer's answer to Q. 86 is as follows— "It has been the custom rather to avoid the use of coal tar or synthetic colors that might be called coal tar derivatives, for use in medicinal products. Some of these colorings are susceptible to change and precipitation, and I suspect that in some of those specimens which show precipitation—this is due in a measure to the artificial coloring that has been used in the specimen." What have you to say as to this?

A. There are only four of these specimens which have been colored artificially and there is absolutely no evidence of any precipitation of any sort in them, and certainly not of the coloring matter. Furthermore the coal tar colors are much less apt to precipitate than natural vegetable or animal coloring matters. And are very much more apt to be purer and more wholesome than natural vegetable and animal colors. The coal tar colors are produced in chemical factories always in the same way under the same conditions and are made uniform. The vegetable and animal dyes such as cudbear and cochineal are gathered under very unsanitary conditions in foreign countries

by people of the lowest classes and hence are apt to be contaminated with almost any kind of impurities.

Q42. I now ask you to examine the testimony of Dr. Beringer respecting Bibbins Sample No. 10, beginning in his answer to Q. 74 and state your opinion and conclusions respecting the same.

A. This Sample No. 10 Mr. Beringer thinks has been colored artificially and that he thought he detected some of the coloring matter in what had separated out. This sample has not been colored artificially, hence there could be no coloring matter contained in the portion that he claimed separated out. I have been unable to detect the separation of any solid material and certainly do not see the dusty deposit on the sides of the bottle to which he refers. He does not make it clear whether he refers to the inside or the outside.

This sample has been shown by me to be entirely homogeneous as shown by quantitative assay. Like all the other samples it has an acid reaction to litmus paper. It has a somewhat bitter taste. The absence of the crystals of quinine sulphate under the miscroscope is not significant, as I explained before, they doubtless had lost their crystallinity.

This preparation in my judgment could be successfully marketed as a pharmaceutical preparation.

Q43. Have you samples of Coco-Quinine and Quin-Coco in bottles similar to those in which the Bibbins samples are contained, and if so will you please produce them?

A. I have and here hand you two bottles similar to those in which the Bibbins samples are contained, containing Coco-Quinine and two like bottles containing Quin-Coco.

Mr. Bradford: The said bottles are offered in evidence and marked Plaintiff's Exhibits, respectively, Coco-Quinine, Caspari Sample No. 1, Coco-Quinine Caspari Sample No. 2, and Quin-

Coco Caspari Sample No. 1, and Quin-Coco, Caspari Sample No. 2.

Q44. Please state when these bottles were filled with what they contain, where and by whom, and from what source the product was obtained?

A. These bottles were filled by me on December 2nd, 1917, in the laboratory of Eli Lilly & Co., from bottles of Coco-Quinine and Quin-Coco which I purchased in the open market in St. Louis in their original packages.

Q45. In answer to Q82 Dr. Beringer stated "The homogeneous suspension of the quinine is essential to the preparation of a pharmaceutically perfect tasteless quinine syrup." What have you to say as to this?

A. If homogeneity is necessary to a perfect, tasteless quinine syrup then there is none on the market because both Coco-Quinine and Quin-Coco upon standing even for a comparatively short time become very non-homogeneous as is apparent both to the eye and as the result of chemical analysis. However, the tastelessness of the preparation is not dependent upon the suspension of the quinine. The only reason for suspending the quinine and placing a shake label on the bottle is to insure uniformity of doses in dispensing.

Q46. Dr. Beringer stated in answer to Q84 that both Coco-Quinine and Quin-Coco proved to be free from the deficiencies that he found apparent in the ten Bibbins specimens. What have you to say as to this?

A. I differ with Dr. Beringer entirely on this question. Each and every one of the ten Bibbins samples is far more homogeneous than either Coco-Quinine or Quin-Coco as shown by chemical assay upon standing. Mr. Beringer considers acidity a defect and yet both Coco-Quinine and Quin-Coco are acid. The quinine sulphate is much more uniformly and more permanently distributed in the Bibbins samples than in either Coco-Quinine or Quin-Coco, and at least four of the Bibbins samples, Nos. 2, 4, 5 and 6, are just as free from bitterness as are Coco-Quinine and Quin-Coco.

Q47. In answer to Q85 Dr. Beringer stated "As a general statement my opinion is that to disguise any drug or any type of drug an individual or distinctive flavoring must be selected." What have you to say as to this?

A. That depends largely upon what a distinctive or individual flavoring is. Individual flavorings are almost non-existent. If we speak of a flavor of peppermint we know that the oil of peppermint contains at least sixteen to twenty different individual substances which are blended together and form a flavor that we commonly call peppermint. The flavor of vanilla is due to a blending of the flavors of several different substances contained in the vanilla bean. The flavor of chocolate is due to a number of different substances blended together giving us what we call a chocolate flavor.

Practically all of what we commonly consider to be individual flavors are in reality blends. Therefore it is not necessary to use an individual flavor to disguise the taste of a drug.

Q48. I show you Complainant's Exhibit, Bottle No. 1, shown by the evidence to contain Coco-Quinine with cocoa omitted and ask you if you have examined this and tasted it and whether or not in your judgment it is an acceptable pharmaceutical preparation and whether or not it is bitter?

A. I have examined this sample. I have tasted it and found that it is entirely free from bitter taste, which shows that the chocolate or cocoa has nothing to do with masking the bitterness of the quinine.

Q49. I now show you Complainant's Exhibit, Bottle No. 2 shown by the evidence to contain Coco-Quinine with the yerba santa omitted and ask you if you have examined this and tasted it and what you find as respecting its bitterness and pharmaceutical merit?

A. I have examined this in the same way that I examined the previous sample, tasted it and found it

extremely bitter, showing again that the cocoa does not mask the bitterness.

Q50. Dr. Beringer in his answer to Q87 stated that tragacanth gum continued to swell and swell and will not yield a uniform preparation and on cross-examination when asked how long this gum would continue to swell stated that it would swell indefinitely. What is your opinion as to this?

A. Tragacanth gum will swell when water is added to it until it is saturated with water, and no longer.

Q51. In the same answer he said respecting Irish moss mucilage that it is subject to a very serious objection in that it would separate out into uneven jelly like mass and that the preparation would consequently be far from homogeneous. What have you to say as to this?

A. That statement is not borne out by the facts. Mucilage of Irish moss does not separate out and is one of the most common emulsifying and suspending mediums used.

Q52. Can dry quinine crystals be swallowed without a bitter taste?

A. No.

Q53. In answer to XQ107 Dr. Beringer stated that the precipitation found in the several Bibbins samples does not appear to be in one uniform substance, that in some cases it is the resinous matter of the flavoring; in others a separation of the coloring; in others a separation of the suspending material; in others a separation of the quinine, as where coffee is used. What have you to say as to this and is there any proofs in the previous testimony of Dr. Beringer that justifies this answer?

A. As I have said before I have failed to find any separation of any sediment in any of these samples. Mr. Beringer examined them under the microscope and was really looking at a material which was in suspension, and not looking at a sedimentation. Even if he

had been looking at a sedimentation there is absolutely no evidence in his testimony to justify any statement from him as to what that sediment consisted of.

Q54. In answer to XQ122, which asked if there were other suspending mediums which might be used besides chocolate and Dr. Beringer said: "We have examined all those that have been suggested and there is nothing before me to change the opinion I gave in my direct testimony that chocolate was the only suspending medium that seems to answer the purpose. There is a colloidal nature about chocolate and its constituent that seems to serve this purpose in a way that nothing else so far as suggested does." What have you to say as to this?

A. Every one of the ten Bibbins samples shows that there is a better suspending medium than chocolate. For example chocolate suspends by virtue of the starch which it contains and starch was used in one of the Bibbins samples as the suspending medium. I do not know in just what sense Mr. Beringer used the word "colloidal". Starch does form a colloidal solution and inasmuch as chocolate contains starch to that same extent chocolate forms a colloidal solution. There is absolutely no difference in the way in which chocolate acts as a suspending medium in Coco-Quinine and Quin-Coco and the way in which the various suspending media which Bibbins used act in his samples.

Q55. I call your attention to Dr. Beringer's definition of colloidal as found in his answers to XQs. 162, 163 and 164 and ask you to express your opinion thereon?

A. The definition which he has given for colloidal is the proper definition for the word "colloid" in distinction from a crystalloid. I do not agree with his definition for a colloidal solution. A colloidal solution I would say is a suspension of a solid in a liquid in such a way that the liquid is almost transparent and particles of solid so small that they can not be seen except

by means of the ultra microscope, and such solutions do not obey the ordinary laws of solution. I should say furthermore that a solution of acacia is a colloidal solution.

Q56. In answer to Q41, Dr. Beringer testified in respect to Bibbins Sample No. 4 as follows: "Coffee contains caffe-tannic acid which precipitates out part of the quinine and I have no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate, so that the quinine is subject to the reaction in two different directions by this preparation." Which preparation in your judgment contained the great amount of tannic acid, the Bibbins Sample No. 4 or Coco-Quinine?

A. Bibbins Sample No. 4 and Coco-Quinine contain very nearly the same amount of tannic acid, the tannic acid in the case of the Bibbins sample coming from the coffee and the tannic acid in the Coco-Quinine coming from the cocoa.

Q57. In XQ191 Dr. Beringer was asked if quinine was equally and thoroughly distributed in Coco-Quinine. He replied that in a number of examinations he had made of Coco-Quinine there appeared to be a uniform distribution of the crystals of quinine sulphate. In XQ201 he was asked if after a bottle of Coco-Quinine had been standing a long time would there be any difference in the quinine contents at the top and at the bottom. He replied, "I have not made such a determination." Is there any other way in which he might have made the determination and justified his answer to XQ191?

A. He could have made the same assay that I made.

Q58. Had he done so he would probably have reached the same results that you did, would he not?

A. If a determination had been carried out as I carried it out he would have reached the same results.

Q59. The standing of the preparations for a period of time was a necessary part of the test made by you, is it not?

A. It was.

Q60. Is or is not cocoa a common suspending medium in liquid medicinal preparations?

A. I do not know of many liquid preparations that use cocoa as a suspending medium.

Q70. Considering the ten Bibbins samples as pharmaceutical experiments, what have you to say respecting their success in the production of satisfactory preparations when compared with ordinary pharmaceutical work?

A. I should say that the unqualified success of four experiments in ten, which is forty per cent., and a somewhat less success in the other six was a very high percentage of successful experiments as compared with the number of experiments necessary to be made before satisfactory pharmaceutical and chemical preparations have been turned out. For example salvorsen, commonly known as 606, is said to represent the six hundred and sixth experiment made before success was achieved. And in many of the preparations on the market far more than ten experiments have been made before a satisfactory product is turned out.

Q71. Would a mixture of chocolate and water ferment and decompose at ordinary room temperature?

A. It would.

Q72. What have you to say about the ethics of the practice of one manufacturer reproducing a successful pharmaceutical specialty of another manufacturer not only in therapeutic value but in physical appearance and flavor so that the imitation can be readily substituted for the original without detection?

A. I should say that such a practice is extremely unethical.

Mr. Rawle: The question and answer are objected to as immaterial and inadmissible, being

purely opinion evidence and on a subject in which the witness is not shown to be an expert and on which expert evidence is not admissible.

Q73. Dr. Beringer in his testimony has stated that as chairman of a sub-committee on the revision of the National Formulary he has made extensive experiments for the purpose of devising a satisfactory formula for a chocolate quinine preparation to be added to that book, having Coco-Quinine before him to work from. What have you to say as to the propriety of this attempted practice from an ethical standpoint?

MR. RAWLE: Objected to as irrelevant and inadmissible unless the witness is asked to deny the statement of Dr. Beringer and nothing more.

A. If the National Formulary should adopt a formula for making a tasteless quinine syrup flavored with chocolate which would yield a product that could be substituted for Coco-Quinine and could not be distinguished from it, I would consider it just as unethical as though a manufacturer had done it.

Q74. In answer to Q95 Dr. Beringer stated that the use of two or more articles in a pharmaceutical preparation where one would answer the purpose is unobjectionable because "it is prone to introduce two articles of different composition which may start decomposition", etc. * * * "As an example I may cite that it is well known that mixtures of oils become rancid much more quickly than pure oils themselves." In XQ216 he was asked to state what mixtures he referred to. He answered "Adulterated olive oil and almond oil become rancid very quickly." He was asked adulterated with what. He replied with lard oil and cotton seed oil or other common adulterants. What have you to say about this testimony?

A. It is certainly not well known to me and I do not believe it is true that a mixture of two oils will turn rancid more rapidly than either one alone would,

and I am quite sure that olive oil adulterated with lard oil or cotton seed oil will not turn rancid more rapidly than any one of these three oils alone would. With reference to the first part of the question as a general rule it may be said that it is unnecessary to use two things where one thing will do the work, but not because those two things have different compositions and may decompose each other. Two substances which act upon each other in a decomposing way should of course not be used where such decomposition would be undesirable. But if we consider for example a mixture of mucilage of quince-seed and gelatin as a suspending medium it is not as complex as cocoa which contains fat, cocoa tannin, caffein, theobromine, starch, protein, cellulose, and other substances.

Adjourned until tomorrow, Tuesday, December 4, 1917, at 9 o'clock a. m.

Indianapolis, Indiana,
Dec. 4, 1917—9 a. m.

Met pursuant to adjournment.

Parties present as before.

Q75. Have you determined the relative viscosity, specific gravity and power of suspension of a sugar solution or simple syrup and Coco-Quinine? If so will you please state what your determinations were?

A. Yes, I have made such determinations. The specific gravity and viscosity of the simple syrup of the U. S. Pharmacopoeia are almost identical with the specific gravity and viscosity of Coco-Quinine. Yet in Coco-Quinine the crystals of quinine sulphate are fairly

well suspended while crystals of quinine sulphate in simple syrup sink to the bottom of the vessel within a day or so.

Q76. Dr. Beringer was asked in XQs. 186 to 189 to explain how he determined that quinine crystals were not evenly distributed in any of the Bibbins samples. Will you please examine his testimony as it appears in his answers to these questions and state your opinion thereon?

A. Mr. Beringer states that he examined different fields of the Bibbins samples under the microscope and by counting the number of quinine crystals in each field determined that the quinine was unevenly distributed through the liquid. He did however not take into consideration the fact that all the quinine crystals which he saw were not of the same size. It is possible that he may have had fifty very small crystals in one field and still have had less quinine present than in one large crystal in another field, so that his method of determining whether or not the quinine was equally distributed is worthless.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ77. I understand that your working office is in St. Louis?

A. That is right.

XQ78. Tell be how the ten Bibbins samples reached you?

A. I took the ten Bibbins samples with me from Indianapolis, having received them from Mr. Bibbins. In fact he poured them out from the large bottles into three or four ounce bottles, and it was the smaller bottles that I took with me in each case.

XQ79. I understand that the samples you worked on and to which you testified yesterday were not in fact

taken out of these ten Bibbins bottles on the table (being the exhibits themselves in the case). Is that correct?

A. That is correct.

XQ80. And I understand that the samples which you took away to St. Louis were given you by Mr. Bibbins in three or four ounce bottles, one of each sample, which bottles Mr. Bibbins filled in your presence from bottles which he had at the Lilly laboratory, which bottles contained as he told you, the unused portions of the ten Bibbins specimens which had been put into eight ounce bottles and offered in the case?

A. That is correct.

Mr. Bradford: Counsel for plaintiff makes of record the fact that prior to the time when Dr. Caspari was given any samples for the purpose of assay and analysis counsel for defendant was asked whether or not he would insist upon such assay or analysis being made from the contents of the actual bottle exhibits that had been introduced during the Bibbins deposition or whether he would consent that Dr. Caspari might be given portions of the batches of the several preparations from which the identical bottles were filled in March, 1916. He replied at that time that he did not wish to commit himself definitely but that we should proceed and there would be no difficulty in agreeing when we came to take the testimony or a statement to this effect. Counsel for plaintiff states that Dr. Caspari was given for his assay and analysis portions of the identical experiments made by Mr. Bibbins in March, 1916, poured from the original bottles out of which these identical bottle exhibits were filled; these unused portions having remained in the laboratory where they were made from the time they were made until the time they were so used. Counsel for plaintiff further adds that the identical bottle exhibits now on the table

have never been outside of his own office or away from his own custody from the time they were introduced in evidence until they were brought to this room at this session, and that their examination by Dr. Beal as well as by Dr. Caspari and Dr. Winton and Dr. Hilton was in his office and in his presence.

MR. RAWLE: Mr. Rawle states (he is reluctant to encumber the record) that he has always assumed that any examination by plaintiff's experts of the Bibbins samples would be made from the exhibits themselves, unless plaintiff's counsel chose to do otherwise and draw from the original excess supply made by Bibbins. He supposed that nothing but a stipulation would lead opposing counsel to do otherwise than use the material in the exhibits, and if he did not so stipulate the matter would be left to the plaintiff's counsel to pursue the proper practice, or if he preferred not, then to pursue another practice without a stipulation and at his own risk.

MR. BRADFORD: Counsel for defendant having been asked to stipulate that the course pursued in this instance might be followed without objection and having left counsel for plaintiff with the impression that he would do so, and having declined to do so, the next best course will be followed. Counsel for defendant was advised that because of the fact that he and his client Mr. Pfeiffer had already emptied from these bottles a considerable portion which was not anticipated when they were offered in evidence, it was feared that to take another like portion from each, a sufficient quantity would not remain for the purposes of the court. No other purpose existed for desiring to use the unused portions of these samples for the purpose of Dr. Caspari's assays and analyses.

MR. RAWLE: Mr. Rawle is not objecting to

the witness' evidence based upon the samples he used, but wishes to know and have it appear what samples he did use.

XQ81. When did you carry these samples from Indianapolis to St. Louis?

A. It was on the 6th of October, 1917.

XQ82. When did you first take up the examination of the material in these ten bottles?

A. As soon as I returned to St. Louis on the 6th of October, 1917.

XQ83. What part of the examination did you take up and how continuously did you carry on your work on these samples?

A. These samples were allowed to stand in my laboratory for six weeks before their assay was undertaken. Thereafter I worked on them continuously until Thanksgiving Day, making the assays to which I have testified in my examination-in-chief and also tests of taste, acidity and general appearance.

XQ84. Why did you let the samples stand for six weeks before beginning on them?

A. Because my object was to determine whether upon standing there would result an uneven distribution of quinine sulphate at the top and bottom of the bottle.

XQ85. Did you not see those samples particularly during the six weeks?

A. I saw them all of the six weeks from day to day.

XQ86. Do you mean that you inspected them and worked on them for the six weeks?

A. I looked at them casually, I did not move them.

XQ87. But you did not give your mind to the work of preparation for this case until about the 17th of November?

A. That is not quite correct. I first entered the case about the first of August and from then until the receipt of the Bibbins samples in Indianapolis I de-

voted a considerable portion of time and thought to the questions involved in the case. During the time that the Bibbins samples were standing for six weeks in my laboratory I was engaged in assaying various samples of Coco-Quinine and Quin-Coco and before that had made a number of experiments for the purpose of ascertaining the best methods to be used in assay.

XQ88. My question was meant to elicit an approximate date when you took down those ten bottles and worked with their material?

A. I should say it was about the middle of November.

XQ89. Did you do the chemist's work yourself or had you someone else do any or part of it?

A. I did every bit of the work myself.

XQ90. Have you now in your mind's eye the physical appearance of each of those ten three or four ounce bottles of Bibbins' material as they stood on your shelf just before you took them down, I mean in respect of more or less sedimentation of the contents?

A. As far as I can remember there was not sufficient sedimentation in any of the samples to have been noticed.

XQ91. At what stage in the proceedings did you take material from the top and bottom of each bottle?

A. That was really the initial step in the assay.

XQ92. Can you state with absolute assurance that the contents of these bottles were not shaken or at least more or less disturbed after their six weeks rest and before you sampled them?

A. I can state with absolute assurance that these bottles were not shaken or in any way disturbed after the six weeks' standing. Otherwise there would have been no object in allowing them to stand six weeks.

XQ93. Is this the only case or business you had during those six weeks?

A. Oh, no.

XQ94. Are you not a pretty busy man?

A. I am.

XQ95. How soon after that did you make the viscosity test?

A. I made some of the viscosity tests on November 24th and some on November 30th, 1917.

XQ96. How long did it take you to make the analyses from the material taken from the top and bottom of each bottle?

A. The time necessary for the assay varied with the different samples, some requiring more, some requiring less time, and I conducted several of the assays simultaneously. After I had sampled some of the samples I then made the viscosity determination on those that had been sampled, the first ones being made on November 24th. I then assayed the remaining samples and on November 30th determined their viscosities. As an average I should say it would take from two to three days to make one assay, but several more could be made in the same time by conducting the assays simultaneously.

XQ97. I should like to ask what your standard for viscosity was. With what did you compare the viscosity of these samples?

A. The viscosity determinations were made with a McMichael viscosimeter. The standard for this instrument consists of a solution of succrose of a strength of 60 per cent. by volume or 49.16 per cent. by weight. Such a solution records a viscosity of eleven on the McMichael viscosimeter, corresponding to an absolute viscosity of .11. This means that a reading of 100 on the McMichael instrument corresponds to an absolute viscosity of one.

XQ98. On your viscosity determinations should there or should there not be a decimal point all the way down the line, and if so where?

A. The paper from which Mr. Rawle has been reading is a record of the readings of the McMichael viscosimeter made by me at the time that the experi-

ments were made. In reporting these results yesterday in my examination-in-chief I was careful to put in the decimal point in each case which is paramount to dividing the McMichael reading in each case by one hundred.

XQ99. Do you mean that water was the McMichael standard with which you compared the viscosity of the Bibbins samples as shown in your evidence and on the sheet which you have produced?

A. I do not.

XQ100. How does the viscosity of the McMichael standard which you say is succrose, compare with any known liquid, say water?

A. The standard succrose solution has about ten times the viscosity of water.

XQ101. Take the Bibbins sample No. 2, with .60 viscosity and tell me approximately how that compares with the viscosity of distilled water as a standard?

A. I should say that it was approximately sixty times as viscous as distilled water.

XQ102. Is not water distilled taken at a temperature of 25 degrees Centigrade the usual chemist's standard of comparison for viscosity?

A. Not necessarily at all. Any substance the viscosity of which has been accurately determined can be taken as a standard and it is only necessary that all determinations should be carried out under the same conditions of temperature, which was done in my experiments. It makes no difference whether we say a McMichael standard for the sugar solution which I have mentioned is eleven, or whether I say that the McMichael standard for water at the same temperature is one.

XQ103. Please tell me the viscosity of Bibbins' sample No. 7 as compared with distilled water at 25 degrees Centigrade, looking at your viscosity determinations?

A. The viscosity of the Bibbins sample No. 7 is nine hundred times that of water under the conditions mentioned.

XQ104. When at the end of those six weeks of rest on your shelf, you began to take down and work with the material of the Bibbins samples, do you state positively that these corresponding Bibbins samples on your shelf was as homogeneous in texture and as free from sedimentation as the corresponding exhibit Bibbins bottles before you on the table?

A. Yes.

XQ105. What did you do with those bottles that you worked with and where are they now?

A. They are here.

XQ106. What acidity tests did you make of the Bibbins bottles and Coco-Quinine and Quin-Coco?

A. I applied the same tests to these that Mr. Beringer did.

XQ107. Won't you please say what tests you applied and the court will not have to look back and find what Mr. Beringer applied?

A. I placed five cubic centimeters of the sample in a test tube, added ten cubic centimeters of water, shook up, allowed the supernatant liquid to become clear and tested that with blue litmus paper.

XQ108. I think you said yesterday that litmus merely detected the presence of some acid but does not tell the story of how much acid?

A. That is correct and I confirm that statement now.

XQ109. You testified yesterday that litmus showed acidity in all Bibbins and both Coco-Quinine and Quin-Coco. Is that correct?

A. That is correct.

XQ110. But so far as litmus told you anything, what it did not tell you is how much there was in any given bottle?

A. The litmus did not tell me how much there was in any given bottle.

XQ111. And so far as litmus told you anything or did not tell it, it is perfectly possible that there might have been great acidity in any one of the said twelve bottles but slight acidity in one or more of the others. Is that correct?

A. That is not quite correct. I believe it would be possible by means of litmus paper to detect the difference between very great acidity and very slight acidity.

XQ112. By slight acidity do you mean a slight trace of acidity?

A. It is very difficult to define a slight amount or a slight trace just as it is to define a great amount, but I can conceive that it would be possible to determine that one liquid would be very faintly acid and another very strongly acid by means of litmus paper.

XQ113. But you would not like as a chemist to push the virtues of litmus paper as a discoverer of acidity very much further than that?

A. No, it would be impossible to make even an approximate quantitative determination of acidity by means of litmus paper.

XQ114. I think you said yesterday that there was no relation between acidity and bitterness?

A. I think I qualified that by saying that there was not necessarily a relation between acidity and bitterness, that there might or might not be depending upon conditions. If I find that a given solution is free from bitter taste and add an acid to it and taste it again and find that it is still free from bitter taste I conclude that the addition of the acid has not increased the bitterness. Furthermore I can conceive that the addition of an acid to a liquid containing quinine partly in solution and partly in suspension would actually cause a removal of some of the quinine from solution and thereby actually decrease the bitterness.

XQ115. You can conceive, but do you know?

A. I know. The addition of tannic acid for ex-

ample to a solution of quinine sulphate would cause some of the quinine to be thrown out of solution.

XQ116. That is the one instance you can mention?

A. That is the one instance I can mention now, but tannic acid is a vegetable acid and I am convinced that other vegetable acids would act similarly, because many alkaloids occur in nature in combination with vegetable acids and can not be removed by means of water alone, indicating that the combination of the vegetable acid with the alkaloid is insoluble in water.

XQ117. Following out somewhat the same thought a little further, does not the presence of acidity in a solution containing crystals of quinine sulphate cause the crystals to pass into solution?

A. That will depend entirely upon what acid is added. As I said yesterday if you have crystals of quinine sulphate suspended in water and add sulphuric acid to that solution the quinine will dissolve. It is impossible for me to answer that question specifically unless I know what acid is added.

XQ118. Name other acids that would act in that way as you say sulphuric acid would?

A. Nitric acid would cause the solution of quinine, hydrochloric acid would, and in general I should say that the stronger mineral acids would increase the solubility of the quinine sulphate. Such acids, however, do not occur in plant life.

XQ119. In your opinion would some of the organic acids tend to a solution of the quinine sulphate crystals as referred to above?

A. I have already said tannic acid which is an organic acid, would not do so, and I had occasion to taste a sample of Coco-Quinine to which one per cent. of glacial acetic acid had been added and there was no development of a bitter taste. Whether or not the addition of that acid caused increased solution of the quinine sulphate I am unable to say, but even admitting that it did, the taste was not rendered bitter by it.

XQ120. Is it a fact that so far as crystals of quinine sulphate in a liquid pass into solution, the preparation tends to become more bitter to the taste as a general proposition?

A. I would say that in the case of water and quinine sulphate that would be true. But whether or not it is true under other conditions I could not say without making an actual experiment having that object in view. As a matter of fact Coco-Quinine and Quin-Coco are not bitter, and yet I am sure that there is at least some quinine sulphate in solution in both of them, and if the conclusion drawn by Mr. Rawle in his question is correct there ought to be some bitter taste to Coco-Quinine and Quin-Coco.

XQ121. But in such a case might not the masking ingredients of Coco-Quinine and Quin-Coco still disguise the bitterness?

A. I think that they undoubtedly do, but the same masking ingredients will have the same effect in other preparations.

XQ122. If in making up Coco-Quinine which I assume contains crystals of quinine sulphate, you should substitute for the crystals of quinine sulphate quinine sulphate in solution and put that into the mass, would you expect to find in the result a greater degree of bitterness than if you had used crystals of quinine sulphate?

A. I would not venture a guess on that, I would make the experiment and taste it and see, because quinine sulphate with the ingredients that apparently mask its bitterness acts so peculiarly in such preparations.

XQ123. I understand your line of reasoning to be in regard to the virtue of certain suspending agents that starch is a good suspending agent, because chocolate is a good suspending agent, and chocolate contains starch. Is that correct?

A. No.

XQ124. Wherein am I wrong?

A. Starch is a good suspending agent. Chocolate is apparently a good suspending agent, but not as good as starch. Chocolate does contain starch and other ingredients, but starch is the only ingredient that would tend to form the colloidal solution. Hence I reason that chocolate suspends by virtue of the starch that it contains.

XQ125. Is it not possible that nature has provided other ingredients in chocolate which at least assist in making a suspending agent and that it is not starch that does the whole thing?

A. Nature is very wonderful in her works and undoubtedly it is possible for her to do things that we do not understand and do not know. It is possible that there may be something in cocoa that suspends besides the starch, but I consider it extremely unlikely, highly improbable, and if it is there I do not know it.

XQ126. Do you think you are scientifically accurate in your answer to Q32 when you used these words, "The excellence of starch as a suspending medium is evidenced in Coco-Quinine and Quin-Coco in that it only suspends the quinine sulphate", &c.?

A. I think so.

XQ127. Would it not have been better in your answer to this question if you had qualified it as you apparently now do in your last two or three answers, and not merely spoken positively of starch as the suspending medium in Coco-Quinine and Quin-Coco?

A. No, I do not think so, because I know of no other suspending medium in the chocolate other than the starch and I have to confine myself to my knowledge.

XQ128. You have testified (Q30) that the statement by Dr. Beringer that in Bibbins No. 7 he found "only six small crystals of quinine", was "of absolutely no significance". Assume that this Bibbins No. 7 was made up with two grains of quinine sulphate to the teaspoonful, would not Dr. Beringer's microscopic

examination have discovered more than six small crystals of quinine"?

A. That question can only be satisfactorily answered if we know how many crystals of quinine are in two grains and if we know furthermore what fraction of a teaspoonful Mr. Beringer was looking at under the microscope. He looked at his miscroscopic field and saw six small crystals of quinine sulphate. I have not the faintest idea whether that corresponds to two grains per teaspoonful or half a grain per teaspoonful or ten grains per teaspoonful.

XQ129. Do you work much with the microscope?

A. I would not say that I work much with it.

XQ130. In the ordinary quinine sulphates of commerce sometimes called powdered, but yet in crystalline form, would there not be a very large number of crystals in two grains of it?

A. There would be quite a number.

XQ131. Will you please tell me what your method of tasting these samples was?

A. I have tasted the samples a number of times, and in different ways. I tasted them on different days and on the same day by removing some of the material from the stopper and tasting that, by dipping a glass rod into the material, withdrawing it and tasting what adhered to the glass rod, and by pouring some in the palm of my hand and tasting it from there by the tongue.

XQ132. Did you make notes of any of these tastings?

A. I made no notes of them.

XQ133. When did you do the tasting, covering what period?

A. Covering a period of from October 6th until December 2nd, 1917.

XQ134. You have referred to Dr. Beringer's microscopic work and said, as I remember, that the presence of tragacanth could not have been detected by him on the microscope. Is this what you meant to say?

A. As I remember correctly I said there was no evidence in Dr. Beringer's testimony that he had identified globules of tragacanth under the microscope.

XQ135. Do you now say that he could not by a microscope have detected the presence of tragacanth in the Bibbins samples?

A. Yes, I do not believe it is possible for anybody to identify globules of gum tragacanth under the microscope.

XQ136. You have referred to Mr. Bibbins ten experiments as you called it, all of which were more or less successful. I take it that you have no knowledge of how many experiments he made at the same time that were unsuccessful have you?

A. I have not.

XQ137. And he may have made six hundred and six without your knowing it?

A. Yes.

Cross-examination closed.

Re-direct examination.

By Mr. Bradford:

RDQ138. How many times have you had occasion to observe and taste the Bibbins samples from the Bibbins exhibit bottles which are on the table?

A. I have tasted them at least three different times and I have had four opportunities of observing them.

RDQ139. Have you ever noticed any difference between any one of these samples, either in its physical appearance or its chemical or pharmaceutical character, and the corresponding sample which was furnished to you by Mr. Bibbins.

A. I have not.

RDQ140. As I understand Mr. Rawle's examination on the subject of viscosity it was chiefly to determine standards and method. As I understand your testimony yesterday it was directed chiefly to

stating your determination of the comparative viscosity of these various samples and of Coco-Quinine and Quin-Coco. Is this correct?

A. That is correct.

Recess until 1.30.

After recess.

RDQ141. Have you the samples of the Bibbins syrups which you used in St. Louis for your assays and analyses? If so will you please produce them?

A. Yes, I have them. Here they are.

The witness here takes ten three ounce bottles from his sample case, each containing a portion of syrup and places them on the table in front of counsel.

RDQ142. I notice a label on each of these bottles and an inscription on each label and writing. Please state who made these inscriptions and whose handwriting it is?

A. The handwriting is mine. I wrote the labels and affixed them to the bottles.

RDQ143. When?

A. On October 6th, 1917.

Mr. Bradford: These bottles are offered in evidence and marked respectively, Plaintiff's Exhibit, Dr. Caspari Sample of Bibbins Syrup No. 1 to No. 10, inclusive.

Re-cross-examination.

By Mr. Rawle:

RXQ144. How full were these bottles when you originally poured the material into them?

A. They were practically all full when I received them, they were filled by Mr. Bibbins in my presence.

Deposition closed.

Charles E. Caspari.

J. B. WELDON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. J. B. Weldon, age 33, Woolsey, Georgia; practicing physician.

Q2. In this case a witness for defendant by the name of S. J. Nottingham when testifying in surrebuttal on June 8, 1917, in answer to Q7. made this statement: "I have never offered any preparation as a substitute for another". In answer to Q10. he also said "I never offered him or any one else Quin-Coco as a substitute for Coco-Quinine". Have you any knowledge of Mr. Nottingham's practices in soliciting orders for the Wm. R. Warner & Co., preparation that is not consistent with these answers and if so will you please state what you know relating any experience you have had with Mr. Nottingham in this respect?

MR. RAWLE: The question is objected to as inadmissible at this stage. The plaintiff having produced evidence in making out his prima facie case following the averments of the bill and called witnesses to testify to selling methods of the same S. J. Nottingham. S. J. Nottingham was called as a witness for the defendant and testified in denial of the statements made in regard to him by plaintiff's witnesses. Since then the plaintiff has taken rebuttal, the court has allowed the defendant to adduce additional evidence and since the defendant did so the plaintiff is now calling this witness and offering to produce by him further evidence apparently intended to attack the integrity of S. J. Nottingham. The evidence for this reason is objected to as irrelevant and inad-

missible and notice of motion to strike out with costs is given.

A. Something like four years ago I was introduced to Mr. Nottingham on a Central of Georgia train by a Dr. Tucker, if I remember correctly, as a salesman for the Wm. R. Warner & Co. He solicited my trade and among other things he asked the question did I use Lilly's Coco-Quinine. Answering him yes, he told me that he had a preparation similar to or as he said the same thing and would like to get me to try it, that it would produce the same results as Lilly's Coco-Quinine, that he had been so advised by men to whom he had sold, and that he would send me samples or advise the house to do so, and would like for me to try it out. The house afterwards sent the samples. I cannot remember now whether I ever used them or not. Possibly I did.

Q3. Did he ever call on you again?

A. He has but I cannot remember much of anything about it. He has solicited my trade and the house has written me more or less but I don't remember the circumstances but it appears to me that I have bought some of Warner's preparations, to the best of my memory, since that time.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ4. Are you what they call in the South a dispensing physician?

A. I am. I carry my own drugs, practically all.

XQ5. Who first mentioned this case to you and asked you to testify and when?

A. Sometime during last summer Mr. King, a representative of Eli Lilly & Co., selling me a bill of Coco-Quinine, made the remark have you ever used any Quin-Coco. I could not make an answer intelligently

and he made the remark that Eli Lilly & Co., and Wm. R. Warner were having a law suit.

XQ6. Did he arrange to have you come to Washington to testify in this case some weeks ago?

A. No, W. R. Bell a salesman for the same company made the arrangement.

XQ7. Will you tell me why you cared to leave your professional work and come this distance to testify in this case?

Objected to as immaterial.

A. I did not especially care to do this, but not having had any time away from home for the past four or five years and being requested by the said Bell that he thought that by coming and testifying in this case that I would possibly do Eli Lilly & Co., an especial favor and owing to the friendship existing between myself and the same company and Bell but no animosity toward any one, I considered after some persuasion and upon the said company being lenient as to the time I should come, I agreed to come.

XQ8. For your expenses and some compensation I suppose?

A. No compensation except expenses and what they saw fit.

XQ9. What territory has King as a Lilly salesman roughly?

Objected to as immaterial and not cross-examination.

A. I suppose the section around Atlanta.

XQ10. What territory has Bell?

Same objection.

A. I understand the city of Atlanta and suburbs.

Deposition closed.

JNO. B. WELDON.

F. C. ATKINSON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. F. C. Atkinson; aged 37, 2534 Broadway, Indianapolis, Indiana, Chemist for the American Hominy Company.

Q2. Please state the character and extent of your work, experience and education whereby you are qualified to testify as an expert in a case requiring the opinion of one having knowledge of the characteristics of fixed oils or vegetable and animal oils?

A. My college work was done at the Polytechnic Institute of Alabama, where in addition to taking the regular course in pharmaceutical chemistry I also pursued a special course in organic and pharmaceutical chemistry, leading to a Master of Science degree. After leaving college I began with the Southern Cotton Oil Company as an assistant in their head laboratory, later being made chemist in charge of their District laboratory, where I had the chemical control work of an oil refinery where from a half million to three quarters of a million pounds of cotton oil was refined daily, and also where we made from two to four million pounds of lard compound per week, the soap and glycerine works also, besides having the chemical control work for the several processes working up the by-products of the plant. Later it was necessary for me to take the complete work of the head laboratory for a short while just before I left that company. In January, 1908, I took up work with the American Hominy Company, the important work before me being to work out the details for refining corn oil. However before the end of the year matters came up that rendered it inadvisable to refine oils at that time and I went with

the McCadless Laboratories, of Atlanta, Georgia, as oil expert. This was October 1, 1908. I remained there until January, 1913, came back to the American Hominy Company where we manufacture fixed oils, mostly corn oil. That brings me up to the present time.

Q3. Dr. George M. Beringer, when called as a witness for defendant in surrebuttal in answer to Q95 testified as follows:

> "As a rule we look upon the use of two or more articles where one will answer the purpose as objectionable, because it is prone to introduce two articles of a different composition which may start decomposition per se between themselves, or render one or the other subject to a change. As an example, I may cite that it is well known that mixtures of oils become rancid much more quickly than the pure oils themselves."

In answer to XQ216 his attention was called to this answer and he was asked to define what mixtures he referred to. He replied:

> "Adulterated olive oil and almond oil become rancid very quickly."

He was then asked "adulterated with what". He replied "with lard oil and cotton seed oil or other common adulterants."

What is your opinion of the opinion here expressed by Dr. Beringer as to these oils?

A. It is rather a surprising statement that an expert should say that blended oils deteriorate more rapidly than a single oil. My experience has been that mixtures of olive oil and cotton seed oil do not deteriorate more rapidly than a single oil, and in fact if a sample of sweet cotton seed oil, by "sweet" I mean "neutral", has added to it a small proportion, say from five to twenty-five per cent. or even up to fifty

per cent for that matter, of olive oil the resulting mixture will remain sweet and free from rancidity much longer than the sample of cotton seed oil itself. I happen to have had considerable experience in blending oils, among which blends were cotton seed oil and olive oil. We certainly had no cases where the addition of olive oil made the cotton oil deteriorate any more rapidly than the cotton oil alone. It is a fact in my own observation that olive oil will remain sweet much longer than cotton oil or corn oil or any of the other vegetable oils that require refining. Now if olive oil is added to those it might really more properly be said that the olive oil acts as a preservative. The fact is the blended oil has keeping qualities intermediate between the keeping qualities of the single oils and the length of time which it will remain sweet is somewhat proportional to the quantities of the different oils entering into the mixture. The mixture perhaps becoming rancid somewhat more quickly than the olive oil but not so quickly as the pure cotton oil. In the case of the mixture of lard oil and olive oil both of which have good keeping qualities a mixture of the two would possess no very different properties in so far as the sweetness of the oil is concerned from the single oils used.

Q4. Then you do not consider that it is "well known" that mixtures of oils become rancid much more quickly than the pure oils themselves?

MR. RAWLE: The objection following Q5 of the testimony of Dr. Caspari is here repeated to apply to the preceding questions of this witness and to stand as against all following questions without being restated.

A. No, sir. I do not. I never heard of this before and it is different from my experience.

Direct examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ5. With what oils or classes of oils have you been concerned in your professional life chiefly and as a business?

A. First with cotton seed oil and with oleo sterrine which is made from the highest grade of beef tallow and used in the manufacture of the lard compounds commonly used as substitute for lard. I have also had considerable experience with corn oil and some experience with cocoanut oil. Most of my other experience then with oils has been in pressing small quantities of oils that are not commonly extracted for commercial purposes, the object of this work being to recover such oils as might be recovered profitably.

XQ6. What are these small quantities that you have sought to recover commercially?

A. Rice oil and cocoanut oil.

XQ7. Now is that the extent of your familiarity with oil in the larger sense?

A. You understand that my work with cotton oils and oleo sterrine was for the manufacture of lard compound, which is an industry of very large proportion and was at the time I was working with it. We also separated from cotton oil the so-called "sterrine" which is really to a large extent *palmatin* and which is used to a great extent in the oleomargarine industry. I have also had some experience hydrogenizing cotton oil and corn oil. And the experience referred to formerly in blending cotton oil with olive oil for making salad oils both for domestic use and for export.

XQ8. And these oils you have mentioned are all for food purposes, are they not?

A. Of course the large proportion of all the oils referred to are for food purposes but they are used also for medicinal purposes and if you call for a sweet oil in a drug store my understanding is you get one of these oils, namely cotton oil or corn oil, and of course

as you know olive oil is used for medicinal purposes.

XQ9. What experience have you had with a large number of oils used in strictly pharmaceutical business?

A. In addition to the oils named I have had experience with castor oil and sweet and bitter almond oil, orange oil, although the orange oil is a volatile oil; with olive oil, with lemon oil, citronelle oil, anise oil, turpentine oil, fennell oil, the oil from monarda punctata, known as horsemint I believe, then the oil from heart leaves, the oil from peppermint, spearmint, the oil from sweet bay, and perhaps a few other oils commonly used.

XQ10. Have you ever made these various other oils just named?

A. I have made several of them but not all of them.

XQ11. Whch ones?

A. I have prepared the oil from the monanda puntata. I have also prepared the oil from heart leaves. I have prepared the oils from deer tongue, a plant growing in the Southern States, and turpentine oil. I have prepared soy bean oil, corn oil and cotton oil, cocoanut oil.

XQ12. To what extent approximately have you made all these last named oils and when and under what circumstances?

A. I am making daily something like twenty thousand pounds of corn oil at the present time. I have made the oil from deer tongue in quantities of from one ounce to one pound when looking for a suitable oil to be used for a soap flavor. I have made oil of sweet bay in similar quantities and under similar conditions. Rice oil I extracted in quantities of about forty or fifty pounds and in this case was searching for an edible product. Cocoanut oil in quantities of one hundred to a thousand pounds per day to be used also for an edible product. Turpentine oil in quantities of

half to three pounds in placing the valuation on turpentine bearing materials.

XQ13. Please observe that I have been asking you about your experience in "oils used in strictly pharmaceutical business". I shall have to call you back to that question and ask you which of the oils you have named intended for use in strictly pharmaceutical business, you have manufactured?

MR. BRADFORD: Objected to as it is certainly not clear from previous questions that counsel's examination has been confined to the class of oils specified in his last question. Moreover unless this line of examination is for the purpose of testing the witness qualifications as an expert it is wholly incompetent, irrelevant and not cross-examination. The testimony of Dr. Beringer about which the witness was interrogated in direct examination was directed to certain specific oils and the direct-examination was confined to witness' opinion respecting Dr. Beringer's opinions as expressed in his testimony. If the purpose of these questions is to test the witness' qualifications no objection is made to them. Otherwise it is believed the objection is well made.

A. I will state that I am not manufacturing any oils on a manufacturing scale that are used strictly for pharmaceutical purposes. Such oils as I have manufactured enter into other lines as well as pharmaceutical.

XQ14. Then you mean that you have in a small way manufactured a little of certain oils which you understand are used in a strictly pharmaceutical way. Is that correct?

A. I have prepared a few and so far as I know enter only in pharmaceutical purposes, such as anise and fennell oils.

XQ15. And if you have manufactured any oils in the class that you believed to be used strictly in phar-

maceutical business has it not been in a small way and as a sort of experimental adjunct to your regular business?

A. It has.

XQ16. In the case of these small manufactures of strictly pharmaceutical oils have you ever blended them and experimented with the result of the blending?

A. I have done that only to the extent as was necessary to produce desirable odors from two or more single oils.

XQ17. State all the instances in which you have done that thing?

A. Orange and citronel is one combination.

XQ18. Any other?

A. There might be others but it has been a long time since I did any considerable work with oils that are used only in a pharmaceutical line. My experience has been with oils that are used for food purposes as well as pharmaceuticals.

XQ19. How long is it since you have had experience with the manufacture and blending of oils which you believe to be of a kind used strictly in pharmaceutical business?

A. It has certainly been six or eight years since I manufactured an oil that was used only in pharmaceutical business.

XQ20. Have you ever to any appreciable extent blended any of these strictly pharmaceutical oils and in a scientific way experimented upon them to observe their keeping effect when blended?

MR. BRADFORD: Further examination along this line is objected to as entirely improper, it not being cross-examination, the witness having thoroughly qualified himself to testify as to the matters inquired about and as a useless waste of time and for no other purpose which is apparent.

A. On strictly pharmaceutical oils, no.

XQ21. Then you do not consider yourself an expert on strictly pharmaceutical oils and the blending thereof do you?

Objection repeated.

A. Inasmuch as it is almost impossible to think of an oil as being strictly pharmaceutical I should say I am not an expert in strictly pharmaceutical oil.

XQ22. Specify the oils in connection with which you fairly believe yourself to be expert?

A. I am an expert in cotton seed oil, corn oil, olive oil, beef and hog fats, and mixtures of these several oils.

XQ23. Did I understand that you have always been a maker of oils rather than a user of them? Is that correct?

A. No, I make them and use them.

XQ24. Which oils do you use and how do you use them?

A. I use cotton oil, olive oil and corn oil at home, also butter fat and lard, occasionally peanut oil and cocoanut oil. Those are the principal oils I use.

XQ25. Can you specify any other use than that on your own domestic table?

A. No.

XQ26. Have you had any serious experience in pharmaceutical articles? Do you know anything about them in an expert way?

A. My chief experience with oils or fats used in pharmaceutical preparations has been from the standpoint of the analysist, having been called upon while in commercial work to make analyses of pharmaceutical preparations containing oil or fat.

XQ27. To any considerable extent?

A. No.

XQ28. Are you a member of the American Chemical Society?

A. I am.

Re-direct-examination.

By Mr. Bradford:

RDQ29. Are the oils mentioned by Dr. Beringer namely, olive oil, cotton seed oil, almond oil and lard oil used exclusively in pharmaceuticals?

A. No, sir. By far the largest proportions of these oils are used in food products or for food purposes.

RDQ30. Are not most of the fixed oils closely related in chemical composition?

A. Yes, essentially most of these oils are the chemical compound known as olein.

RDQ31. Have you held any offices in the American Chemical Society and if so what?

A. Yes, one year I was Vice President of the Indiana section of the American Chemical Society. Another year I was a member of the Council of the American Chemical Society. Another year I served as President of the Indiana section of the American Chemical Society. I am now serving a second term as President of the Indiana section of the Society.

RDQ32. Are you a member or have you ever held office in any other scientific society?

A. I am a member of the Society of Chemical Industry, the head office of which is in London. I am also a member of the Deutsches Chemisches Gesellschaft. I am also a member of the Verein Deutsche Chemicer and I am a member of the Society of Distillers and Sugar Chemists of France.

RDQ33. Have you ever served on any important scientific committees and if so what?

A. I served on a committee to draw up constitution and by-laws for the Society of Commercial Analysists, which is now known as the Society of Cotton Products Analysists.

RDQ34. Notwithstanding Mr. Rawle's long cross-examination respecting oils which so far as Mr. Beringer's testimony reveals he is not familiar with, do you still say that as far as your knowledge goes it is

not a well known fact that the mixtures of the oils he specified become rancid much more quickly than the pure oils themselves?

MR. RAWLE: Objected to as the witness has declined to consider himself as expert and has admittedly had very little experience in respect to pharmaceutical oils which are the only kind involved in this litigation. And further objected to for the reference to the cross-examination and Mr. Beringer's lack of knowledge of oils as stated in the question.

MR. BRADFORD: No apologies are made for reference to the long cross-examination. Perhaps the reference to Dr. Beringer was not quite proper in the question and it is withdrawn. The statement by counsel in his objection that witness has not qualified as an expert respecting the oils referred to by Dr. Beringer certainly is unjustifiable.

A. I certainly say so.

Deposition closed.

F. C. ATKINSON.

ANDREW L. WINTON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Andrew L. Winton, age 53, Wilton, Connecticut, chemist and microscopist.

Q2. Please state the extent and character of your work and experience and education by which you are qualified to testify as an expert in cases requiring knowledge of chemistry and examination of specimens under the microscope?

A. I was graduated from Yale University first

with the degree of Ph. B. and later with the degree of Ph. D. I have also studied microscopy, at the Pharmacological Institute, Graz University, Austria. For twenty three years I was employed as chemist at the Connecticut Agricultural Experiment Station, New Haven, Conn., during eighteen years of which time I was in charge of the analytical laboratory. I also taught food analysis, agricultural analysis, approximate organic analysis and microscopy at Yale. For seven years I was chief of the Chicago Laboratory of the United States Department of Agriculture, Bureau of Chemistry, the laboratory being known as the Food and Drug Inspection Laboratory. Just before I retired from the Government service I was appointed chemist in charge of food investigations. I have written numerous papers on chemical analysis, microscopy and kindred subjects.

Q3. Have you done any literary work or written any books on scientific subjects and if so what?

A. I am author of the Microscopy of Vegetable Foods, 1916, John Wiley & Sons, Inc., New York; Chapman & Hall, London. This has run through two editions; a Course of Food Analysis published during the present year; I am the translator of Hanusek's Microscopy of Technical Products and the reviser of Leach's Food Inspection and Analysis, the latter having been revised four times counting editions and thousands of editions, and I am now working on an extensive revision.

Q4. What scientific societies are you a member of and have you held any official connection with any and on what important committee assignments?

A. I am a member of the American Chemical Society. During my official career a member of the Association of Official Agricultural Chemists, of which latter association I was president in 1897 or 1898. I am an honorary member of the Philadelphia College of Pharmacy.

Q5. You see before you quite a number of bottles containing preparations of different colors and descriptions. Ten of them are exhibits in the case and are commonly referred to as Bibbins specimens or Bibbins Samples from 1 to 10. There is also a bottle of plaintiff's product Coco-Quinine and a bottle of defendant's product Quin-Coco and the same preparations in plain or flint glass bottles similar to those in which the Bibbins samples are contained. I will ask you first if you have before today had opportunity to see and examine the exhibits and for what purpose and to what extent?

MR. RAWLE: Objected to as irregular and inadmissible at this stage of the cause, the matter inquired of having been part of the case set up in the Bill and gone into by witnesses in making out the prima facie case under the Bill.

Notice of motion to strike out with costs is given.

A. I have seen on several occasions the ten samples of the Bibbin's preparations, at the office of Bradford and Doolittle, Indianapolis. I also received on August 28, 1917, portions of these ten preparations from the hands of Mr. Bibbins. These ten portions or subsamples were used in my examinations and I have with me the remnants of these portions. On receiving the ten Bibbins samples I was asked by Dr. Eldred of the Eli Lilly Company to make suitable microscopic examinations of the same and certain other suitable tests touching on the points brought out in the testimony of Mr. Beringer. In regard to the samples of Coco-Quinine and Quin-Coco I have seen these two samples in the original bottles and also the portions in the flint glass bottles, also at the office of Bradford and Doolittle in this city.

Q6. Referring to the preparation Coco-Quinine and Quin-Coco will you please explain the character of examination you made of these products?

A. I made microscopical examinations of samples of both products obtained in the open market. Three samples of Coco-Quinine examined were purchased by me in Boston, Mass., and New York City, in original pint bottles. Of the three samples of Quin-Coco which I examined one was bought by me in an original pint bottle, at Westport, Conn., but as the dealer did not have an original package he ordered the same for me from Wm. R. Warner & Co., Philadelphia, and delivered it to me in its original form, to wit, an original pint bottle. Of the two remaining samples, one was received in its original unopened package from Dr. Caspari, of St. Louis, November 30, 1917, and the other in the original bottle which however, had been opened and sealed, from Mr. Bibbins. In addition to a microscopical examination I tested the samples for acidity and also examined them with reference to the suspension of the quinine sulphate crystals after standing for different periods of time. I also tasted the samples both the ten Bibbins samples and the commercial preparations. What I have said about the examination of the Coco-Quinine and Quin-Coco applies also to the ten Bibbins samples.

MR. BRADFORD: It is agreed tha the objection by counsel for defendant following Q5 may stand to all questions and answers of this witness' deposition with the same force and effect as if repeated following each question or answer. Also the notice.

MR. BRADFORD: The bottles of Coco-Quinine produced by the witness are offered in evidence and marked Plaintiff's Exhibit, Winton Bottle of Coco-Quinine Bottle No. 1, No. 2 and No. 3, respectively. The bottles of Quin-Coco produced by the witness are offered in evidence and marked respectively Plaintiff's Exhibit, Winton Quin-Coco Bottle, No. 4, No. 6 and No. 8.

Q7. In answer to Q8 Dr. Beringer stated respecting the acidity of the several Bibbins samples that he tested them by taking five cubic centimeters of each specimen, shaking it up with ten cubic centimeters of distilled water, allowing the sediment to subside, then testing the supernatant liquid with litmus paper. By such a test he discovered that each of these samples was in his judgment acid, some more acid than others. What have you to say as to Dr. Beringer's experiments and his opinion of them?

A. The litmus paper test is recognized as merely a qualitative test for acidity and not as a quantitative test.

Q8. Dr. Beringer also testified that he discovered that each of these samples was bitter, some of them decidedly bitter, and gave it as his opinion that this bitterness resulted from the acidity which he discovered in them. What have you to say as to this?

MR. RAWLE: The question is further objected to as not properly representing what Dr. Beringer testified to. Dr. Beringer testified that the acidity caused dilution of the quinine sulphate and that in turn caused bitterness.

A. In my opinion the acidity of the samples as determined by the litmus paper test is of no value whatever, in explaining the bitterness or absence of bitterness in any of these samples.

Q9. Is your opinion based upon any experiments you made, and if so, will you state what these experiments were and the results you obtained?

A. I tested all ten Bibbins samples with litmus paper and found that each and every one gave an acid reaction, the intensity of the coloration being the same in all of the samples. I also tasted the ten samples and found that four of them, namely Nos. 2, 4, 5 and 6, were bitterless, quite as bitterless as Coco-Quinine or Quin-Coco. Nos. 1 and 9 were slightly bitter, but still to my palate, which through years of practical experi-

ence as a sufferer from diseases for which quinine is a remedy, had become accustomed to the intense bitter of quinine, were very acceptable. Four of the samples, Nos. 3, 8, 7 and 10, were distinctly bitter. I name them in the order of their bitterness as determined by my tasting. From these examinations as to acidity and bitterness I am forced to the conclusion that there is no connection whatever between the results by the two tests.

Q10. Did you test Coco-Quinine and Quin-Coco for acidity and if so what did you discover?

A. I did. I discovered that both preparations were acid to litmus paper and gave quite as strong color reactions as the ten Bibbins samples. I will say that while a preparation or solution containing a very minute quantity of acid may show with litmus paper only a faint red color that when the quantity of acid is considerable, although slight, the color is indistinguishable from that when the amount is large. In other words when the quantity of acid in the preparation exceeds a certain very small amount the reaction of test paper bears no relation to the amount, and this is recognized everywhere in chemical laboratories. Test paper as the name indicates is merely for testing the reaction. It is not for a quantitative determination and is not even a rough test for the amount.

Q11. In answer to Q24 Dr. Beringer stated respecting Specimen No. 1 that the acidity developed in the specimen brings out the bitterness of the quinine perceptibly. I gather from your previous answers that this is not in accord with your opinion or the result of your tests?

A. The sample is slightly bitter. It is distinctly acid. The fact that it is distinctly acid is absolutely no proof or even indication that the sample should be bitter.

Q12. Did you make any further or other tests, whereby you obtained further evidence that acidity

does not cause the bitterness in these samples? If so will you please explain?

A. To a sample of Coco-Quinine I added sufficient glacial acetic acid to form one per cent by volume of the mixture. This mixture I shook thoroughly, then examined it microscopically and tasted it. The microscopic appearance did not differ from the original Coco-Quinine. In taste it was distinctly sour but it was no more bitter than the Coco-Quinine. Standard vinegar contains at least four per cent by weight of acetic acid. The quantity present in the mixture which I made contained one per cent by volume, which is slightly different from the per cent by weight, but not sufficiently different to alter a conclusion that Coco-Quinine acidified with acetic acid so as to be about one quarter as sour as standard vinegar is quite as bitterless to my palate as Coco-Quinine. I made this test immediately after preparing the mixture and again over two months later. The results being the same in both cases.

Q13. Dr. Beringer stated in answer to Q17 that in the preparations of the character we are considering that the suspending material must produce a uniform, homogeneous liquid that does not separate out, that does not undergo subsequent change, that it is not acid when first prepared and does not become acid on keeping, that remains permanently as a uniform, homogeneous suspending liquid, even after keeping for some time, as necessarily would be done in a package offered to the trade. Bearing in mind Dr. Beringer's requirements for a suspending medium for such a preparation are the conditions fulfilled in Coco-Quinine or Quin-Coco?

A. They are not. While both preparations after shaking are uniform, at least sufficiently so to permit the accurate dispensing and administration of the preparation, they do not remain so on standing. As regards the second point I have no evidence that they

undergo chemical change on keeping, but they do lose their homogeneity on standing undisturbed. Both preparations are distinctly acid and remain acid on keeping. They do not either of them remain permanently as a uniform homogeneous suspending liquid, assuming in the latter case that by liquid he means both substances in solution and substances in suspension. The portion in solution quite probably remains the same both in the top and in the bottom of the bottle, but the substances in suspension do not remain uniformly distributed. If they did the label "shake well" which I find on the samples of Coco-Quinine and the labels "shake well before using" which I find on the bottles of Quin-Coco would be a flagrant waste of paper pulp and printer's ink.

Q14. Did you find any evidence that the quinine crystals had gone into solution in any one of the Bibbins samples.

A. I have no direct scientific evidence but the fact that all of them are aqueous preparations and that quinine is slightly soluble in water, to my mind was sufficient evidence that a portion of the quinine must have been in solution.

Q15. Is this true to the same or approximately the same extent in Coco-Quinine and Quin-Coco?

A. It is. All of the preparations both the ten Bibbins samples and the six samples of the commercial products being saturated solutions of quinine salt with other substances in solution or suspension.

Q16. I show you Q20 of the Beringer deposition and ask you to read his answer thereto and express your opinion of his conclusions as there stated?

A. It is true as he states that in the chocolate quinine syrups Quin-Coco and Coco-Quinine the crystalline structure of the quinine sulphate was very evident, quite apparent. He states further in a number of specimens examined of these ten samples the crystals were more or less attacked, what you might call eroded

surfaces, showing that the crystals had been acted on by the suspending liquid and had partly undergone solution. It is true I found in my examination that the four preparations which I found to be distinctly bitter, to wit, Nos. 3, 8, 7 and 10 had undergone changes and the crystals differ in appearance from the normal quinine sulphate crystals of Coco-Quinine, Quin-Coco and the remaining six of the Bibbin samples. To say however that they are eroded appears to my mind quite erroneous. The word "erosion" is used commonly in the mineralogical or geological sense. It refers to the action of the elements on rocks and crystals, whereby mechanically a portion is removed. In the present case the crystals are surrounded by a liquid which has more or less of a solvent action and may affect the crystals in some other way. I found no evidence whatever to support Mr. Beringer's contention that the crystals had partly undergone solution beyond what they had undergone in the case of the other preparations. The fact that they had been acted on was no proof that they had at the same time gone into solution beyond the amount first dissolved. Dr. Beringer offers no evidence whatever that they have undergone this additional solution. In the final sentence he states in one specimen the quinine was practically entirely dissolved; in the others more or less so. In my own experiments I obtained no evidence that the quinine was practically entirely dissolved, nor did I in any case secure any evidence whatever that the quinine was dissolved any more than was true in the normal commercial preparations, both Coco-Quinine and Quin-Coco, or the other Bibbins samples. A bitter taste more or less pronounced is, to be sure, evidence that quinine is in solution, but it is no evidence that it is any more in solution than in the commercal preparations named which are quite bitterless in taste.

Q17. In answer to Q58 Dr. Beringer defined eroded as a phrase that is used in chemical and micro-

scopical technology to indicate an action of some chemical to the body or surface by which you have indentations or roughened surfaces. What have you to say as to this?

A. I would say that an erosion of a rock or a mineral might be defined in something that way and that perhaps it would also apply to a metallic surface or some similar substance. I am unfamiliar with the term as used in chemical and microscopic technology as applied to the action of a solution on crystals in suspension, especially as in the present case where there is no action of a nature such as he names.

Q18. In answer to Q23 Dr. Beringer stated respecting Sample No. 1 "The glass now shows some separation of the suspending material tragacanth and under the microscope it showed some crystals of quinine sulphate; separated portions of tragacanth mucilage and quince-seed mucilage were unequally distributed throughout the field." Please state the result of your examination and your opinion respecting this testimony by Dr. Beringer.

A. I was unable to note any separation of the suspending material which appeared to be tragacanth, nor was I able under the microscope either immediately after shaking or after standing undisturbed for five weeks, to note any separation of the quinine sulphate crystals.

Q19. Dr. Beringer also stated in the same answer that tragacanth does not form a solution but simply continues to swell and swell and make an uneven mucilage. On cross-examination he was asked how long tragacanth would continue to swell and swell and he replied indefinitely. What have you to say as to this?

A. It is well known that tragacanth does not go into a true solution, but rather into a colloidal solution and that some time is required for it to reach this latter condition. It is not true however that the process of swelling will continue indefinitely. It stops

when the maximum action is attained and an equilibrium reached.

Q20. I ask you to read Dr. Beringer's answer to Q27, respecting Specimen No. 2 and express your views respecting his conclusions as there stated about this particular specimen?

A. I was unable to verify the statement that there was a marked separation in this sample, a thin upper layer and a thicker lower layer. After standing five weeks undisturbed I could not either with the naked eye or with the compound microscope detect material separation of any of the constituents. The material appeared remarkably uniform, smooth so to speak to the naked eye, and under the microscope there was a uniform distribution of the quinine crystals and no noticeable separation of any kind. I did not note a separation of the tolu in resinous masses on the sides of the bottle. To be sure all the preparations will show a small amount adhering to the glass, but I do not consider that, when the adhering portion is in a finely divided condition, is any indication of the lack of homogeneity. I failed to find any evidence of gelatin separating out. As regards the acid reaction this as well as all of the other Bibbins samples and the samples of Coco-Quinine and Quin-Coco was acid to litmus paper. I believe that in this sample as in all of the other Bibbins samples even after standing five weeks the proper amount of quinine could be obtained by merely pouring out from the bottle into a teaspoon without mixing, that the shake label for a length of time of standing such as I have stated would not be necessary. Even admitting that this sample was not absolutely uniform in every degree it approaches much more nearly that condition than the commercial cocoa products in question, which could not be accurately dispensed or administered even after a few days standing, without shaking. I was unable in this sample to obtain any evidence of incomplete distribution of the

quinine sulphate after standing five weeks, but in every test of the cocoa preparations I secured such evidence.

Q21. How about Dr. Beringer's opinion of the taste of this specimen No. 2 as expressed in his answer to the next question?

A. He states the taste was decidedly bitter. I could detect no bitterness. In fact I considered the product delicious. I should state at this time that in my experience in tasting quinine preparations in suspension that after some minutes the bitter taste can be detected, and in all cases when I make the statement that the preparation is bitterless I refer to the taste sensation immediately after swallowing the product and for a short time thereafter. If I may be allowed to state my own personal experience in taking these preparations as a medicine I find the sensation of Coco-Quinine and Quin-Coco very agreeable at first and I experience no disagreeable sensation whatever if immediately after I eat or drink, so as to remove any of the medicine from the nerve ends. I found sample No. 2 quite as bitterless treated in the same manner as Coco-Quinine and Quin-Coco. For a cold or similar affection I have used Coco-Quinine taken just before going to bed. It has been my experience that a few minutes after taking the dose if I do not take the precautions above stated the bitter taste will come in my mouth and remain all night.

Q22. In answer to Q26 Dr. Beringer stated that separation and unevenness indicated additional decomposition. What is your opinion of this?

A. I examined these preparations sometime after Dr. Beringer made his examination and found them remarkably uniform and even, more so than Coco-Quinine and Quin-Coco. They had a smooth appearance and I was unable to detect separation and unevenness other than a very slight separation on the surface in the case of No. 2 on standing five weeks, to which I will refer later and in the case of No. 5 on

standing five weeks. This slight separation, a kind of watery appearance on the surface, was evident to the naked eye but it did not extend down into the preparation sufficiently so that with the microscope I could distinguish a portion removed from the top of the preparation and a portion removed from the bottom by the number of quinine crystals.

Q23. As a general question do separation and unevenness in pharmaceuticals indicate decomposition?

A. They do not. Separation and unevenness might indicate decomposition, but of themselves without further indications they would be due to mechanical or physical causes. Decomposition such as fermentation, putrefaction, growth of molds, and other changes of that sort, would be evidenced by certain changes such as formation of bubbles, moldy appearance on the surface, and so on. But an unevenness in the absence of any evidence of biological change or chemical change whether or not induced by biological change would be inferred to be mechanical, or physical. In the case of Coco-Quinine and Quin-Coco there is no evidence of decomposition either biological or purely chemical on standing, but there is distinct evidence of mechanical separation, and consequently a lack of uniformity.

Q24. In XQ153 Dr. Beringer was asked if separation could be brought about by standing. He answered "No, not in a perfect preparation. That is evidence of the imperfect suspension." What have you to say as to this?

A. I would say judged by that standard Coco-Quinine and Quin-Coco are imperfect preparations. It is evidence of an imperfect preparation if remaining in suspension for an indefinite time is essential. The question remains whether Coco-Quinine or Quin-Coco are imperfect preparations because they require shaking before dispensing or administering. Personally I do not consider it necessary to make a standard for a

preparation of this sort that the preparation does not need shaking. There are many medicinal preparations and technical mixtures which are used successfully that require thorough mixing before use. I think of furniture polish of the kinds I have seen where there is a separation in layers even after standing for a short time. These are shaken and then used. I have never heard objection made to such preparations because they require shaking. I have never heard or considered that they were not perfect preparations because they require shaking. If however Dr. Beringer establishes as necessary a condition such as requires no mixing my only conclusion is that Coco-Quinine and Quin-Coco do not comply with that requirement but that the Bibbins samples do comply in a very large degree, that is to say on standing five weeks they could be used even without mixing.

Recess until 7.45 P. M.

After recess.

Q25. Were any of the other samples which you used in your experiments furnished you by Dr. Caspari and if so will you produce them?

A. There is one other, a three ounce bottle containing Quin-Coco, bearing his label "Quin-Coco C. E. C. 1, Lot No. 186004." I obtained this sample from Dr. Caspari November 30th, 1917. He gave it to me here in Indianapolis and I have used it in my tests for the purpose of comparing its settling action with that of the three other samples of Quin-Coco previously mentioned.

MR. BRADFORD: The bottle referred to is produced and offered in evidence and marked Plaintiff's Exhibit, Winton Quin-Coco Sample No. 7.

The witness is here excused for a few moments for the purpose of recalling Dr. Caspari to identify these bottles.

DR. CHARLES E. CASPARI, recalled.

By MR. BRADFORD:

Q1. In Dr. Winton's testimony he has referred to certain samples of Quin-Coco obtained from you. I ask you if you can identify the Sample No. 6 and if so state where you obtained it and the circumstances under which you gave it to Dr. Winton if you did?

A. I identify this sample marked WVI as one which I purchased in St. Louis, an original package, in the open market, on the 28th of November, 1917, and which I handed to Dr. Winton, seal unbroken in Indianapolis on Nov. 30, 1917. I identify it by my initials on it and the date I purchased it.

Q2. I also show you Winton Quin-Coco Sample No. 7 and ask you if you can identify this bottle and state the circumstances under which it was given to Dr. Winton?

A. I identify this sample as one which I handed to Dr. Winton in Indianapolis on November 30, 1917. The contents of this bottle were placed in it by me from the original bottle of Quin-Coco which I purchased as an original package in the open market, in St. Louis about August 1st, 1917. I identify it by my initials and hand writing on the label and lot number.

WITNESS CASPARI is excused and DR. WINTON recalled.

DR. WINTON, recalled.

Q26. Have you any other sample bottles which you have used in your experiments and if so will you produce them?

A. I have the ten bottles of the Bibbins Samples numbered from 1 to 10, bearing my initials, and each containing what was left of the sample after making my examination.

MR. BRADFORD: Said bottles with their con-

tents are offered in evidence and marked respectively Plaintiff's Exhibit, Winton Specimens of Bibbins Samples 1 to 10.

Q27. Please explain where you obtained these samples, when and from whom?

A. I received these samples from the hands of Mr. Bibbins, August 28, 1917, in Indianapolis. He told me at the time they were bottles filled from the same bottles as were the original Bibbins Samples, Plaintiff's Exhibit, Bibbins Sample Syrup No. 1 to No. 10, respectively.

Q28. Did you make any record of your tests in the way of diagrams or otherwise, and if so will you please produce them and explain what they represent?

A. I made sedimentation tests on the ten Bibbins samples and on the three Coco-Quinine Samples, No. 1, No. 2 and No. 3, and one Quin-Coco sample, No. 4, which I purchased in Westport, Connecticut. I was unable to make these tests on the remaining three samples of Quin-Coco for the reason that they did not come into my hands until a few days ago. I will state at this time that this sample of Quin-Coco No. 4 behaved somewhat differently from the remaining three samples of Quin-Coco and I note that the lot number on this Sample No. 4 is very different from the lot numbers on the remaining three. Furthermore that it is in a different style of type. Again this Sample No. 4 has a small label of a reddish or orange color, "Net Contents 16 Fld ozs" and a sticker on the cork printed on blue paper bearing the monogram S. H. & Co. etc. It would seem that there may be some relation between the deportment of this sample No. 4 as compared with the others and the difference in the numbering and labeling. Evidently it was made under somewhat different conditions than the three samples collected in St. Louis, which I obtained from Dr. Caspari and Mr. Bibbins. As already stated this sample No. 4 was obtained through the Westport druggist direct from Wm.

R. Warner & Co., in Philadelphia. The history of these other samples of Quin-Coco No. 6, No. 7 and No. 8, is unknown to me.

On this sheet I show diagrammatically the results of sedimentation tests where all of the samples were allowed to remain undisturbed for thirty-five days. The bottles used were of approximately three ounce capacity and I was guided in my selection by the bottles in which the Bibbins samples were furnished me. To explain more fully the Bibbins samples were allowed to stand in the bottles in which they were furnished me and in order to have the conditions the same with the samples of Coco-Quinine and Quin-Coco I selected bottles of the same size and shape and used amounts of the material approximately the same. After standing thirty-five days I noted what separation had taken place, measuring with a millimeter ruler the heighth of the column or in case separation took place of the two columns. These measurements are shown on the sheet in each case at the right of the bottle. For example in Coco-Quinine No. 1 the figure at the right "26" shows the height of the upper layer which separated. The figure "6" the height of the lower layer. The sum of the two "32", representing the total height of the liquid in the bottle. I have written on the diagrams of the bottles the conditions observed after the thirty-five days. For example, in this first sample I have written "Dark Brown, Granular, Many Crystals". This means that this column, 26 millimeters high, was of a dark brown color, a granular condition to the naked eye, and under the microscope was found to contain many crystals of quinine sulphate. The transverse line below indicates where this layer ended. Between that and the bottom of the bottle is a layer marked "Light Brown, muddy, few crystals". This refers to the color of this lower layer, its muddy appearance and the fact that under the microscope very few crystals of quinine sulphate were

present. This lower layer contained not only very few quinine crystals but also hardly any of the solid particles of the cocoa. These solid particles being almost entirely in the layer above it and give to that layer its dark brown, granular appearance. The muddy appearance in the lower layer is due to a very small quantity of finely suspended material.

The two other samples of Coco-Quinine No. 2 and No. 3, show the same condition as the first except that the heights of the layers differ somewhat. In Quin-Coco No. 4, at the top right hand corner of the sheet shows a very different appearance. I noted after the first few days of standing that this sample began to show a curdled appearance, that is, a separation into a flocculent condition and into watery streaks or pockets. This same condition has sometimes been observed in Coco-Quinine but in a lesser degree. After standing thirty-five days these watery pockets or streaks had risen to near the surface of the bottle, combining to form a large pocket of irregular shape. At the very surface of the bottle was a layer 7 millimeters high of red brown color, granular appearance, containing many crystals of quinine sulphate. At the bottom of the bottle was a layer of a dark brown granular appearance also containing many crystals of quinine sulphate. The large pocket referred to contained only a few crystals. It corresponded in its general appearance with the lower layer of the Coco-Quinine preparation, but because of some difference in the make-up of the material, specific gravity and other unknown reasons, this rose to near the surface. The fact that the very surface layer was red brown, whereas the lower layer was dark brown, shows that there was a mechanical separation of the insoluble matter according to specific gravity, the watery layer containing the few crystals choosing to repose in between. I will state at this time that later experiments with the samples examined at Indianapolis showed that these latter behaved practi-

cally the same as Coco-Quinine, the muddy or watery layer settling to the bottom. The remainder of this sheet shows the results of this sedimentation test on the ten Bibbins samples. In only two of the samples was there any noticeable separation into layers on standing thirty-five days. These were No. 2, which showed a watery layer at the surface, 1.5 millimeters high and No. 5, which showed a watery layer at the surface 2 millimeters high. These watery layers in No. 2 and No. 5 I was able to measure with my millimeter ruler, but they were not thick enough or rather high enough so that I could detect on microscopic examination any difference in the number of crystals present at the top and at the bottom of the bottle. Microscopic examination of all ten Bibbins samples showed no determinable difference between the number of crystals in the top and in the bottom of the bottles, even in the case as already stated of No. 2 and No. 5, where with the naked eye a thin watery layer was detectable. In one case, however, Bibbins No. 4 although no stratification was evident to the naked eye I noted after microscopic examination that the crystals at the bottom of the bottle were of a larger size than any I found at the top, but that crystals were distributed throughout. In this sheet it should be noted that the heights of the different layers are roughly to scale but that the bottles are made half size, in order that all could go on one sheet for ready reference. In order that there might be no misunderstanding as to this point on the second sheet I show the bottles natural size and the layer to scale. It should be noted that the diameter of the bottle does not have any bearing on the height of the columns or layers.

MR. BRADFORD: The sheets or diagrams referred to by the witness in his last answer are offered in evidence and marked respectively Plaintiff's Exhibits, Winton Diagram No. 1 and Winton Diagram No. 2.

Q29. Have you any other record of your tests and if so will you put it in the record and explain it?

A. During the last week since I came to Indianapolis I made sedimentation tests like the preceding, using however only Coco-Quinine and Quin-Coco specimens. These specimens included the four specimens represented on the diagram mentioned, to wit, Coco-Quinine No. 1, No. 2 and No. 3, and Quin-Coco No. 4, and in addition the three samples of Quin-Coco No. 6, No. 7 and No. 8. Time would permit only of a three days' experiment and I have not had opportunity to give the results in diagrammatic form but only in figures, representing the height in millimeters of the top and bottom layers. These figures are as follows:

Coco-Quinine I, top 32 bottom 3; Coco-Quinine II, top 34, bottom 2; Coco-Quinine III, top 33, bottom 2; Quin-Coco IV, top 32, bottom 3; Quin-Coco VII, top 28, bottom 7; Quin-Coco VIII, top 32, bottom 3. In all cases the top layers contained many crystals of quinine and the bottom layer very few. Quin-Coco No. 4 after three days did not show distinct layers but a very marked curdled appearance which was observed in the early stages of the previous sedimentation tests. The crystals were more evenly distributed through the entire liquid although whenever I was able with a pipet to remove a portion from one of the pockets the number was there found to be less. It is clearly evident that the flocculent and the watery part differed in the number of quinine crystals but that this did not exist on a large scale until the pockets united as in the former experiment.

Q30. Dr. Beringer in testifying respecting the Bibbins Sample No. 3 stated that under the microscope the crystals of quinine were shown to be distinctly eroded or eaten away? What have you to say as to this?

A. I noticed in this sample as well as in samples 8, 7 and 10, that the crystals of quinine were more or

less changed. To say that they were eroded does not at all express the conditions. In No. 3 the crystals were enveloped at least at the ends by an oily substance. In No. 8 this oily substance was in greater amount and the crystals were smaller correspondingly. In No. 7 the change was still further advanced, the crystals being greatly reduced in size and the oily material increased correspondingly in quantity. And in No. 10 there were no crystals at all of quinine sulphate, all of them having gone into the oily condition which has been noted. The crystals were not and could not be bone-shaped. Crystals do not deport themselves in that way. Obviously what Mr. Beringer considered bone-shaped crystals were merely crystals more or less enveloped in this oily substance. No one who has had experience with the microscope could fail to note the difference between the crystals themselves and this oily substance, and the progressive change establishes beyond question the fact that the quinine has gradually changed due to some unknown reason, from the crystalline form into an oily yellowish transformation product, so that the appearance in No. 10 instead of being that of quinine crystals in suspension was that of a yellow, oily substance suspended in globular drops. There is no evidence whatever that because the crystals of quinine sulphate disappeared as such they went into solution, or, in other words, that the amount of quinine sulphate in solution was increased by this change. The fact that these four samples were distinctly bitter may be correlated with the change in the quinine crystals but no evidence has been presented so far as I have read Dr. Beringer's testimony to that effect.

Q31. In your answer you have covered Dr. Beringer's testimony respecting the condition of quinine crystals as he found it in Bibbins Samples 3, 7, 8 and 10. I call your attention to Beringer's sketch and ask you to observe his illustration of the bone-shaped, as he

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termed them, eroded crystals of quinine sulphate as he found them in samples Nos. 7 and 8, and comment thereon, expressing your opinion as to the value of this evidence?

A. I can not see how any one experienced in microscopic work could interpret the phenomena I have referred to, namely the coating or enveloping of the crystals, particularly at the ends, with the transformation substance, as being due to eroded or bone-shaped crystals. I can see that an unskilled observer might not distinguish between the two elements, namely, the crystals proper and the yellow, oily substance, which gives the peculiar appearance in samples Nos. 7 and 8. It is still more inexplicable how a microscopist could state that in No. 10 all the crystals had gone into solution, when as a matter of fact they had merely gone into this oily transformation product and there is no evidence whatever that a greater amount has gone into solution than already existed before the changes.

Q32. I call your attention to Dr. Beringer's answer to Qs. 40 and 41 respecting Specimen No. 4 and ask you to express your opinion respecting the correctness of his conclusions as there stated, bearing in mind particularly what he has said about his microscopic examination and also what he says in answer to Q41 about the cafe-tannic acid?

A. He states this showed some precipitation on the bottle, still evidenced on the sides of the bottle and bottom, poured like mucilage, having the flavor and characteristics of dextrine. I failed to note any such precipitation myself, the sample being remarkably homogeneous. And I am quite unacquainted with dextrine that precipitates in such a manner. I am at a loss to know how the flavor of such a precipitate could be determined when I have been unable to note even a separation. Furthermore it is hard to understand how such a substance could be identified as dextrine by its taste even if secured in the form of a precipitate from

a preparation so highly flavored with other constituents. Dextrine is practically a tasteless substance and its characteristics even when separated in pure form could be determined only by a skilled chemist. It has practically no flavor. It does have certain polariscopic and other physical as well as chemical characteristics belonging to this carbohydrate. He further states "The slight flavor of coffee which was first perceptible was soon drowned out by the extreme bitterness of the quinine."

I have already testified that this is one of the Bibbins samples which was quite as bitterless as Coco-Quinine. I would not call any of these Bibbins samples extremely bitter. I would however call a sample of suspended quinine sulphate in a chocolate saccharine medium which was submitted to me, such as Complainant's Exhibit Bottle No. 2, extremely bitter. I tasted that sample and for some time afterward suffered excruciating torment, showing that the nerves of my mouth are quite susceptible to such an intense bitter. He refers in the next sentence to the broken down and eroded quinine crystals. This point I have already considered. In this sample I saw no change whatever in the quinine crystals. In only four out of the ten Bibbins samples was the quinine abnormal and showed any change. He states further that "the solution gave a distinct reaction with litmus paper, a distinct acid reaction". As to this point we are all agreed. In reference to the statement "there was likewise in the microscopic fields starch grains partly altered and distributed unevenly throughout the field" I will say that if such starch grains were present they escaped my notice. Dextrine does sometimes contain unaltered starch grains but they were not present in sufficient numbers in this case to attract my attention, and have no bearing on the points in question. He states "coffee contains cafe-tannic acid, which precipitated out part of the quinine, and I have

no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate so that the quinine was subject to reactions in two different directions by this precipitation." In this statement he merelyexpresses a theory but gives no evidence whatever of an experimental nature. Even if the quinine is partly precipitated as tannate, I fail to find any detriment in the change, but on the contrary a distinct advantage as a portion that was in solution would be in an insoluble form. It might here be stated that cocoa as well as coffee is a carrier of tannin, cocoa red, a member of the tannin group, tannin and tannic acid being used synonymously, is present in the cocoa bean to the extent of four to seven per cent., and the precipitation of tannate is quite as probable in the cocoa preparations containing a very considerable amount of cocoa as in this preparation flavored with a small amount of coffee extract.

Q33. Will you please take up Dr. Beringer's answer to Q44 respecting Specimen No. 5 and state your opinion and conclusions on the subjects there discussed?

A. He states "There was decided evidence of precipitation on the sides of the bottle, still showing". I noted no precipitation. He then states "The taste was decidedly bitter and it gave a decided acid reaction with litmus paper and the crystals of quinine sulphate, when examined under the microscope, were distinctly eroded and attacked, and there was likewise separation of quince seed mucilage, showing as I have sketched here the characters of quince mucilage as separated in these specimens (referring to sketch in the witness' hands)". With regard to the alleged bitter taste, No. 5 in my test was quite as bitterless as Coco-Quinine. It was no more acid than Coco-Quinine by the litmus paper test. The crystals of quinine sulphate in my examination were not eroded or attacked, they were normal in appearance.

Q34. Will you please refer to Dr. Beringer's answer to Q59 respecting Bibbins Specimen No. 6. In this answer he stated "under the microscope the crystals of quinine sulphate showed that they were acted upon and eroded and that they separated the Irish moss, jelly and quince seed mucilage in different masses. That this was apparent on the surface of the glass bottle as well as under the microscope. He stated further "In the sketch I have shown (Beringer's sketch) the typical separation of the Irish moss jelly as occurred in this specimen No. 6, and likewise the mucilage of quince-seed, as separated. These separations were unequally distributed throughout the field showing the lack of homogeneous suspension". In connection with this answer as well as his answer respecting Sample No. 5, I ask you to consider his sketch and express your views respecting the same and his conclusions.

A. With reference to the crystals of quinine sulphate I must disagree absolutely with Dr. Beringer. My examination failed to disclose any erosion or any abnormal appearance of the crystals. The preparation is as bitterless as Coco-Quinine. He refers to the separation of the Irish moss jelly and the quince seed mucilage jelly and his illustration of this alleged quince mucilage and Irish moss jelly. The mucilage separated from Irish moss and from quince seed goes into a form of colloidal solution. It is formed by the vegetable cells but on solution in water and straining severs its connection with the organized tissues. If it is precipitated from this colloidal solution, it is a most remarkable phenomena if once again it assumes cellular form. Such a statement is absurd in the highest degree, against all laws of biology or cell formation. The quince seed has an interesting cellular structure corresponding closely to the allied seeds of the apple and pear. There are several distinctive layers which have been carefully studied and to which I have myself

before considering this case or before knowing of this case, studied in detail. There is no structure in the quince seed that corresponds with Dr. Beringer's drawing marked "quince mucilage", and even if there were such a structure I can not comprehend how it would find its way into the quince mucilage in the form of a solution and then be precipitated. The case is somewhat different with Irish moss. This breaks up in the treatment and some of the cells might pass through into the colloidal solution although the cellular matter is removed in making such a solution as completely as possible. If Dr. Beringer found under the microscope any cellular structure such as he marks "quince mucilage" it must have come from the Irish moss although from the picture it might be anything, as it bears the closest resemblance to ciphers arranged in nine rows. His drawing marked "Irish moss jelly" may represent solid particles of the Irish moss which quite posibly found their way in small amount into the preparation. Such being the case it is obviously unfair to make a microscopic picture of the cellular elements, magnified several hundred diameter to illustrate the lack of uniformity of the sample when thousands of such particles equally large or larger can be found under the microscope in Coco-Quinine or Quin-Coco and yet these particles do not interfere in the slightest with the even distribution of the quinine sulphate after reasonable shaking. And in the case of Bibbins sample No. 6 on standing a considerable time, five weeks in fact, without shaking, would also be no detriment and not interfere with the proper dispensing or administering the mixture even without shaking.

Of all the preparations which I have examined, Coco-Quinine and Quin-Coco are the ones that abound in solid particles of cellular matter, whereas in his samples Bibbins employed as thickening or suspending media substances containing little and in some cases no cellular matter. To the naked eye one can see par-

ticles in the cocoa preparations quite as distinctly if not more so than in the Bibbins samples.

Q35. What special experience have you had with or what personal study have you given to the quince seed problem referred to in your answer?

A. In my book on the Microscopy of Food I give a somewhat extensive account of the microscopic structure of the quince seed on page 331 of the second edition.

Q36. In answer to XQ224 Dr. Beringer testifies that in chocolate there is an astringent principle which is classified in tannins. "In my opinion the trace of the tannin like principle present in the commercial cocoas and chocolate is due largely to the admixture of portions of the shells which may be accidentally or otherwise present. In that hull you have a tannic acid principle. It is like a peanut. You take a peanut and in the skin coating there will be tannin, and in the outer shell coating there is some more." What have you to say as to this?

A. Dr. Beringer is correct in his statement that in chocolate there is an astringent principle which is classified with the tannins. In cocoa there is still more than in chocolate, because cocoa is merely chocolate from which a portion of the fat or cocoa butter has been pressed out, thereby increasing the percentage of the other constituents. The statement that in his opinion the trace of the tannin like principle present in the commercial cocoas or chocolates is due largely to the admixture of portions of the shell which may be accidentally or otherwise present is contrary to the well known structure of the cocoa bean, commercial practice and recorded chemical analyses of the products. This statement shows an absolute lack of knowledge of the microscopic structure of the cocoa bean, equal lack of knowledge of the chemical composition of the cocoa bean and cocoa products and a gross injustice to manufacturers of cocoa as well as a possible suggestion of

the grossest neglect on the part of the administrators of the food and drugs act, who would allow cocoa shells to be used in cocoa to such an extent as to give several per cent. of tannin substances. The structure of the cocoa bean is shown on page 445 of the second edition of the Microscopy of Foods, Fig. 348. This figure is a cross section through the shelled cocoa bean or cocoa nib. The cocoa bean is somewhat larger than and about the same size as an ordinary lima bean and is similar to the lima bean (although botanically not at all related), in that it consists in large part of fleshy seed leaves enclosed within a rather thin membraneous skin. Figure 348 referred to is a cross section through one of these seed leaves corresponding to the part of the lima bean which comes up out of the ground in the spring. It shows cells containing starch grains and among these starch three cells of dark color known as the pigment or tannin cells. These three black cells contain tannin or tannic acid, as their chief and characteristic constituent and it is from these cells that the cocoa derives its considerable percentage of tannin. The cocoa shells do not contain tannin in such large amount. They do not find their way into cocoa as the shells are removed in the process of manufacture. So it is obvious that the statement of Dr. Beringer that the tannin of cocoa is due largely to the admixture of portions of the shell is grossly false and misleading. On page 443 of the work cited is the following statement:

> "Over fifty per cent. of the dry embryo consists of fat, the remaining constituents being starch, proteids, theobromine, caffein, a tannin substance known as cooca red, and other substances in small amounts."

Tannin is not an accidental or a minor constituent of the cocoa bean. It is one of the chief constituents and a highly characteristic constituent, both as to its chemical properties, its color and its taste. He states that it

is like a peanut. I can not imagine any common product more unlike a peanut than the cocoa bean in its gross appearance, in its structure, and in many other details. He refers to the tannin in the skin of a peanut and to the tannin in the outer shell coating and in the outer shell, three distinct formations outside of the kernel proper, while I myself after a study covering some weeks never found but two, the red skin and the shell. The statements with regard to the tannin in these three parts of the peanut are not supported by analyses either of his own or of others.

Q37. How extensive has been your study of the cocoa bean and cocoa products?

A. During the years 1902 and 1903 while I was connected with the Connecticut Agricultural Station with the help of two assistants, I made somewhat extensive investigations of the composition of the cocoa bean as secured direct from the importer and ground in the laboratory. This work was the basis for the standards for the composition of cocoa and chocolate promulgated by the United States Department of Agriculture. The methods used or elaborated in this work were for the most part adopted by the Association of Official Agricultural Chemists. In addition somewhat extensive analyses were made of commercial chocolates and cocoas. I submit the report of the station named for 1902 and refer to pages 258 and 259 showing analyses of commercial cocoa. Analyses of the authentic samples to which mention has been made are found on subsequent pages, but in this connection are not of so much interest as those on pages 258 and 259, which are of cocoa such as might be used in the preparation of Coco-Quinine although attention should be called to the fact that in the preparation of this drug product as well as of soda water syrup a cocoa would doubtless be selected containing the minimum amount of fat and correspondingly larger amount of other constituents. In the analyses of cocoa referred to, the range of starch (pure

Indianaoplis, Ind., December 5, 1917, 9 A. M.

Met pursuant to adjournment.

Parties present as before.

Q40. I call your attention to Dr. Beringer's answer to XQs. 212, 213 and 214, and ask you to express your views respecting the subject matter there inquired about and whether or not you agree with Dr. Beringer?

A. The term "peculiar" as used by Dr. Beringer seems to be most unfortunate. Had he said "characteristic" I would agree with him. I find nothing peculiar about cocoa starch, at least more peculiar than of any other starch. The form, size, and other visual characters of the starch grains from different vegetable products differ greatly, so that with the microscope these different starches may be distinguished. In chemical composition the starch in different products agree. We have no evidence that the starch of cocoa is any different from the starch of Indian corn, the potato, the bean, and so on, although different in form. Dr. Beringer states they vary in the character of their coating. I do not understand what he means by "coating," but I will say that I have never heard of a coating of starch grains. It is true that the grains show a concentric structure, as exhibited under the microscope. We note more or less distinct concentric rings, but this structure is not considered to mean a difference in chemical composition other than possibly a variation in the moisture contents. On treatment with reagents starch grains show certain peculiarities, but these are not to my knowledge of the nature of coatings.

He states that it is a mooted question whether the different starches have the same chemical composition, but adds that it is commonly considered that they are chemically of the same composition. While modern research shows that perhaps the true formula for starch is some multiple of the figures given in the common formula $C_6H_{10}O_5$. I know of no evidence whatever that this differs in the starch from different sources.

To sum up, starch is considered to have the same chemical composition regardless of its source; but the granules differ in form in different plants.

Q41. I call your attention to Dr. Beringer's answer to XQ122, respecting suspending mediums and call your attention to what he said about chocolate as a suspending medium, and ask your opinion of this same subject matter?

A. Basing my answer on my own examination of the Bibbins samples, Coco-Quinine and Quin-Coco, I will say that cocoa, which I assume is what Dr. Beringer means by chocolate, is not as good a suspending medium as gelatin, Irish moss, dextrine. It is true that chocolate, or rather cocoa, on boiling with water gelatinizes to a certain extent, and therefore becomes more or less of a colloidal nature, but this is attributable to the starch of the cocoa, and such being the case there is no reason to conclude that cocoa serves the purpose in a way that nothing else so far suggested does. As a matter of fact, cocoa owes its suspending power after boiling with water to starch. This I have shown to be true by a very simple experiment. I mixed a teaspoonful of cocoa with a half of cup of cold water, transferred the mixture to a bottle. I then mixed another teaspoonful of cocoa with half a cup of water and brought the mixture to a boil with constant stirring, boiled for a few minutes, then transferred to a bottle as in the case of the unboiled mixture. The boiling was not continued long enough to decrease the volume through evaporation. Both the boiled and the unboiled prep-

arations were thoroughly shaken and allowed to stand undisturbed. After a time the cocoa in the unboiled preparation settled out, forming a distinct layer, that is, the insoluble portions of the cocoa; small quantities may have gone into solution. From the boiled preparation the cocoa also settled out after a time, but in a much more bulky condition. It occupied several times the bulk, as in the unboiled preparation. The boiling performed one function, namely, the gelatinization of the starch, that is, the conversion of this constituent into the pasty condition with the water. And this change accounts for the change noted.

I know of no other constituent of cocoa than starch which gives this condition—that goes into colloidal solution and thereby imparts to the preparation suspending power. In my opinion starch by itself used in the same quantity present in the cocoa is superior as a suspending agent to cocoa containing that amount of starch. In the cocoa the starch after its gelatinization, in the case of quinine preparations, not only has the task of suspending the quinine crystals, but it must also suspend the solid insoluble portion of the cocoa itself. In other words, while the cocoa contains a suspending gelatinizing material it also contains materials that must themselves be suspended.

Q42. I ask you to refer to Dr. Beringer's answers to XQs. 134, 135 and 136 and 137, and express your opinion on the subjects there inquired about very briefly. You have already covered the subject matter very thoroughly, and I only ask now for brief comments directed to these particular answers?

A. It appears to me that Dr. Beringer uses a great many words to describe a very simple phenomenon, but that he evades the true explanation of the suspending power of cocoa. He states in answer to the question, "How does chocolate suspend quinine," that this is "by virtue of the constituents of chocolate", that "it has the property of making a mixture that will hold

up, distributed throughout it, or in suspending the quinine sulphate". I can not understand why he did not state that this is due to the starch in the cocoa. He evades a simple explanation.

Q43. Dr. Beringer stated in answer to XQ159 respecting Bibbins Sample No. 2, that it was decidedly more bitter than Coco-Quinine. What have you to say as to this?

A. I did not find it so. I found it delicious, quite as bitterless as Coco-Quinine.

Q44. In answer to XQ174, Dr. Beringer stated that he could distinguish the mucilage of quince seed from the mucilage of Irish moss under the microscope. In XQ175 he was asked in what way. He replied: "Irish moss is larger and more gelatinous and gluey in character." What have you to say as to this?

A. I will say that I am unable in a gelatinized form to distinguish these products. I do not believe it can be done, although it is well known that the Irish moss itself has microscopic appearances quite distinct from those of the quince seed. I refer to the cellular elements which do not go into colloidal solution. The quince seed tissues I was unable to find in any of these preparations.

Q45. Do you believe it is possible to distinguish under the microscope quince seed mucilage, tragacanth, Irish moss jelly tolu and gelatin, as found in these Bibbins samples and identify each?

A. I do not believe it is possible. I would not attempt it.

Q46. I ask your attention to the answer of Dr. Beringer to Qs. 86 and 87 and XQ206, respecting the colorings used, with special reference to what he says about coal tar dyes, and ask for your opinion of his testimony and your own opinion respecting the subject matter inquired about?

A. With regard to his statement that the coal tar dyes are susceptible to occasional precipitation and

that he suspects that some of the specimens which show precipitation owe this in a measure to the artificial coloring, I will say that the amount of coloring used was so minute that if precipitated it could not be detected by ordinary means in a colloidal solution, such as exists in the Bibbins samples. Even if precipitated I fail to see any disadvantage, as the whole purpose of the coloring is to please the eye, and the eye shows in all of these samples an even distribution of color.

As regards the therapeutic action of dyes his reference to Allen seems to me grossly unfair and misleading. Allen does state, and every food chemist knows, that napthol yellow is a poisonous dye. Napthol yellow S, however, is recognized as a harmless color and its use is sanctioned by the United States Government, it being one of the eight colors allowed by regulation of the United States Department of Agriculture. To insinuate that napthol yellow S, which was used in at least one of the Bibbins samples, may be harmful because napthol yellow is known to be harmful, is unfair as to insinuate that common salt is injurious to health because muriatic acid and caustic soda, which, together in the proper amount, form common salt, are highly corrosive substances.

I might cite numerous cases where napthol yellow has been shown to be a poison. While I was in charge of the Chicago laboratory in the enforcement of the Foods and Drugs Act, we seized and finally by condemnation of the Court destroyed several carloads of macaroni colored with napthol yellow, yet at that time the Government was sanctioning the use of napthol yellow S as a coloring, under suitable regulations to avoid deception.

If coloring matter is to be allowed in foods and drugs I believe that carefully selected coal tar colors inocuous in themselves and free from poisoning contamination, are more likely to be unobjectionable from a sanitary standpoint than so-called natural colors, such

as cudbear, prepared from sea mosses, and cochineal, a disgusting bug, which come from regions where sanitary precautions are not taken, and where they are handled by natives under filthy conditions.

Q47. In XQ187 Dr. Beringer was asked how he determined the unevenness in the different fields by his microscopic examination. He answered: "Under the same magnification we would have naturally the same number of quinine crystals." He was then asked if he counted the quinine crystals in the respective fields, and he answered that he did in some of them. What have you to say as to this?

A. I will say that the mere counting of quinine crystals in a field is of little or no use, for the reason that the crystals vary greatly in size. Some of them being ten, twenty, and perhaps a hundred times larger than others. If an experienced microscopist expressed his judgment on the matter I would consider the results of some value, although the microscope in the case of a solid material, such as quinine crystals, where the individuals vary greatly, cannot be used in a strictly quantitative way. In such preparations as blood, where the size of the corpuscles is quite uniform, counting is a valuable quantitative test.

Q48. In your experience as a chemist have you ever understood that it was a well known fact that mixtures of oil become rancid much more quickly than pure oils themselves?

A. I have never noted the fact, nor had I ever heard of it until I came into this case.

Q49. I ask you to refer to Dr. Beringer's answer to Q85, the last paragraph of his answer, and note what he says respecting benzaldehyde as a flavoring, and comment thereon and express your opinion of the subject inquired about?

A. Benzaldehyde is a very popular flavor. It is the flavor of the so-called maraschino cherries. It is the chief flavor constituent of bitter almond oil, highly prized for culinary use in this country and especially

in England. I have never heard that it is objectionable because it loses its flavor by reduction to benzoic acid. Dr. Beringer states that it is apt to be oxidized, being reduced to benzoic acid. Oxidization and reduction are diametrically opposite chemical processes. Even if a portion of the benzaldehyde were oxidized to benzoic acid, such benzoic acid would be no detriment in preparations such as we are considering, as it would act as a preservative.

Q50. In answer to XQ191 Dr. Beringer stated that in a number of examinations that he had made he found quinine sulphate equally and thoroughly distributed. In answer to XQ201, wherein he was asked whether after a bottle of Coco-Quinine had been standing a long time would there be any difference in the quinine contents at the top and the bottom, he answered: "I have not made such a determination." What do you understand by his answers to these respective questions?

A. These two answers are not in harmony. It would be impossible to show a uniform distribution of the crystals without a microscopic examination of the top and the bottom of the bottle. Dr. Beringer says in answer to XQ191, that there appears to be a uniform distribution, but in answer to XQ201 he states that he made no determination after standing for a long time. It may be that in answer to XQ191 he had in mind an even distribution immediately after shaking, but judging from his previous testimony it has been my understanding that he insisted that a suspending medium to be satisfactory must hold up the crystals for a long time.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ51. I think you said that the litmus determination of acidity was not quantitative. Is that correct?

A. Using litmus paper as a test of acidity is not quantitative.

XQ52. Is that absolutely true in your opinion, or only to a modified extent?

A. It is true that a very faint degree of acidity with blue litmus paper would not become as red as when a medium or large amount was present, but beyond that small degree of acidity you get no indication from the litmus paper as to the amount present. You could not tell, for example, whether there was 1 per cent. or 30 per cent. of acid present by the degree of color.

XQ53. When saying that the litmus determination of acidity is not quantitative, I take it that you mean that it furnishes no method by which an accurate determination or a scientific determination of the acidity present can be made?

A. It is not even approximate. To explain, vinegar makers have rough, or approximate, methods of determining the acidity of their products, which methods are quantitative, although not accurate to such a high degree as the methods used in the chemical laboratory, but no vinegar maker would think of using litmus paper to determine the strength of his vinegar. With it he could not tell whether his vinegar contained half a per cent., 5 per cent. or 10 per cent. of acid. I refer, of course, to dipping the litmus paper into the product and not to using the litmus paper in conjunction with other reagents. Used in such latter way litmus paper may become a part of a strictly accurate determination.

XQ54. Suppose you took up the ten Bibbins exhibits the first time, ignorant of their contents, and tested them by simply placing litmus paper in each bottle, do you mean to say that you would get absolutely no information from such action as to comparative acidity of the material in the ten bottles?

A. I mean to say that I did test all ten bottles with litmus paper, and the only information I got was that the products were distinctly acid, and I got this

same information when I dipped the litmus paper into the cocoa preparations of the two manufacturers; that no difference in acidity could be detected between the Bibbins samples and the cocoa preparations by this test. I made the tests independent of any knowledge of the constituents.

XQ55. I understand that you made no quantitative test of acidity of the Bibbins samples other than the litmus test so far as that threw any light on the subject?

A. I made no quantitative tests for acidity. I made the litmus test, which is not quantitative.

XQ56. Is there any sense in which you call yourself a pharmacist?

A. No, sir.

XQ57. Has your professional work been more along the line of foods or drugs?

A. More along the line of foods.

XQ58. And very much more?

A. Very much more.

XQ59. This question of human tasting and of detecting by the gustatory organs of the mouth the presence of some particular article by its taste—does not this human sense of taste differ enormously in different people, just as sight or hearing do?

A. It differs somewhat.

XQ60. Would you not use a stronger word than "somewhat"?

A. I am not qualifying as a medical man, but in my understanding the sense of taste does not differ so much as the sense of sight or hearing. I know of people who are stone blind and absolutely deaf, but I do not happen to know of any one who cannot taste.

XQ61. Is tasting at all a matter of training in any given individual. I mean the accurate sense of taste?

A. It is well known that wine tasters and tea tasters develop their faculty of taste in a high degree. So far as I know.

XQ62. Then your answer to my question is yes, and what you actually answered was explanatory. Is that correct?

A. I would hardly like to answer the question yes, for fear that I might not understand your meaning. I explained what my understanding was of cultivated sense of taste. I wish to add that these trained tasters are distinguishing between products of different degrees of excellence, not between products that are absolutely nauseating, bitter, and products which are delicious.

XQ63. Would you say that your professional life and daily work constantly called for the exercise for the sense of taste in a practical way from various chemical or other substances?

A. The chemist is taught early in life to be a taster. The sense of taste and smell are continually used in the chemical laboratory and especially in food examinations. I will state, however, in this case, one does not need to become skilled as a taster any more than one needs to become skilled in detecting the difference between good tasting food and poor tasting food.

XQ64. But you have assumed in this case to pass upon the degree of bitterness in the various compounds you have handled here? That is, in a more or less quantitative way. How far does that not imply an assumption on your part that your palate is a more or less trained palate to detect differences in bitterness, for instance?

A. I did not assume that my palate was especially trained. The patient who would take these preparations as drugs would not have specially trained palates, and I expressed my judgment, putting myself in the position of the patient.

XQ65. That is you became the sick child in place of the expert chemist. Is that correct?

A. I did not put myself in the position of the child,

but of an intelligent person who has a palate who can tell the difference between what is good and what is distasteful.

XQ66. Do you know personally, where is the seat of your strongest sense of taste?

A. I am not a physiologist, and I have never thought of that point. Products taste, for example, bitter or not bitter to me, and I do not attempt to locate the nerves.

XQ67. But is it on the tip of your tongue?

A. That I could not say.

XQ68. If you were now asked to taste one of these Bibbin samples in order to testify as to what you tasted in it, would you take a drop or a spoonful, or what portion?

A. I would take different quantities, and repeat the test several times, taking care that the bitter taste of one sample held over did not mislead my judgment in regard to another sample.

XQ69. Will you not answer my last question a little more closely than you have.

A. I would take several days for the test. I could not do it all at one sitting, because after tasting one bitter sample my sense of taste would be ruined for testing those that were not bitter. I would say that a teaspoonful appears to me to be a large quantity to use. I believe a somewhat smaller amount would answer, because in my experience in tasting the cocoa preparations I found I could form as good a judgment from say a quarter of a teaspoonful as a whole teaspoonful.

XQ70. Have you any knowledge as to what the popular flavoring substances are in drug business and in the candy business?

A. I have the knowledge that several flavors are very popular in the candy business, and I also have some knowledge as to the flavors which are used in drugs.

XQ71. Would you be testifying, professionally I

mean, on the latter subject if I examined you or would you only speak from such general knowledge that a great many people have unprofessionally?

A. I would not be testifying from the standpoint of a physician or a pharmacist or pharmaceutical manufacturer.

XQ72. Referring to your answer to Q36 on the subject of the presence in commercial cocoa of particles of shell and the consequent presence of such particles in the preparations before us or some of them, is it not a fact that Dr. Beringer has testified that the amount if any of such shells in any one of these preparations is extremely minute?

A. I can only refer you to the official record.

XQ73. Would you venture to say as your opinion that commercial cocoas or chocolates contain or usually contain no portions of the shell of the article?

A. They might contain minute portions, but any considerable portion which would, of course, constitute an adulteration is rarely or if ever present at the present time in commercial cocoa.

XQ74. Is every bag of cocoa tested by the Government?

A. No, sir.

XQ75. How could its presence in minute or even small quantities of the shell be likely to be found out except by the user?

A. The user would not be able to find it out, anything like as readily as the trained Government examiner and expert, who has at his command chemical and microscopical methods.

XQ76. But don't you see that you have just said that the Government does not interest itself in every bag of cocoa?

A. Certainly not, but the Government does exercise a rigid inspection of the product, the Government inspectors having access to the factories at all times and Government chemists and microscopists being con-

tinually engaged in the examination of samples taken here and there in the market. Of course, no system of inspection of any kind is an absolute safeguard against fraud, but I fail to see how even if fraud were practiced by the addition of shells to the cocoa furnished to either of the houses in this litigation would alter my general contention that the seat of the tannin in cocoa is the cocoa nib, the part of the cocoa bean legitimately used in the manufacture of cocoa, and not in the shell, which might in minute quantities accidentally be introduced into the product, although the shell might contain a small percentage of tannin.

XQ77. Then you severely criticise Dr. Beringer for holding to the opinion that some commercial cocoa may have in it some particles of shell of the cocoa bean?

A. I criticize him for attributing to a highly improbable form of contamination the presence of a substance, to wit, tannin, which is normally present as one of the important constituents of the pure unadulterated product.

XQ78. You have stated that some of the crystals of quinine sulphate in one or more of the ten Bibbins samples appeared in the microscope to have changed to an oily compound, or to have gone into an oily condition. How did you ascertain that this condition was "oily"?

A. When I said "oily" I meant deported itself like an oil, being in a liquid condition insoluble in the menstrum. I do not wish to say that it has the composition of any kind of an oil.

XQ79. And you made no attempt to identify the substance?

A. That would be a long and difficult undertaking, but I will say that the observations I made were such as might lead an organic chemist into an exceedingly interesting field.

XQ80. Did you observe any such change in the quinine sulphate crystals in Coco-Quinine or Quin-Coco?

A. I did not.

XQ81. Would you consider a product in which such changes had taken place to be a suitable product for commercial use in the drug business? Without further investigation at least?

A. I think that is a pharmaceutical question.

XQ82. But you would at least admit that seeing such changes, that something had gone wrong with the preparation, would you not?

A. That, coupled with the bitter taste.

XQ83. Did you form an estimate in your mind of the number of crystals in the several layers which you found in the Bibbins specimens when examined under the microscope?

A. I formed no quantitative estimate. I did reach the conclusion that the appearance at the top and the bottom of the bottle was not disinguishable, I mean in respect of crystals, except in one instance, where I noted that the crystals were small at the top. I did, however, in the Coco-Quinine and Quin-Coco specimens on standing find a marked distinction in the number or rather quantity of the crystals at the top and at the bottom of the bottle. Mere numbers of crystals does not tell the story. It is merely a judgment based on all the characters involved as to the quantity suspended in the top or in the bottom of the bottle.

Re-direct-examination.

By Mr. Bradford:

RDQ84. In one of your answers to a cross-question you stated that litmus paper might be used as a part of a method to determine accurately quantitative acidity in a preparation. Was such a method employed by Dr. Beringer as explained by him in answer to Q8 of his deposition?

A. It was not.

RDQ85. You have stated that your work has been more largely with foods than with drugs. Do or do not

many of the same constituents enter into the manufacture of foods and drugs?

A. The two subjects overlap. For example, in the products in question, cocoa, sugar, the different flavoring constituents, such as ginger, peppermint, sassafras, wintergreen, orange and benzaldehyde, are well known food constituents.

RDQ86. And your testimony in this case has been with subjects that you are entirely familiar with and in a number of instances have made the subject of a number of experiments and investigations?

A. That is true.

Deposition closed.

ANDREW L. WINTON.

FRANCIS E. BIBBINS, being recalled as a witness for plaintiff, in answer to interrogatories propounded to him by counsel, testifies as follows:

By MR. BRADFORD:

Q1. Dr. Winton in his testimony has referred to certain bottles of syrups which he testified he received from you. Among others, a bottle partially filled with Quin-Coco, marked No. 8. I ask if you recognize this bottle and can identify it, and if so, where you obtained it and what condition it was in when you obtained it and the circumstances under which you gave it to Dr. Winton, if you gave it to him?

A. This sample No. 8 was received by me in an unbroken package through the receiving department of Eli Lilly & Co. It was delivered to me with the parchment wrapping intact, and opened by me, and after a portion of its contents being used by me in my experimental work in this case, the balance of the sample in this bottle was turned over to Dr. Winton.

Q2. I also show you ten three-ounce bottles, said to contain specimens of the Bibbins syrups, Nos. 1 to

10, respectively, and testified by Dr. Winton to have been received by him from you. Will you please state what these bottles contain and the circumstances under which they were delivered to Dr. Winton by you, if such is the fact?

A. These samples were taken from the balance of the experimental lot from which the samples offered in this case as exhibits by me were taken. I refer to Plaintiff's Exhibits, Sample Syrups No. 1 to 10, respectively. The syrups were transferred to the bottles and labelled No. 1 to No. 10, the same as the exhibits respectively referred to, and were handed by me to Dr. Winton.

Q3. Do these bottles contain a portion of the identical batch of material, as contained in the exhibit syrups No. 1 to No. 10, respectively, and have these portions of said batches been in your possession continuously from the time they were made until they were turned over to Dr. Winton?

A. Yes, sir.

Q4. In answer to Q74, Dr. Beringer testified respecting sample No. 10, stated that it appeared to have been colored, but that the coloring matter is not stated. Was any coloring matter used in this sample?

A. No.

Cross-examination.

By Mr. Rawle:

XQ5. Do you state that the integrity of the manufacturer of the Bibbins samples, their preservation after the sample bottles put in evidence had been taken from them and until the Winton bottles were filled, has all been in your own personal professional care and under your personal professional observation?

A. Yes.

Re-direct-examination.

By Mr. Bradford:

RDQ6. I neglected to ask you if the same facts are true, and applied respecting the ten specimens of

these sample syrups numbered 1 to 10, used and introduced into evidence by Dr. Caspari?

A. They are. I personally filled the Caspari sample bottles from the same original batches and personally handed them to Dr. Caspari.

Deposition closed.

FRANCIS E. BIBBONS.

SAMUEL L. HILTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Samuel L. Hilton; age, nearly 52; Washington, D. C.; pharmacist.

Q2. Please state the character and extent of your experience, education and work by which you are qualified to testify as an expert in cases requiring knowledge of chemical and pharmaceutical subjects?

A. I am a graduate of pharmacy, having a degree of doctor of pharmacy, having been engaged actively and continuously in the practice of pharmacy for thirty-four years. I was assistant to the chair of analytical chemistry at the National College of Pharmacy, Washington, D. C., for five years. On many occasions I have delivered many lectures on special pharmaceutical subjects to the classes. For eight years I was a member of the Board of Pharmacy of the District of Columbia, its secretary, and having in charge all examinations on theoretical and practical pharmacy.

Q3. Please state what scientific or other societies you are a member of, and any official or committee connections you have with such societies or have had with such societies?

A. I was a delegate to the United States Pharmacopoeia Convention of 1900 and 1910, was elected treasurer of the U. S. Pharmacopoeia Convention in 1910, and still hold that position. While not a member of the United States Pharmacopoeia Revision Committee, I have been active in revision work, and received special notice for my activities in the lists of those who were active, published in the Pharmacopœia. I am a life member of the American Pharmaceutical Association, twice have been a member of its council, and at present vice-chairman of the council. I have likewise been a member of numerous committees of the American Pharmaceutical Association. I am also a member of the revision committee having charge of the revision of the National Formulary. Member of the American Chemical Society.

Q4. You see before you on the table a number of bottles containing preparations, one being a bottle of plaintiff's preparation, Coco-Quinine, another a bottle of defendant's preparation, Quin-Coco, and ten other bottles containing Bibbins Exhibits Syrups Number 1 to 10, also Plaintiff's Exhibit, Bottle No. 1, shown by the evidence to contain Coco-Quinine with cocoa omitted; another, complainant's exhibit, Bottle No. 2, shown by the evidence to contain Coco-Quinine, with yerba santa omitted. I ask you if you have seen these various exhibit bottles before, and if so, when and where?

MR. RAWLE: Same objections as have been noted of record to all of the preceding witnesses, and upon the same ground of irregularity and admissibility and notice of motion to strike out with costs.

MR. BRADFORD: Same agreement to apply.

A. I have, at Mr. Bradford's office in Indianapolis, Indiana, Sunday evening, December 2, 1917.

Q5. Did you examine the preparations contained

in these several bottles, and if you did, will you please explain the character and extent of your examination?

A. I examined them on that occasion as carefully as could be done under the circumstances, and noting their physical characteristics, their odor and taste.

Q6. Are you familiar with the preparation Coco-Quinine, and if so, when did you first become familiar with it and what is the extent of your knowledge of it as a medicine?

A. I am familiar with Coco-Quinine, and if my memory serves me correctly, became familiar first with it about fourteen or fifteen years ago. I have continuously handled the product in my business, dispensing same on physician's prescriptions and to the laity when called for over the counter. It has been perfectly satisfactory as a medicine, and I can testify that it has been what is known among pharmaceutical preparations as a good repeater, persons once using it will repeatedly call for the same preparation when they need such a preparation.

Q7. Are you familiar with Quin-Coco, and if you are, to what extent?

A. With reference to Quin-Coco I know there is such a preparation on the market. The salesman of the house that makes it offered it to me four or five years ago as a substitute for Coco-Quinine. His offer being rejected on the grounds that it was unfair competition, and when Coco-Quinine was called for it meant a preparation manufactured by Eli Lilly & Co.

MR. RAWLE: The last two questions and the answers are objected to for the additional reasons as irregular at this time and therefore inadmissible, and as irrelevant. The answer to the last question is objected to as volunteered, as stating inferences and not facts. The original objections are repeated.

Q8. Dr. George M. Beringer, when called as a wit-

ness for defendant, testifying in sur-rebuttal at Philadelphia on June 8, 1917, stated that he had examined specimens of these Bibbins samples, being a part of the contents removed from these identical bottles when they were introduced in evidence at the time Mr. Bibbins' deposition was taken, poured therefrom by Mr. Pfeiffer and Mr. Rawle into smaller bottles, and he took up each specimen separately and condemned each and all as pharmaceutically objectionable, unfit and unmarketable and unstable. Assuming that these preparations were made in March, 1916, and have been in the laboratory of Mr. Bibbin from that time until the date of his deposition and in my office in Indianapolis from that day untl Sunday night, when they were brought to this room, I will ask you to express your opinion respecting these qualities of the respective syrups, first will you please take up Sample No. 2, then No. 4, then No. 5 and then No. 6, and state your opinion as a pharmacist of these preparations and whether or not you would consider them stable, satisfactory and marketable?

A. With reference to preparation No. 2, as to stability there is no question in my judgment of its being perfectly stable. As to being a good pharmaceutical preparation I would class it as an elegant pharmaceutical preparation.

As to its marketability I see no reason why it should not be, if the proper endeavors were put back of the preparation to introduce it and bring it to the attention of physicians. It is a far better appearing preparation in every way than many pharmaceutical preparations now on the market enjoying extensive sales. As to the taste I will state that I have tasted this before the examination and am willing to do so again. The taste is perfectly pleasant and showing but a very slight bitter taste, and then only after being in constant contact with the tongue quite a little time.

With reference to Sample No. 4, the same testi-

mony that I have given with reference to Sample No. 2 holds with reference to Sample No. 4. With reference to taste it is very pleasant and showing but a slight bitter taste, and then only after some little while in constant contact with the tongue.

The same testimony that I have given in reference to Sample No. 4 is equally true as to No. 5. While there is a slight sign of separation at the top of the liquid that is entirely immaterial in my judgment and does not affect the marketability of the preparation. With reference to taste, what I have testified with respect to No. 2 and No. 4 is equally true as to Sample No. 5, the bitter taste is but very slight.

Sample No. 6, while this sample shows a little different condition on the upper portion of the bottle, as a pharmaceutical preparation that is immaterial in my judgment and does not affect the marketability of the preparation whatever. Other than that what I have testified to with reference to the previous samples holds true for Sample No. 6. With reference to taste, it is perfectly palatable and shows but very slight bitter taste only after being in contact with the tongue for some little time.

Collecively, I consider all four samples elegant, marketable preparations, that would enjoy a large sale if they were properly exploited.

Q9. In his testimony Dr. Beringer condemned each and all of these preparations without qualification, pointing out many defects in each, and compared them with Coco-Quinine, and stating particularly as to Sample No. 2, that it was decidedly more bitter than Coco-Quinine. I will ask you if what you said about bitterness of these samples is likewise true of Coco-Quinine, and what you have to say about Dr. Beringer's testimony thus referred to?

A. I cannot agree in any way with Mr. Beringer. None of the four samples, in my judgment, develop any more bitterness than Coco-Quinine. In general

appearance the samples, 2, 4, 5 and 6, I believe, show up as better pharmaceutical preparations than Coco-Quinine.

Q10. Will you please consider Samples Nos. 1 and 9 and answer in the same way what you find in reference to these preparations?

A. Sample No. 1 in my judgment is but slightly inferior as a pharmaceutical preparation in appearance when compared with Sample No. 2. As to flavor it is rather pleasant, and it would be no doubt acceptable to a majority of users. As to taste, it is not quite as pleasant as Samples Nos. 2, 4, 5 and 6, in my judgment. You get the slightly bitter taste much quicker than with Samples Nos. 2, 4, 5 or 6.

With reference to Sample No. 9, as to appearance I cannot see the slightest objection as a pharmaceutical preparation of the character of these preparations holding medicaments in suspension. The flavor is decidedly pleasant, and no doubt would be acceptable by many. As to taste, it is more bitter than samples Nos. 2, 4, 5 and 6, you getting the bitter taste in a much shorter period of time.

I would consider both samples No. 1 and No. 9 as marketable preparations, and would no doubt enjoy a large sale if properly exploited, there being many preparations on the market at the present time inferior in character in every way enjoying such sales.

Q11. Without asking you to examine into detail Samples Nos. 3, 7, 8 and 10, which all the witnesses have agreed have developed some degree of bitterness, perhaps exceeding that of the other samples, I will ask you to state as a pharmacist whether you believe that such defect might be overcome by further laboratory experimentation, and whether or not even in their present form or as thus improved they might become marketable preparations?

Mr. Rawle: Specially objected to, because the witness cannot possibly be expected to know or

testify what further experimentation would make these preparations good or what work had been put on them or anything about the formula.

A. I agree that they could probably, with some experimentation, be improved, and I consider that they are all marketable preparations in their present condition, far better than many preparations that are sold by the retail pharmacists to-day.

Q12. What does a "Shake Well" label on a bottle of medicine signify to a druggist?

A. It is a specific direction that the product contains a medicament that is held only in suspension, and for the purpose of securing even distribution the bottle is directed to be well shaken. The pharmacist likewise directs the purchaser of that fact on dispensing a physician's prescription containing substances held in suspension, or when selling direct to the purchaser so that each dose will be practically uniform.

Q13. In Dr. Beringer's testimony he states that a perfect suspending medium for a preparation of this character must have perfect homogeneity and maintain the medicament in even distribution, even after standing for a long period of time. What have you to say as to this?

A. I do not agree with Mr. Beringer. While it is desirable to have a minimum of separation it is practically unobtainable, even on short standing.

Q14. I show you this bottle, Complainant's Exhibit, Bottle No. 1, containing all of the constituents of Coco-Quinine, except cocoa, and ask you if you have tasted the same, and to express your opinion respecting its characteristics, and whether or not it would in itself be a marketable preparation?

A. While the preparation on standing showed some separation, it is on shaking homogeneous and in better condition than very many preparations as to appearance now on the market. As to odor, decidedly pleasant. As to taste, no more bitter than Coco-Quinine or

Samples 2, 4, 5 and 6. As to marketability I can see no reason whatever why it is not as marketable as the other samples about which I have testified.

Q15. Will you also examine and taste Complainant's Exhibit, Bottle No. 2, which contains all of the ingredients of Coco-Quinine, with the exception of the yerba santa, and state what you find as to its taste, etc.?

A. As to appearance, I will say and repeat what I said with reference to No. 1, last referred to. The odor is rather pleasant, but not as pleasant as some of the other specimens. As to taste, the bitterness develops instantly.

Q16. You stated that you were a member of the Committee on Revision of the National Formulary. I believe Dr. Beringer also is a member of that committee, and in his testimony he told us of experiments he had made in an endeavor to make a formula for a chocolate quinine preparation for that book, and expressed the opinion that from an ethical standpoint he was entirely justified in so doing, even with Coco-Quinine as the preparation to work from. What have you to say as to this?

A. Mr. Beringer reported at a session of the National Formulary committee on a preparation of that character that he had been working on a formula for the preparation, that he had failed to make a satisfactory preparation, asking for time to continue his experiments. Several of us, myself included, objected to the inclusion of any such formula, and stated our objections vigorously, that the National Formulary was not to be a receptacle for substitute preparations. As far as I know, no further work was done on the preparation, and the National Formulary IV shows no such formula included.

Q17. What have you to say as to the merits or demerits of benzaldehyde as a flavor for medicinal preparations?

A. I know of no objection based on a sound prin-

ciple against the use of benzaldehyde, and can further say that in the District of Columbia there are several preparations, one of which has been used in rather a large way for many years, both on physician's prescriptions and by direct sale to the public, in which the predominant flavor is benzaldehyde. I further manufacture a preparation myself for physicians' use, and also for a tuberculosis dispensary, where the predominant flavor is benzaldehyde, and have been using it and furnishing same for about six years. Benzaldehyde is also used in certain food products as a flavor, and is a very acceptable flavor.

Q18. What medicinal preparation did you first become acquainted with in which cocoa or chocolate was used as the coloring and flavoring agent?

A. Coco-Quinine.

Q19. How extensively has the use of cocoa gone into use as a coloring and flavoring agent for liquid medicine?

A. I know of none other than the Lilly line that enjoy any sale or reputation in the District of Columbia worth speaking of.

Q20. Is, or is not, the use of coal tar products in medicines objectionable?

A. My opinion is that they are not objectionable, not as much so as many of the animal and vegetable colorings that have been used for some time, for the reason that the accepted colors as specified by the Bureau of Chemistry of the Department of Agriculture are classed as harmless and rightly so in food products, and that they are prepared in laboratories with the greatest amount of care under excellent sanitary conditions, so that you obtain a pure product free from contamination, while with animal and vegetable coloring matters they are prepared in countries foreign to our own by usually the ignorant natives, mostly under the most unsanitary and unfavorable conditions, making it impossible to obtain a pure product that is not contaminated with filthy, nasty foreign material.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ21. When you say that Coco-Quinine is a "good repeater," do you mean that it is well thought of by your customers or your prescribing doctors, and that they are very apt to order it again and again, or call for it again and again over the counter? Is that about what you mean by a "repeater"?

A. Yes.

XQ22. And from the standpoint of the drug salesman who calls on you I suppose a "good repeater" would be a drug or preparation which the salesman had sold to the druggist before and the druggist liked it, and that it was pretty easy for the salesman to sell him some more on the next trip if the drug was out?

A. I don't see that the drug salesman has anything to do with it; it is what the physicians and what the public want.

XQ23. Is the expression, a "good repeater," a familiar one among the druggists, or with you?

A. It is quite a familiar one among the druggists with reference to preparations for which there is a good sale.

XQ24. That is a steady demand?

A. Yes.

XQ25. And may not the expression have gotten into the mouths of the drug salesmen, so that they have been talking or do talk sometimes of a preparation being a "good repeater," meaning that there is a steady demand for it among their customers?

A. Not being a salesman I am unable to state what their view is.

XQ26. In tasting the Bibbins Samples 2, 4, 5 and 6, this morning, you inverted the bottle, leaving some of the contents on the bottom of the cork, removed a little of the contents on your finger and placed it on your tongue, in each case. Is that correct?

A. It is, and I consider I got an average sample for the test.

XQ27. Then, as I timed you, you would wait for about twenty seconds and then begin to answer the question put to you by counsel?

A. That is correct, and the answer was not forthcoming until the moment I began to obtain the slightest bitter taste, which I consider, without timing, to be at least thirty seconds in each case, instead of twenty seconds, possibly longer.

XQ28. And this elapsed period of at least thirty seconds is what you referred to in answer to one of the questions when you said that Sample No. 4 showed "but a slight bitter taste, and then only after some little while in constant contact with the tongue"? Is that correct?

A. That is.

XQ29. And in tasting those first four samples you did nothing in tasting the samples to remove from your organs of taste whatever might have remained thereon from the tasting of the preceding sample. Is that correct?

A. That is not correct, as I rinsed my mouth with water on each occasion in the presence of counsel.

XQ30. Then, to be perfectly fair to you, I understand that you did rinse your mouth after each sample before you tasted the next?

A. That is correct.

XQ31. I understand that your phrase "elegant pharmaceutical preparation," in answer to Q8, is a common phrase to indicate a good appearing preparation, and such a one as you as a leading druggist in Washington are willing to carry on your shelves. Is that correct? I would like you to assume that the preparation has merit of its own, in your belief.

A. I used the term in a different sense, and in this way to distinguish from the ordinary extemporaneous preparation, as, for instance, a physician's prescription, from one that is the result of careful research and experiment, that has not only qualities of merit, but is of itself elegant in every sense of the word.

XQ32. In testifying that this Bibbins article No. 2 was "an elegant pharmaceutical preparation," what qualities in the Bibbins bottle No. 2 before you did you consider as the basis of such an opinion?

A. I think my answer sufficient, and covered the main points of my observation.

XQ33. How can you, sitting there, pick up one of the bottles before you and properly give any opinion as to the "stability" of the preparation in that bottle?

A. I testified at the start that I had examined those preparations Sunday evening, December 2nd, 1917; that it was admitted that these samples were over one year old at the time they were presented to me, and that I think that is sufficient to show that they had not undergone any change when the contents of each package clearly shows that they are free from fermentation, and that they are homogeneous mixtures and that they are practically tasteless.

XQ34. How can you properly testify to the homogeneity of the contents of Bibbins No. 2, except so far as to say that it looks homogeneous at the present moment?

A. The only means at my command at the time of giving the testimony to more minutely define that question was not available, and I was therefore compelled to rely upon the physical appearance, as presented to the eye.

XQ35. Bibbins Samples 3, 7, 8 and 10 were not tasted by you while testifying. Is that correct?

A. The record should show that. I do not remember those numbers at this time. I admit that there were some I did not taste.

XQ36. Have you at this sitting today tasted Coco-Quinine or Quin-Coco?

A. I have not.

XQ37. Then, of course, you have not compared the degree of bitterness of the Bibbins samples you have tasted with any degree of bitterness in Coco-Quinine and Quin-Coco, have you?

A. With Coco-Quinine I have made no comparison to-day, for the reason that I am so familiar with the product, having tasted it possibly several thousand times in which I have handled it, that I did not consider it necessary. With Quin-Coco I believe that that question is immaterial, as I was not requested to make the comparison, and that I am not familiar with the product other than that there is such a product in imitation and offered as a substitute for Coco-Quinine.

XQ38. Is it true that Coco-Quinine is rather largely sold in prescriptions and over the counter for children?

A. It is.

XQ39. Apparently because it is not bitter to the taste?

A. That is probably one of its advantages.

XQ40. In your answer to Q7, in referring to Quin-Coco, you said that "the salesman of the house that makes it offered it to me four or five years ago as a substitute for Coco-Quinine." At what store?

A. At my place of business, 1033 Twenty-second Street, N. W., Washington, D. C.

XQ41. Have you ever stocked the goods of Wm. R. Warner & Co., of Philadelphia?

A. Some of them.

XQ42. Who was that salesman?

A. That I am unable to inform you now. I don't remember his name.

XQ43. Might it have been longer than four or five years ago? Have you any means of approximating the date more closely?

A. From the data that I used to locate the occasion, that is approximately as close as I can state it.

XQ44. What was the data that you used?

A. It was considerably before the death of my partner and brother-in-law, who died three years ago September 9th, that we were looking over these samples together for the purpose of placing an order for

the purchase of certain specialties of Wm. R. Warner & Co., for which we had demand.

XQ45. How fully at that time did you go through that salesman line?

A. Quite extensively, and I believe that I examined practically everything that he had in his sample case. There being a number of pharmaceutical preparations along the general line of pharmaceuticals which I manufacture myself, and at which time I made comparisons of the salesman's sample with my own product.

XQ46. Mention some of those preparations of yours which you compared with his products?

A. Elixir of phosphates of iron, quinine and strychnine, U. S. P. VIII; glycerophosphates compound, no sugar is now official in N. F. IV; several elixirs N. F. III; several tinctures, U. S. P. VIII.

XQ47. Besides his line of samples, did you to any extent go through the rest of his line?

A. Only his particular specialties, for which I had demand on physicians' prescriptions.

XQ48. State what this salesman said to yor in trying to sell you his Quin-Coco. Give his exact words and your exact reply in direct statement.

A. As close as I can possibly state Quin-Coco was presented and offered as a tasteless quinine preparation, to use instead of the product of Lilly & Co., and he said it costs you much less. My reply was I use no substitutes, prices does not enter into the consideration; Coco-Quinine is a specialty of the firm of Lilly & Co., placed on the market after proper experiment and investigation on their part, and that they were entitled to reap the reward for their endeavors, and that when I received a prescription or a call for Coco-Quinine the physician and the person making the call had only one product in view, and that product was the product of Eli Lilly & Co.

XQ49. Can you now say positively after this in-

terval of four or five years that you made that long speech to the salesman, and in just the words you have now used?

A. I have purposely eliminated a portion of what I used at the time, because I consider that the language would not look well in testimony. We had quite an argument on that question.

XQ50. Did this salesman say to you that he could sell you a tasteless chocolate quinine preparation, and that it was medicinally similar to Lilly's Coco-Quinine and would sell it at a less price? Is that about what he said?

A. His statement was on presenting the sample. "Here is Coco-Quinine; we have it perfectly." That was the statement that caused a protracted argument, to which I have previously referred in answering another question.

XQ51. Of course, you knew at the time that he was a Warner salesman, and that he was not selling Coco-Quinine, Lilly, did you not?

A. He not only offered that substitute, but as my memory now serves me several other substitutes for other products. So that I almost came to the conclusion that he was offering a line of substitute products for well known pharmaceutical specialties.

XQ52. Question repeated.

A. I think I have answered that I knew he was a Warner salesman, and have stated exactly what he did.

XQ53. Did you or did you not know at the time that the preparation he was offering you was not a preparation manufactured and put on the market by Lilly?

A. That is self evident. He was selling goods for Warner & Co.

XQ54. Then when this salesman said as you have testified (in XQ50): "Here is Coco-Quinine," you understood that he meant that he had an article similar to Coco-Quinine, but not real Coco-Quinine, made by Lilly, did you not?

A. No. I definitely understood that he deliberately offered the preparation of Warner & Co., as a substitute and to be sold for Coco-Quinine.

XQ55. Did you see his labels at that time?

A. The sample from the sample case contained a small label, as I remember it. The sample was offered to me for examination, and I refused even to take the sample and look at it, so that I am unable to state exactly how it was labelled.

XQ56. I show you the pint bottle of Warner's Quin-Coco. Does that remind you of the label the salesman had? (Bottle shown witness was "Complainant's Exhibit, Bottle No. 5.")

A. That was not the package, or anything like it. The sample exhibited was from a salesman's sample case, the bottle being the ordinary homeopathic sample vial, probably holding about two fluid ounces.

XQ57. Had it a label?

A. I testified a moment ago that my recollection is that it had a label of some kind on it, and I further testified that I refused to examine the package and could not state how it was labelled.

XQ58. Was the name Quin-Coco mentioned between you in this talk?

A. It was not, as I remember.

XQ59. How long did that controversy over this article last?

A. If my memory serves me correctly, very near thirty minutes. We had several controversies in discussing various products, and I am of the opinion now that the salesman was in my store for at least two hours.

XQ60. How long did the controversy over Quin-Coco last?

A. The previous answer will show.

XQ61. I venture to ask you to answer it again.

A. I have testified to about thirty minutes.

XQ62. But you said that you did not talk all that time about Quin-Coco, did you not?

A. I did.

XQ63. And therefore, I now ask you how long you talked about Quin-Coco?

A. I again testify that I stated that we discussed that question about thirty minutes, and that the entire interview lasted about two hours.

XQ64. What did the salesman state as to the nature or composition of the preparation he was then offering you? I mean the tasteless quinine preparation.

A. As close as I can remember his statement was to the effect that it had all of the properties of Coco-Quinine, and why pay the price. This started the argument.

XQ65. And I think you have said that at that interview this salesman offered you a number of other Warner articles, which were in competition with articles of similar medicinal value made by other houses, and pressed them on your attention. Is that correct?

A. That is as I remember it.

XQ66. Might there have been a dozen of such other articles?

A. I would not like to state the number of such articles, for the reason that after our argument on this particular preparation he pursued different tactics.

XQ67. Please name some of the other articles that you had a controversy about?

A. A substitute for lapactic pills, S. & D.; a substitute for alophen pills, P. D. & Co., and I think some cascara preparation, but I cannot call that to mind at this time.

XQ68. A substitute for listerine.

A. I think there was.

XQ69. Lactopeptin, or a like article?

A. If my memory serves me correctly there was a preparation as a substitute for elixir of lactopeptin.

Mr. Bradford: I have refrained from objecting to this line of questions, hoping that it would

soon conclude, but I must interpose an objection that it is entirely improper, not being cross-examination in any sense of the word.

XQ70. Elixir salicylic comp. or any like preparation?

A. They would hardly offer me a substitute for elixir of salicylic Comp., when that is their own preparation.

XQ71. Did he offer you elixir salicylic comp.?

A. It was a perfectly legitimate offer. It was one of their preparations that I purchased at the time. It was one of their specialties, to which they are entitled to a just reward of their labors for introducing the preparation, the same as Eli Lilly & Co. are entitled to the just reward on their preparation Coco-Quinine.

XQ72. At that time had you been handling a preparation similar to the salicylic comp. of any of the other houses?

A. I have never handled anything but Warner's Elixir Calycylic Comp., and would not, because I believe firmly that that is their product, and that they are entitled to all the business on that product and when that product is demanded I know of no other product than Warner & Co.

XQ73. You mean then that when the Warner product is called for you know no other?

A. I know of no other product than the product of the manufacturer who makes a specialty when that product is called for.

XQ74. But you know that Parke, Davis, Lilly, Mumford, Sharp & Dohme, Wyeth and Wampole all market a preparation similar to elixir salicylic comp.?

A. I do not. I know only Warner's preparation, or as far as I can recollect I never heard of the others.

Mr. Rawle: Mr. Rawle moves to strike out so much of the deposition of this witness as is other than of an expert nature, upon the ground that no

notice has been given of the calling of this witness on facts, but only as an expert, and because the evidence on facts that he has given is inadmissible at this time, and repeats the motion to strike out.

Re-direct-examination.

By Mr. Bradford:

RDQ75. In taking medicine, does a person hold it in the mouth more than thirty seconds? I refer, of course, to medicine of the character we have been considering.

A. I should say they hold it very much less than thirty seconds. The inclination is to swallow as quickly as possible, and I am of the opinion that they do so in less than ten seconds.

Deposition closed.

Sam'l L. Hilton.

IN THE
DISTRICT COURT OF THE UNITED STATES,
Eastern District of Pennsylvania.

IN EQUITY.

THE ELI LILLY & COMPANY, a Corporation,
Plaintiff,

vs.

WM. F. WARNER & CO., a Corporation,
Defendant.

District of Columbia,
City of Washington, } *ss.*

I, Charles E. Riordon, a Notary Public, within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the plaintiff in the above

entitled cause were taken before me, pursuant to notice and agreement of counsel, as follows:

At Washington, D. C., November 7th and 8th, 1917:

Samuel H. Bell,
Ellis Walker Howard,
R. H. Greene,
W. R. Bell,
Edmond Francis O'Connell.

At Indianapolis, Ind., December 3d, 4th and 5th, 1917:

James H. Beal,
Charles E. Caspari,
J. B. Weldon,
F. C. Atkinson,
Andrew L. Winton,
Francis Bibbins,
Samuel L. Hilton,

that each of said witnesses was by me first duly sworn in accordance with the law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and by Mr. Francis Rawle, attorney for defendant, as appears in the record; that the depositions of said witnesses was read over by him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause, and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit. I further certify that the exhibits placed in evidence before me in the course of examination of said witnesses were duly marked by me and in accordance with stipulation of counsel retained by the plaintiff who introduced same.

In testimony whereof I have hereunto set my hand and seal this 5th day of December, 1917.

(Seal)

CHARLES E. RIORDON,
Special Examiner.

160382

Vol. III

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]32

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 3, 1923.

CERTIORARI AND RETURN FILED JULY 31, 1923.

(26,613)

(28,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME III.

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1 VOL. 3.

In the District Court of the United States for the Eastern District of Pennsylvania, December Term, 1914.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Answer.

Filed January 29, 1915.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The answer of William R. Warner & Company, a corporation, to the bill of complaint in the above entitled case showeth as follows:

1. The averments of paragraph 1 are admitted, except the averment that "Coco-Quinine" is a compound of high medicinal value. It has the medicinal value of quinine, the chocolate merely acting as a vehicle, used to make the quinine more palatable.

2 2. Defendant has no exact knowledge as to when the plaintiff began the manufacture and sale of "Coco-Quinine." It denies that at the time when the plaintiff became such manufacturer, no similar product was known either to the drug trade or to the medical profession, but avers that at that time there were on the market preparations intended to be used as vehicles for administering quinine and disguising its bitter taste. It has no knowledge as to whether the product was the result of long study and expensive experiment. It denies that the said compound became widely and favorably known as a remedy except in the sense that it was a product which enabled the administration of quinine in a more palatable form.

3. It is denied that the plaintiff, for the purpose of identifying its product, made the compound of a special color commonly called chocolate. The defendant avers that the plaintiff's compound merely has substantially the natural color of chocolate, of which it is in part compounded.

4. The defendant denies that the plaintiff, as a means of identifying the origin of the said product, adopted a certain arbitrary selected flavor, to wit, chocolate. The defendant has no knowledge or in-

formation of any other syrups of other flavors that might be used for the same purpose as is averred in paragraph 4, and therefore denies that any such exist or are known, and avers that chocolate, while non-essential to the medicinal characteristics of the product, is essential to certain vital characteristics thereof.

5. The defendant admits that such product of the plaintiff has become known as "Coco-Quinine," but denies that has become so known by its color or flavor or by its medicinal effects, or in any other way than as a palatable preparation of quinine. The defendant admits that the name of the plaintiff's product has been recog-
3 nized, but denies that its color and flavor were and are recognized and freely acquiesced in by the trade.

Defendant further avers that compounds of quinine and chocolate, similar to plaintiff's, were manufactured and sold on the market by various drug manufacturers prior to the time when Searle & Hereth Company began to manufacture and sell "Quin-Coco."

6. The defendant admits the averments of paragraph 6, but avers that the sale of compounds of quinine and chocolate to consumers are almost universally made in doses, usually by druggists on physician's prescriptions.

7. The averments of paragraph 7 are admitted, except that it is averred that the plaintiff's product has no other reputation than as quinine in a palatable form and that its remedial action depends solely on the quinine contents.

8. The defendant admits that it is a corporation under the laws of Pennsylvania, and a citizen of said state; that its principal place of business is in Philadelphia, and that it is engaged in the manufacture and sale of medicinal products, and distributes the products of other concerns, including Searle & Hereth Company and Pfeiffer Chemical Company. It is admitted that about the year 1906 the Searle & Hereth Company began the manufacture and sale of a compound of quinine and chocolate. It is denied that it did so with any wrongful or fraudulent intent to divert and appropriate to its own use and own profit a part of the plaintiff's business in the sale of Coco-Quinine or with any other wrongful or fraudulent intent whatever. It is denied that it made its said product in exact imitation of the plaintiff's product. It is denied that it manufactured the same with the purpose and intent of selling it for a substitute for
4 the plaintiff's product and enabling druggists and others to substitute it for the plaintiff's product when Coco-Quinine was called for by customers and indicated on physicians' prescriptions. It is admitted that the defendant's product is of the same color and appearance substantially and of similar flavor as plaintiff's product, but it is averred that the color and appearance of plaintiff's product are due entirely to the chocolate ingredient, but that the flavor of defendant's product is not due to chocolate syrup alone, as is claimed for plaintiff's product, but is due to a combination of chocolate, vannalin and a special extract of yerba santa.

The defendant admits that the name "Quin-Coco" was adopted, but denies that the name and label used by the defendant are a close imitation or any imitation of the plaintiff's name and label, and that they are easily confused therewith. It denies that the defendant's product is a substantially exact imitation of and substitute for plaintiff's product and that it is so recognized in the trade. It avers that the label used on defendant's preparation is easily distinguishable from the plaintiff's label. It denies that Searle & Hereth Company offers the said product to plaintiff's customers, druggists and dealers, informing them that it could and can be used as a substitute for the plaintiff's product. It denies that druggists had any instructions as to any wrongful sale of defendant's product. It denies that defendant's product has been sold to the trade on such representations (at least by the knowledge, authority or permission of the defendant) and that it has been sold by druggists, upon any instructions from defendant to supply demands from customers for plaintiff's product, by authority, or to the knowledge of defendant.

9. It is denied that the defendant has ever made renewed efforts or any efforts to push its product in the drug trade and medical profession as a substitute for the plaintiff's product, except in the way of fair and lawful business competition. It is denied that the Searle & Hereth Company is merged into the business of the Pfeiffer Chemical Company. It is admitted that the same individuals subsequently became interested in all three of the companies mentioned in paragraph 9, and that the defendant is the distributor of "Quin-Coco." It is denied that the defendant has by many and divers ways and schemes or otherwise, in placing its said product on the market represented, through its agents and salesmen to purchasing druggists and physicians that its said product could be furnished in lieu of plaintiff's product when called for by customers or by physicians' prescriptions. There was no connection between defendant and Searle & Hereth Company until late in the year 1908.

It is denied that druggists have, as averred in this paragraph, received any instructions from defendant as to selling "Quin-Coco" for "Coco-Quinine." The defendant is without knowledge or information that druggists ave sold and are now selling "Quin-Coco" for "Coco-Quinine"; but it avers that if any druggist has done so it hase been without the instruction, suggestion or knowledge of the defendant.

The defendant has no knowledge or information that customers frequently receive "Quin-Coco" with the druggists' own label, but bearing the name of "Coco-Quinine," but avers that if such has ever been the case, it has been without the knowledge, instruction, representation or suggestion of the defendant, and has been done by such druggists' own unaided volition. The defendation denies that any act on its part has ever unlawfully or wrongfully deprived or is now depriving the plaintiff of sales of its said product, or has resulted in deceiving or defrauding purchasers and users who intend to buy "Coco-Quinine." The defendant denies that it has by any

unlawful or wrongful method whatever pushed the sale and
6 distribution to the trade of "Quin-Coco," and that its product has been retailed as "Coco-Quinine."

10. The defendant denies that its product is inferior in quality and medicinal properties to the plaintiff's product; but it avers that the medicinal action is due to the quinine content, and that the amount of this, according to the labels of both plaintiff and defendant, is the same in each case. It is denied that defendant's sals have ever unlawfully deprived the plaintiff of profits to which it was justly entitled. The defendant denies that it has by any unlawful act injured the reputation of plaintiff's product or in any way unlawfully interfered with the demand therefor, and that any act of defendant has resulted in defrauding the public by giving the public a different product from that demanded. It is denied that the defendants product is of less merit than the plaintiff's.

11. If the averments in paragraph 11 that the long continued use of the name "Coco-Quinine" has constituted it a valid trade mark, the defendant denies the averment. The defendant admits that "Coco-Quinine" has for many years been recognized in the trade as the product of the plaintiff. The defendant denies that the color of the plaintiff's product has caused such color to be recognized in the trade as identifying the product as being that of the plaintiff, and that the chocolate flavor of the plaintiff's product has come to identify said product as being that of the plaintiff. The defendant denies infringement of any exclusive right of the plaintiff to the said name or color or flavor. The defendant is advised, and so avers, that the plaintiff is not entitled to any valid trade mark or exclusive right whatever in the premises, either by reason of the said name "Coco-Quinine" or the color or flavor of his product.

The defendant denies that it is guilty of infringement of any lawful right of the plaintiff in the color of its product or
7 the flavor thereof. The defendant denies that it adopted the name "Quin-Coco" and the color and flavor of its product, and has used the same with the fraudulent and wrongful purpose and intent of unfairly and fraudulently diverting to the defendant part of the plaintiff's trade and to enable its product to be palmed off on the public as and for the product of the plaintiff. The defendant is advised, and so avers, that it has a legal right to manufacture and sell a compound of quinine and chocolate, under the name of "Quin-Coco," and of the natural color and substantially of the flavor of chocolate, and that in doing so it has infringed upon no exclusive right of the plaintiff in the premises.

The defendant denies that it has artfully and fraudulently or in any way whatsoever, through its salesmen, agents, druggists, dealers and confederates, heretofore or ever substituted or is now substituting its product for the plaintiff's product or has injured the plaintiff or deceived the public or done any act or thing in the premises contrary to equity or fair dealing. The defendant avers, on the contrary, that it is and always has been lawfully selling its said product on its own merits, and in so doing has not committed any wrong

against the plaintiff or deceived the public, but has extended its sales by means of a large force of traveling salesmen and by free samples.

12. The defendant denies that the plaintiff has any exclusive right to the use of the color or the flavor of its said product. The defendant denies that it has in any way infringed upon the plaintiff's exclusive rights, and that it has in any way unlawfully caused or is now unlawfully causing the plaintiff any pecuniary loss, and that any act on its part has wrongfully or unlawfully or otherwise affected the plaintiff's reputation as a manufacturer of medicinal products.

8 And the defendant, for a further defense to the bill of complaint, says that it has since —, 1908, and the Searle & Hereth Company from 1906 to 1908, openly sold the product "Quin-Coco" to the trade, and that this has been known to the plaintiff, and that notwithstanding such knowledge, the plaintiff has made no objection to such sales, except one objection made in October, 1909, that defendant's prices were too low.

Wherefore the defendant prays that the plaintiff's bill be dismissed, and prays its reasonable costs in this behalf most wrongfully sustained.

[SEAL.] WM. R. WARNER & CO.
G. A. PFEIFFER,
Treas.

JOSEPH W. HENDERSON,
FRANCIS RAWLE,
For Defendant.

Deposition on behalf of the defendant taken before George Brodbeck, Esq., Special Examiner, at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Wednesday, November 24, 1915, at 10 o'clock a. m.

Present:

George Brodbeck, Esq., Special Examiner.
E. W. Bradford, Esq., representing the Plaintiff.
Francis Rawle, Esq., representing the Defendant.

GUSTAVUS A. PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

9 A. Gustavus A. Pfeiffer. 43 years old. Treasurer and General Manager of William R. Warner & Company. Residence, Philadelphia, Pa. I first became connected with William R. Warner & Company in July, 1908.

Q. 2. State briefly what had been your connection with the drug business before this?

A. I was connected with the retail drug business ever since I was a boy, first as a clerk, then as the owner of a drug store, and am a registered pharmacist, and was the owner of a drug store for about nine years. In 1901 I assisted in organizing the Pfeiffer Chemical Company, a manufacturing drug concern.

Q. 3. With headquarters in St. Louis?

A. With headquarters in St. Louis.

Q. 4. What are your affiliated companies at present?

A. At present the companies with which we are affiliated are The Searle & Hereth Company, the Dr. Earl S. Sloan, H. E. Bucklen & Company, Pfeiffer Chemical Company, and the E. E. Sutherland Medicine Company, and several others.

Q. 5. When was the product "Quin-Coco" first marketed?

A. In the fall of 1906, by the Pfeiffer Chemical Company.

Q. 6. Why was it introduced?

A. To supply the demand for a chocolate quinine mixture with the taste of the quinine sulphate masked or disguised.

Q. 7. Will you state whether or not that demand existed prior to its first introduction?

A. It did.

Q. 8. Who makes it now, and since 1908, and who sells it and who distributes it?

A. It is manufactured by The Searle & Hereth Company, and it is distributed by William R. Warner & Company.

10 Q. 9. To what trade?

A. To the retail drug trade and to the dispensing doctor and to the jobbing drug trade.

Q. 10. In what size bottles or containers?

A. It is supplied in two ounce bottles, four ounce bottles, pint bottles, five pint bottles and gallon bottles.

Q. 11. Has William R. Warner & Company been its sole distributors ever since August, 1908?

A. Almost exclusively. For a time after August, 1908, the Pfeiffer Chemical Company invoiced goods under the firm name of the Pfeiffer Chemical Company and acted as distributors for "Quin-Coco" in the territory handled by the Pfeiffer Chemical Company. Later, however, the Pfeiffer Chemical Company discontinued using their name in selling goods to the trade and for some time past William R. Warner & Company has handled and is the sole and exclusive distributor.

Q. 12. From your experience in the drug business what would you say the therapeutic effects of this preparation are due to?

A. Due to the quinine sulphate contained.

Q. 13. What would you say were the advantages of the preparation?

A. The advantage of "Quin-Coco" is that it supplies quinine sulphate in minute crystals undissolved, very much sub-divided, and held in suspension by the cocoa. This facilitates administration and absorption, and on account of the pleasant flavor and taste of chocolate, makes the product acceptable to the patient.

Q. 14. To what extent is the bitter taste of the quinine masked in his preparation?

A. Almost completely.

Q. 15. What do you mean by facilitating absorption?

A. The preparation being in liquid form is easier assimilated by the organs, because naturally the product before absorption must be in such form in the digestive organs.

11 Q. 16. You would say it hastens assimilation by the organs?

A. I would.

Q. 17. That it assimilates more quickly than if the same amount of quinine were given in the shape of a pill?

A. It would.

Q. 18. What other, if any, principal ingredients are there in this "Quin-Coco?"

A. Yerba santa, vannilin, saccharin, and cocoa, and a syrup base.

Q. 19. Cocoa in a syrup base?

A. Yes, sir.

Q. 20. Explain that to the Court. What is meant by "syrup" in the drug business?

A. A mixture of sugar and water.

Q. 21. What part does the yerba santa play in this mixture?

A. To disguise the bitter taste of the quinine.

Q. 22. State whether or not the cocoa has the effect of disguising the bitter taste of the quinine?

A. It has.

Q. 23. What about the syrup and vannalin?

A. The syrup is used as a sweetener of the preparation, and is commonly used in medicine for such purposes. The vannalin is added as a flavor and to emphasize the flavor of the cocoa.

Q. 24. But in quite small proportions?

A. Vannalin is used in small proportions.

Q. 25. Have you made any personal experiments in order to demonstrate whether or not cocoa has any effect in masking the bitter taste of the quinine?

A. I have. I have made a sample of a mixture with a syrup base, using the same proportion of quinine as we use in "Quin-Coco" and without any other ingredients. I made another sample, using a syrup of cocoa as a base, and having the same quantity of quinine sulphate, and without any other ingredients *of* flavors. Upon

12 tasting these, I found the one with a cocoa base was markedly less bitter than the one without the cocoa.

Q. 26. You made those experiments yourself?

A. I made these experiments personally. I placed some of the two preparations I made in the bottles, which I produced.

(The bottles produced by the witness are offered in evidence and marked "Pfeiffer Experiment No. 1" and "Pfeiffer Experiment No. 2.")

Q. 27. Can you state what other qualities the cocoa imparts to the combination in "Quin-Coco" in respect of flavor and the fluidity of the mixture and so forth?

A. Besides assisting in masking the bitter taste of quinine sulphate, the cocoa acts as a thickener of the mixture, and has the property of holding the undissolved quinine sulphate in suspension. It also makes the product opaque in this way, hiding the fact that the quinine sulphate is not dissolved. Further, it gives the preparation a chocolate flavor and taste. It also is important in preventing precipitation or settling of the quinine sulphate to the bottom of the bottle, thus enabling the making of a preparation which is pharmaceutically satisfactory.

Q. 28. What is the nature of the preparation in regard to its fluidity and touch, if you choose?

A. It is a thick and rather viscid mixture.

Q. 29. Will you state whether cocoa, that is to say, chocolate, using the broader term, is a popular flavor, and how popular?

A. It is a popular flavor, and is probably the most used flavor of any single flavor.

Q. 30. Will you state whether or not the particles of quinine sulphate are in solution in Quin-Coco.

A. They are almost entirely undissolved.

Q. 31. What would be the relation of the solution of the quinine sulphate in this preparation and its bitterness?

13 A. If the quinine sulphate was all in solution, the preparation would have a bitter taste.

Q. 32. Does undissolved quinine exist in a crystalline form?

A. Usually.

Q. 33. Does it so exist in this preparation?

A. It does, as I have tested it under the microscope.

Q. 34. Explain a little bit more fully what is the advantage of an opaque drug?

A. The advantage of an opaque mixture is limited to those mixtures which have not the ingredients in complete solution. This is to overcome the objection which patients have to taking muddy mixtures or mixtures with precipitates in the bottom, and the opaqueness tends to hide the undissolved ingredients and precipitates, giving the product a more appetizing appearance.

Q. 35. Dr. Francis, one of the plaintiff's witnesses, testified, in his opinion, in substance, that in "Coco-Quinine" the quinine sulphate was in solution. What have you to say about this?

A. Dr. Francis is mistaken.

Q. 36. Give your reason.

A. Almost all the quinine is undissolved and held in suspension.

Q. 37. You have now mentioned certain effects of cocoa in this mixture. Please state your opinion as to how far the cocoa is essential to the preparation, and whether any other ingredient could replace it, in your opinion?

A. I could not make the preparation without it, and I know of no other ingredient which could be used in its stead.

Q. 38. Upon what do you base those statements?

A. On experiments made.

Q. 39. State whether or not you have ever known or seen a

14 liquid mixture which satisfactorily disguised or masked the taste of the quinine without the use of chocolate or cocoa?

A. I have not.

Q. 40. State the difference between chocolate and cocoa.

A. Cocoa is chocolate with most of the cocoa butter pressed out.

Q. 41. Usually and commercially does some of the butter remain in the cocoa?

A. It does.

Q. 42. What becames of the cocoa butter taken out of the chocolate?

A. It is sold as a commercial product.

Q. 43. Under that name?

A. Under the name of cocoa butter.

Q. 44. Why do you prefer to use cocoa instead of chocolate in your "Quin-Coco"?

A. Chocolate contains an excess amount of butter fat which would separate upon standing or in shaking and in shipping goods from maker to user.

Q. 45. What similarity in therapeutic effect, in your opinion, is there between your "Quin-Coco" and Lilly's "Coco-Quinine"?

A. I would say they were similar.

Q. 46. What is the usual unit of a dose of quinine?

A. This varies, but a two grain dose is the more popular.

Q. 47. And in multiples of two?

A. In repeated doses.

Q. 48. In respect of the thickness of the mixture, do you know whether there is any difference between these two preparations.

A. From actual experience, no. I have been told that "Quin-Coco" was the thinner.

Q. 49. When the Pfeiffer Chemical Company first put out its "Quin-Coco" in the fall of 1906, state whether or not it was listed in your catalogue and given to your salesmen to sell over the country?

15 A. It was listed in the catalogue of the Pfeiffer Chemical Company, and the preparation was announced to the travellers, they were advised to accept orders for "Quin-Coco." At that time we employed about thirty-three travellers.

Q. 50. From what sources did the demand prior to 1906 for a liquid preparation of this sort come?

A. It came from the retail drug trade and from dispensing doctors.

Q. 51. What are "dispensing doctors," and how general is the practice?

A. As generally understood, a dispensing doctor is a doctor who carries and dispenses a preparation direct to the patient as against the prescribing doctor writing the prescription and sending the patient to the drug store to obtain the medicine. The practice of dispensing medicines has grown very materially in the last twenty-five years.

Q. 52. Among the doctors?

A. Very materially among the doctors in the last twenty-five years, and at the present time I should estimate that about one-half of the doctors could be classed as dispensing doctors.

Q. 53. Are some of them interested in drug stores?

A. Many doctors are interested in drug stores. Usually when

a doctor becomes interested in a drug store, he ceases to be a dispenser and writes prescriptions for that drug store.

Q. 54. What influence has the increase or diminution of malaria as a disease throughout the county upon the demand for quinine products?

A. Quinine being a popular treatment for malaria, naturally its use would increase and decrease in accordance as malaria increased and decreased.

Q. 55. Can you give any opinion as to whether malaria has increased or decreased in the last ten years?

16 A. I have travelled some in the south. I have noticed improved drainage, and from observations I would say that malaria has decreased. I know in the State of Iowa when I was a boy there was a great deal of malaria and at present there is none whatever.

Q. 56. About what percentage of your sales are direct to retailers and dispensing doctors?

A. Seventy-five per cent.

Q. 57. How does Warner & Company sell their goods?

A. We employ a large force of travelers. At present we have between 75 and 80. These travelers regularly call on the retail drug trade and dispensing doctors. We also distribute literature to our customers and others through the mails and with the products. We also sample our products in response to requests from the trade and as suggested by our travelers and from time to time we sample largely direct from mailing lists which we purchase from circularizing companies.

Q. 58. You mean you distribute samples in containers, bottles or other containers, is that the idea?

A. Yes. The samples are finished in accordance with the nature of the product. If a liquid it is in a bottle, if a tablet it may be either in a bottle or a box, and if a powder in paper; if an ointment, in a tin can.

Q. 59. Do you advertise in the medical drug trade journals?

A. Not at present.

Q. 60. Do you advertise in newspapers?

A. Not the pharmaceutical lines, which covers products of the William R. Warner Company and the Searle & Hereth Company.

Q. 61. How much of the United States do these salesmen cover, how often do they call upon substantially all of the druggists and dispensing doctors in their territory?

17 A. Our aim is to cover the entire United States and our travelers call on the dispensing doctors and druggists from one to six times a year, this in accordance with the territory assigned them.

Q. 62. What was the expense of maintaining this force of salesmen in 1914?

A. Between $250,000 and $255,000.

Q. 63. Of what are your sales of Quin-Coco the result?

A. They are the result of demand for a preparation containing quinine sulphate with the taste disguised, and the result of sampling

we have done with this product and of our efforts in selling the product.

Q. 64. I understand that the retail druggists, the wholesale druggists, sometimes called jobbers, and the dispensing doctors, all buy direct from you?

A. That is correct.

Q. 65. Has the plaintiff a definite method of selling his products which is different from yours, and if so, what is it?

A. As it is generally understood in the trade, Lilly confines the sale of his products through the jobbing drug channel. He employs salesmen to solicit orders from retail druggists and dispensing doctors. The orders from the dispensing doctors are usually filled through the retail drug trade, the orders from the retail druggists being filled through the jobbing drug trade. I don't know whether or not Lilly makes any exception to this general policy, nor what they are. Our policy is to solicit orders from retail druggists, from dispensing doctors and from jobbers, shipping and filling the purchase direct to the purchaser, whether he be a retail druggist, dispensing doctor, or jobber.

Q. 66. Do you know whether the plaintiff solicits or details any dispensing doctors?

A. I understand that he does.

Q. 67. What does "detail" mean in this connection?

A. To demonstrate your preparation, to the physician, either with or without a sample.

18 Q. 68. Are there other drug manufacturing houses who have other methods of sale than those two methods you have just mentioned?

A. Yes, there are some firms who sell only to the retail drug trade; some firms who sell only to dispensing doctors.

Q. 69. Then I understand that your method reaches all classes of purchasers who wish to buy your preparations, whereas the Lilly method and the other methods you have mentioned are limited to a class of purchasers as direct customers?

A. That is correct.

Q. 70. Referring to pint bottle of your product, Quin-Coco, is that and was it when you adopted it a stock bottle in common use?

A. It was.

Q. 71. Both as to color and shape?

A. It was.

Q. 72. What do you know about the word "Lilly" painted in red on Lilly preparations?

A. All the Lilly products that I have seen bear the word "Lilly" in red ink.

Q. 73. In script type?

A. Yes.

Mr. Rawle offers in evidence copy of the trade mark "Lilly" marked "Defendant's Exhibit, Lilly trade-mark."

Q. 74. What is meant in this business by "specialty?"

A. "Specialty" as usually used, means a product introduced by

the firm marketing the same. Oftentimes the word has a broader meaning and includes preparations to which the manufacturer has given a special name or special dress.

Q. 75. May it be a secret or an open formula?

A. It may be either.

Q. 76. Which is it usually?

19 A. When specialties were first introduced they were almost entirely secret. Of recent years, however, quite a number of them have open formulas. I am unable to state which is the larger proportion.

Q. 77. Does your house put out a number of specialties?

A. We do.

Q. 78. Does the Lilly house put out any specialties of the same or similar preparations put out subsequently to your putting out your corresponding specialty?

A. They do.

Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

Q. 79. Can you furnish a list of such?

Same objection.

A. I can furnish a list of preparations of specialties of various firms, including those of William R. Warner & Company and the Searle & Hereth Company, giving the name of the Warner, Searle & Hereth and the manufacturers' preparation and the corresponding preparation marketed by Eli Lilly & Company and first marketed by Eli Lilly & Company subsequent to the marketing of the product by the manufacturer who markets the original specialty. In making out this list I have used the Lilly Company's 1913-14 catalogue. The tabular statement which I produce, contains in the first column the name of the article as originally and first introduced; and in the second column the name of the original introducer, and in the third column the name of the product as subsequently introduced by the Lilly Company, with the page in the Lilly catalogue.

Q. 80. To make the matter clear, is it correct to say, taking an instance, that William R. Warner & Company originally introduced Syrup of Tolu and Heroin, and that at a subsequent date the

20 Lilly Company introduced Syrup of Tolu Comp. and that the two preparations are pharmaceutically similar?

Same objection.

A. That is correct.

Q. 81. What can you say as to whether the various Lilly products on column 3 of this list are pharmaceutically similar to the corresponding production of the original house on the first column of your list?

Same objection.

A. Many of them are.

Q. 82. Name some which you think are?

Same objection.

A. Calomel and bismuth powder, Lilly, is similar both in physical appearance and formula to Calalactose, S. & H. Digestive Comp. powder, Lilly, is similar both in physical appearance and therapeutic action to Compound Digestive Powder, S. & H.; Elixir Salicylic Acid Comp., Lilly, is similar to Elixir Salicylic Comp., Warner. Guaiacol Comp., Lilly, is similar to Guaiatonic, S. & H. Elixir Lactated Pepsin, Lilly, is similar to Lacto-Peptine, New York Pharm. Co. Eucalyptus Thymol Antiseptic, Lilly, is similar to Listerine, Lambert Pharm Co. Tritici, Lilly, is similar to Tritica, S. & H.

Q. 83. State whether or not, in answering above that many of the articles in the third column are similar to those in the first column, you mean that there is no similarity between the others and them?

Same objection.

A. The similarity between the product exists both as regards their therapeutic action and their physical appearance. Some of these products have similar therapeutic action, but vary in physical appearance, while others are similar both therapeutically and physically.

21 Q. 84. State whether or not the items in the third column are such as to be in competition with the corresponding article in the first column.

Same objection.

A. They are.

Q. 85. State whether or not the articles in the third column are such that they could be used with practically the same effect interchangeably with the corresponding article in the first column?

Same objection.

A. Yes.

Mr. Rawle offers in evidence the list produced by the witness, which is marked "Defendant's Exhibit, G. A. Pfeiffer's list of Lilly products."

Mr. Bradford: The offer and exhibit is objected to for the same reasons as stated in the objection to the testimony based thereon.

Q. 86. In the drug business as a whole, and the vast amount of drugs and preparations which we all know of and see in the druggists', can you give an estimate of about how many items are being more or less sold in this country?

A. I would be unable to make any accurate statement, but 125,000 different kinds would be far below the actual number.

Q. 87. Can you classify these in a large sense?

A. They can be divided in chemicals, of which Warner lists practically none; in patent medicines, of which Warner lists practically none; in pharmaceuticals, which embody practically all the Warner

line. Pharmaceuticals may be subdivided into specialties and miscellaneous preparations, of which Warner lists several hundred; into fluid extracts, of which Warner lists over 400; into tablets, of
22 which Warner lists over 1,200; elixirs, of which Warner lists over 200; syrups, of which Warner lists over 50; tinctures, of which Warner lists over 25; capsules, of which Warner lists 6 or 8, besides, several other minor subdivisions.

Mr. Bradford: The last two questions and answers are objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

Q. 88. To what extent are there preparations of the various drug houses which could be used interchangeably without the doctor or the user knowing it?

Same objection.

A. There are quite a few thousand.

Q. 89. To what extent are these interchangeable drugs and preparations put on the market by a number of different drug houses?

Same objection.

A. They are marketed by practically all pharmaceutical and chemical firms, chemical manufacturers.

Q. 90. When you say that they are interchangeable, what have you to say as to whether or not the patient, getting one or the other, would know the difference?

Same objection.

A. He could not know the difference.

Q. 91. Then, if a prescription mentioned one of these interchangeable drugs, it could be filled by the druggist, so far as the patient is concerned, by the use of any of the interchangeable drugs of a number of houses?

Same objection.

A. It could.

Q. 92. If the prescription specified one of these interchangeable drugs, but named the maker, what would be the duty of the druggist?

A. To supply the make or brand specified.

Q. 93. To what extent are drug stores stocked with these
23 interchangeable drugs of the make or brand of several different houses—do they carry the makes of several houses?

Same objection.

A. Very often they do.

Q. 94. In filling or not filling a doctor's prescription, specifying a particular drug, upon whose honesty does the matter depend?

A. Upon the party who fills the prescription.

Q. 95. You were in the retail drug business for a number of years

and in the manufacturing drug business for many years; can you state what is considered to be the ethics on this subject?

A. To fill the prescription exactly as written.

Q. 96. How far, in your experience, is this understood among the druggists and the officials to be the ethics of the drug business?

A. Universally.

Q. 97. What, in this code of ethics, is thought of the druggist who, without informing the prescription writer, fills a prescription with a drug other than the one mentioned therein?

A. He is considered dishonest.

Q. 98. From your experience in the retail drug business and manufacturing drug business, to what extent do you think that this ethical code, which you have mentioned, prevails, and is recognized as followed by the retail druggists?

A. I personally have never known of any one substituting one article when another article was specified on prescription. I further feel that it is generally known and understood that the relation of the retail druggist is confidential, both toward the prescriber and the patient. In filling the prescription the dispenser can infer the ailment of the patient, and he has no right to divulge information which he obtained through this confidential relation. In addition, it is the dispenser's duty to carefully examine the prescription to discover any possible errors of the prescriber. Especially is this true in the case of poisons, to discover and correct any possibility of over-doses. Further, he has no right to use an article in place of the one specified. Doing so brands him as being dishonest, violating a confidence, and committing a reprehensible act. As regards our firm, we have never authorized or suggested any one to use any products we make in place of the product specified. In all our instructions to the travellers, this point is not only discussed, but emphasized. Further, we point out the objections to such a practice. We consider it not only unethical, but a violation of confidence on the part of the dispenser.

24

Q. 99. What is your opinion, based upon all these years of experience, of the morals of the retail druggist?

A. As a whole, I consider them very high—above the average of the ordinary commercial man.

Q. 100. How far do you consider the drug business properly carried on is fundamentally based upon the personal honesty of the retail druggists in the country?

A. Almost entirely so.

Q. 101. I hand you "Complainant's Exhibit, Document No. 3." Please state what this list contains in respect of Warner's products?

A. Over 90 per cent of the products we make are competitive. Most of these are listed under the same names, while others, although alike therapeutically and in formula, have names different from the competitors' product. This list contains a majority of this second class of items. Some of the products are similar physically, while all of them are similar from the standpoint of the formula and therapeutic effect. This refers to the articles listed opposite each other in the first and second columns. None of the preparations in the second

column are similar in dress and make-up to the articles in the
25 first column, and many of them are very much different in physical appearances, character and so forth. The purpose of that list was for the convenience of our pricing department, of our salesmen, of our druggists and doctors' customers, and to enable them to find preparations similar to each other. In this respect it might be termed a finding list. In a sense, we considered this list as a supplement to our catalogue. We distributed the same to our travellers, to dispensing doctors, and we have heard of travellers of competitors carrying the same.

Q. 102. Are there items in this list which were first put out by any one of your houses and afterwards a similar article was put out by some other house?

Mr. Bradford: I object to that question as immaterial, irrelevant and incompetent.

A. There are.

Q. 103. Are there any preparations made up from the United States Pharmacopœ-a or the National Formulary on this list?

A. Not any that I know of under the same name, except I notice at least one which is listed in the United States Pharmacopœ-a, Syrup of Hypophosphates, Comp., which I think is a U. S. P. product. There may be others, but I would be unable to identify them without referring to the U. S. P. and the National Formulary.

Q. 104. Does this list contain, to any extent, or any large extent, your fluid extracts, tinctures, elixirs, syrups, pills and tablets?

A. It does not.

Q. 105. About how many such do you put out similar to the like products of other houses?

A. 2,000 or more.

Q. 106. How far do the other houses in respect of those preparations put out a like or greater number?

A. It varies, but I would say it averages about the same, with all the prominent drug manufacturers.

At one o'clock P. M. a recess was taken until two o'clock P. M.

26 (After Recess.)

Q. 107. What are "line pharmaceuticals"?

A. They are a list of pharmaceuticals which are marketed by different firms under the same name and are subdivided in fluid extracts, elixirs, tablets, tinctures and syrups, wines, pills and several other subdivisions.

Q. 108. They are entirely similar pharmaceutically and are all marketed under the same name substantially?

A. Practically.

Q. 109. They are all similar pharmaceutically, though made by different houses, and are practically marketed under the same name?

A. Yes. But under the manufacturer's individual label.

Q. 110. Before the Lilly Company marketed its Coco-Quinine product, say about 1900, was there a demand in the trade for quinine sulphate with the taste of the quinine masked, and if so, how was that demand met by the drug trade?

A. There has always been a desire to mask the bitter taste of quinine, and this demand was filled by supplying coated pills and tablets, by elixirs, by marketing special syrups of quinine. Some of these, however, did not contain quinine sulphate, but contained the less bitter alkaloids of cinchona bark, which alkaloids have similar therapeutic action. To illustrate, quinine tannate, quinidine alkaloid, cinchonidine alkaloid; also the retail druggist often disguises the bitter taste of quinine by dispensing it at the soda fountain in soda water, such as coffee flavor and chocolate flavor, chocolate soda, and the quinine sulphate was also disguised in powders by being prescribed mixed with powdered chocolate and sugar. In addition there were vehicles on the market for disguising the bitter taste of quinine.

These were intended for extemporaneous preparation—that
27 is, the mixture was made at the time the prescription was written or the product was sold or the dose taken.

Q. 111. State whether or not other drug manufacturing houses have within the last fifteen years put on the market and sold chocolate or cocoa and quinine mixtures similar to Quin-Coco?

A. They have. There are quite a number of such preparations on the market and have been for a great many years.

Mr. Bradford: The question and answer objected to unless the witness antedates the complainant's product.

The Witness: Some of these were on the market before Quin-Coco was marketed.

Q. 112. Please produce samples of such products that have been on the market as you say for some years?

A. I produce the following, giving the name of the product, together with the name of the respective makers:

"Syrup Quinine, with Chocolate;" H. K. Mulford Co., Philadelphia;

"Wampole's Chocolate Quinine," Henry K. Wampole Company, Philadelphia;

"Quin-Choc," First Texas Chemical Manufacturing Company, Dallas, Texas;

"Koquin," John T. Milliken & Co., St. Louis, Mo.

"Chocolate Quinine Syrup," Tilden Company, New Lebanon, New York, and St. Louis, Mo.;

"Quinico," Mayer Bros. Drug Company, St. Louis, Mo.;

"Chocolate Quinine," Burrough Bros., Baltimore, Md.;

"Quin-coco-ine," the Harvey Company, Saratoga Springs, New York;

"Chocolate Syrup of Quinine," the William A. Webster Company, Memphis, Tenn.;

28 "Cocoa & Quinine Comp.," Henry S. Wampole Company, Baltimore, Md.;

"Choquin," William S. Merrell Chemical Company, Cincinnati.

Mr. Bradford: The question and answer and offer of exhibits I object to as irrelevant and not competent to prove any issue in this cause.

Q. 113. Are there others?
A. There are.

Mr. Rawle: I will produce others when received.

Q. 114. What knowledge have you as to the original date at about which any of these products were put on the market?
A. I know that several of these products were on the market prior to the time when Quin-Coco was first marketed. Among these are Syrup of Quinine with Chocolate, H. K. Mulford & Company; Wampole's Chocolate Quinine, Henry K. Wampole & Company, Philadelphia. I am unable to state the exact date of marketing of the others. Some of them were marketed either just before or at about the same time Quin-Coco was first marketed.

Mr. Rawle: I will produce evidence as to dates later on.
Mr. Bradford: The last question and answer are objected to for the reasons previously given.

Q. 115. Can you state from an inspection of the labels of these respective bottles just offered how far the contents are respectively a similar preparation to Coco-Quinine or Quin-Coco?

Same objection.

A. The quinine content of the preparations varies to some extent; but, as a whole, the quinine content is about the same as that of Coco-Quinine, Lilly, and Quin-Coco, S. & H.

29 Q. 116. Do they all contain chocolate or cocoa as an ingredient?

Same objection.

A. They do.
Q. 117. State whether or not these various preparations you have just introduced are in competition and have been for some years on the market with Coco-Quinine, and more or less extensively offered for sale and listed?

Same objection.

A. They have.
Q. 118. What have you to say as to the business standing of the drug houses putting out these products?

Same objection.

A. They all have the reputation in the trade as being reliable houses. Some of them have a national reputation, while a certain few do an international business as well. Among the latter are H. K. Mulford & Company, of Philadelphia, and H. K. Wampole & Company, of Philadelphia, who have an international reputation.
Q. 119. I think you said that the Lilly Company especially de-

tails—that is to say, solicits the business of—prescription doctors, and that you did not; is that correct?

A. That is not quite correct. Prescription doctors have no business to solicit. They are prescribers and not purchasers of medicinal products, as a rule.

Q. 120. I did not mean to ask you whether the Lilly Company solicited the business of the prescribing doctors. I merely meant to ask whether the Lilly Company "details" the prescription doctors?

A. They do.

Q. 121. And your company does not?

A. We do to a limited extent.

Q. 122. And by "detail," do you mean that a salesman
30 visits a prescription doctor and talks about all the merits of a particular drug and hopes to induce him to prescribe it?

A. That is correct.

Q. 123. What effect on the druggists, as to carrying a particular make of goods, does this detailing work among the prescribing doctors have?

A. It creates a demand for that special product.

Q. 124. What do the druggists then do?

A. Supply the demand.

Q. 125. That is, they thereupon keep it in stock?

A. They stock the item and supply the demand.

Q. 126. In this way—that it, by the action of the prescribing doctors of the kind I have mentioned—is that particular product so detailed more fully brought to the attention of the drug stores?

A. Yes.

Q. 127. Please state among what classes of customers your market lies?

A. Among the dispensing doctors, retail druggists and jobbers.

Q. 128. How many doctors are there in the United States, and how many of them are dispensing doctors?

A. They are over 130,000 doctors. I have previously stated that, in my opinion, about 50 per cent. are dispensing doctors. This would mean over 65,000 dispensing doctors. I have before me the classified list of professions and trades in the United States, published by the Howe Addressing Company, of Philadelphia—the issues of September, 1915, which gives the number of the physicians by states, with an aggregate number of 137,760.

Counsel stipulates that the Howe list produced by the witness may go into the record as being a list of physicians in the United States classified by states, and that the list is published by a responsible house in Philadelphia, and bears the inscription on the front page as follows:

31 "Howe mailing lists guaranteed 99 per cent correct." "The Howe Company agrees to furnish a list of all doctors in the United States by states with their respective addresses."

Q. 129. What proportion of your output is sold to dispensing doctors?

A. I am unable to state accurately, but in my opinion it is about one-sixth of our sales of pharmaceutical preparations.

Q. 130. You have said that you had a market with retail druggists throughout the country. Upon what calls, either by prescription or over the counter, could a retail druggist dispense your product other than for the direct call of Quin-Coco?

Mr. Bradford: That is objected to as calling for the witness' opinion, and not for any evidence of value in determining questions at issue.

The Witness: As an ex-retail druggist, this could be dispensed on calls for a cough syrup, especially those with grippy tendencies. It could be dispensed upon calls for a sweet syrup of quinine. It could be dispensed upon calls for a tasteless quinine. It could be dispensed upon calls for a chocolate quinine. It could be recommended by the druggists in cases of coughs, colds and malarial conditions, such as chills and fever. A retail druggist could in many ways dispose of this product other than for calls for either Coco-Quinine, Quin-coco, or even chocolate syrup of quinine.

Q. 131. What about calls for a dose of quinine?

A. The retail druggist could point out the advantage of taking quinine in a preparation that disguises the taste, and especially would this be true if it was difficult for the patient to take pills or tablets, or the patient was nauseated by the bitter taste of quinine.

Q. 132. Have you referred to calls for Quin-Coco as one of the occasions on which a druggist might sell it?

32 A. I have not, but I assumed, of course, that he could sell it on such calls.

Q. 133. Can you state the aggregate sales in dollars of Quin-Coco during the past year or any period?

A. I am unable to give any accurate statement of this because we do not keep a record of such sales in our statistical department; but, judging from the amount made, the sales in 1914 were over $12,000 and less than $13,500.

Q. 134. What have you to say as to druggists recommending Quin-Coco to their doctors and asking them to prescribe it?

A. That is quite a common practice. Druggists very often stock a product which is similar to a nationally advertised or a nationally detailed product, and in a sense act as "detailers" for the manufacturer of the competitive product, interviewing the doctors and requesting them to write prescriptions for the competitive preparation.

Q. 135. Is that considered proper practice on the part of the druggist?

A It is.

Q. 136. How far, in your opinion, as experienced in a retail drug business, can a druggist, by personal effort, increase the sale of any product or products?

A. A retail druggist can sell almost any product he chooses, and in fact create a demand for such products. This has been and is being done continually. There are some firms in the trade who

market products almost the entire sale of which depends upon the druggist's recommendation and interest in those products. Some of these firms are national in their scope, and have sales in excess of a million dollars each. Oftentimes customers come into the store asking the druggist's opinion as to the product they should use. In many communities, or in some communities, the druggist is looked upon as possessing more or less ability in this direction, and is often called "Doc" or doctor. This is especially true in the Southern states, where it is common practice to call a druggist "Doc."

Q. 137. How about orders from jobbers?

A. We have received orders for Quin-Coco from a great many jobbers, almost all of which were unsolicited.

Q. 138. What proportion of the jobbers in the country would this cover?

A. I am unable to state accurately, but I should judge about one-third of all the jobbers.

Q. 139. What about mail orders?

A. We have received mail orders for Quin-Coco continuously. From an examination of the orders which I have made casually from time to time, I should judge the orders for Quin-Coco average, with those for our other products, everything considered.

Mr. Rawle offers in evidence the Howe Addressing publication referred to above, giving the list of retail druggists in the United States, classified by states, as 53,773.

Q. 140. Does that fairly represent your own estimate of the number of druggists in the United States?

A. That is more retail druggists than I thought there were. I thought it was between 43,000 and 46,000.

Q. 141. What is it that has brought about your sales of Quin-Coco?

A. First, a demand for a chocolate mixture containing quinine sulphate and disguising its bitter taste.

Second, efforts we have made to create a demand, this through samples and through our usual business efforts to increase and extend our business.

Third, through efforts of the retail druggists in inducing doctors to use and inducing consumers to buy Quin-Coco.

Fourth, from the dispensing doctors, from whom we solicit direct, and who use Quin-Coco, in their practice, dispensing it in those cases where they feel such a product is indicated.

Fifth, We have received orders from the jobbers, who in turn supply the retail druggists and dispensing doctors. We also expect our sales organization, which we continue at a large expense, to extend and increase the sale of all our products, including Quin-Coco. These salesmen, in addition to soliciting orders from the retail drug trade and dispensing doctors, also use their spare time in detailing and calling upon the prescribing physicians.

Q. 142. Do they spend their spare time in detailing the prescribing physicians, or is it on the entire line of items carried by you?

A. No, that is impossible. The preparations detailed vary with the salesmen and with the territory.

Q. 143. Will you please state to what extent your salesmen, before they are put to work, are instructed by the officers of the company or others, in the performance of their duties as salesmen?

A. They are given what we consider a good training and a demonstration of our products and policies. Personally I have done a great deal of this work, and did it entirely during the absence of Mr. H. Pfeiffer, who in the last five years has been away traveling perhaps more than half the time. The usual practice is to have the salesman come to the house and have him spend a little time in each of the departments, to acquaint him with the various lines we supply. He is given a set of catalogues to study, and before leaving for the territory, I always made it a point to personally review his visit and go over the matter of selling with him. I deemed this work so important that I had made an outline of the different points I would take up with the salesman. These points cover and review all his work in the department, a review of his contract and territory, a review of our policies regarding our different lines, and a review of our policies regarding other lines, also requirements of a successful traveler. Under this heading I discussed character, industry, knowledge of human nature, knowledge of business, knowledge of goods, knowledge of prices, and particularly dwelt upon character as the best asset which not only a traveler but which any individual could possess. I also pointed out the need of his help, loyalty and co-operation to increase his firm's success. Under the point of policy, regarding our products, I pointed out our relations with our competitors and impressed upon him the disadvantages of making any false statements or soliciting any orders under false promises. I also talked about the question of substitution and pointed out to him that this was dishonest, no matter who did it, bringing out the point that the drug business was rightly ethical, that confidence must exist, that health and life depended thereon. I also reviewed our salesmen's "Confidential and Manual," and our list giving quantity, prices and special offers. This list was not generally distributed to the trade, but was used by our pricing and selling department. It contained nothing secret, and some of these lists were distributed among our competitors. In this salesmen's "Confidential and Manual" we have a section "What a Salesman Should Know." This is in numbered paragraphs. Paragraph 16 reads that "It pays to adhere strictly to the truth at all times."

Paragraph 17 reads that "It don't pay to speak ill or even mention your competitor".

There are other paragraphs. From the last page of this manual I quote the following:

"Our policy in dealing with the trade is briefly stated.

"1. We believe in honesty and fair dealing.

"2. To supply the best quality of products.

"3. To sell goods as low as possible consistent with quality.

"4. To ship orders promptly.

36 "5. To fill orders complete.
"6. To never speak ill of a competitor.
"7. To accord courteous treatment."

Knowing the tendency of the salesman to make promises and statements in his desire to get an order, we would emphasize the need of restraint in this regard, and impress upon him as strongly as we can the need of honesty and fair dealing in his relations with the trade. We impressed upon him also that he is the firm's representative and the house or his firm is judged by him. If he makes a false statement or uses unfair methods, the house is judged in that light.

Q. 144. How far back was this manual in use?

A. The oldest copy which we have on file containing the matter quoted is dated 1911. I don't know whether previous copies contain this matter or not, as we have none on file. Each salesman is supplied with one of these "Confidentials". I would add also that my connection with the selling department is limited to salesmen who work in the territory handled by the Philadelphia office. For convenience our sales organization is divided, part being handled by the Philadelphia office and the other part being handled by the St. Louis office.

Q. 145. Have you any older written matter from which you taught the salesmen?

A. Yes, I have a little vest pocket memorandum which I use in connection with this outline, in fact reference to this booklet is made on the outline, so that I would not overlook reviewing this also. This vest pocket memorandum contains other points to take up with the salesmen, among which are salesmen's expenses, salesmen's sundry points, mailing orders promptly, never talking about competitors. I quote the language of one clause on page 14, reading as follows:

"Never talk about your competitors."

This booklet has other points, such as the disadvantage of
37 talking dull times and discouraging the buyer, and so forth.

I have carried this booklet for over eight years, had it in my possession before coming to Philadelphia, which was in June, 1908.

Q. 146. In thus instructing your salesmen before sending them out on the road, you are instructing them as I understand, to take out a line of many thousands of items. How many thousands are there?

A. Over 5,000.

Q. 147. Have you ever had any information or knowledge except from the plaintiff's testimony in this case of a retail druggist selling or dispensing your product, Quin-Coco, on a physician's prescription or on a call over the counter when Eli Lilly & Company's product, Coco-Quinine was called for or specified?

A. Never.

Q. 148. Have you ever, directly or indirectly, authorized any retail druggist to do so, or in any way whatever suggested to any retail druggist that he could do so?

A. Never.

Q. 149. Have you ever had any information or knowledge except from the testimony in this case that any salesman of William R. Warner & Company had ever suggested to any retail druggist that he could dispense William R. Warner & Company's product, Quin-Coco, on a physician's prescription, or an a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 150. Have you ever in any way, directly or indirectly, directed, authorized or suggested to any one of your salesmen, that he should or might suggest to any retail druggist that he could dispense your product, Quin-Coco, on physician's prescriptions, or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically prescribed or called for?

A. I never have.

38 Q. 151. I think you said that the earliest Quin-Coco was put out in August, 1906, and that the defendant company had nothing to do with that product until August, 1908?

A. That is correct.

Q. 152. What can you say as to whether the plaintiff company had knowledge that that product, Quin-Coco, was on the market?

A. I am unable to state as to what knowledge they had of Quin-Coco being on the market, when first marketed, but sometime in September, 1909, I received a letter from Mr. Lilly, on the subject of Quin-Coco. I produce his letter, dated August 31st, 1909, which is in the following words:

8-31-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

My Dear Mr. Pfeiffer:

Presuming upon our very pleasant acquaintance, I am going to put a proposition before you in the matter of Coco-Quinine. You are possibly aware that this preparation was entirely original with our house. This fact was fully recognized by our competitors with whom we hold pleasant relations. Mulford and Pfeiffer are the only ones who are making a preparation of the same nature. While it would probably be asking too much to make the request that you discontinue this preparation, we do think it would be reasonable to ask that you observe the same prices. We find that you are selling 5 pint bottles at $2.50 against our $3.30; pints at $7.20 a dozen against our $8.50 to the retail trade. Should you feel inclined to make your lowest price to the retail trade correspond with our prices, which are absolutely fixed, we would certainly appreciate it and be very glad to reciprocate whenever possible. If manufacturers were generally making this preparation, we would not be bold enough to make this suggestion.

Very truly yours,

(Signed) J. K. LILLY.

39 Mr. Rawle calls on plaintiff's counsel for letter from G. A. Pfeiffer, to J. K. Lilly, dated September 23rd, 1909.

Mr. Bradford: Counsel for complainant states that he has not the letter called for, but that he has requested the officers of the plaintiff corporation to furnish it and search of their files has failed to discover it.

Q. 153. Please produce your copy of your reply to the last mentioned letter?

A. I produce a copy. It is as follows:

Wm. R. Warner & Co.,
Philadelphia, Pa.,
639 N. Broad St.

September 23rd, 1909.

Mr. J. K. Lilly,
c-o Eli Lilly & Co.,
Indianapolis, Ind.

DEAR SIR:

Mr. H. Pfeiffer has returned and we have conferred with him concerning your letter of 8-31-09, referring to Coco-Quinine. In reply would state that we would almost prefer to discontinue supplying Quin-Coco rather than raise the price, not because we could not sell some of the goods at the advanced price, but because we know the tenor of the retail trade, and their objection to manufacturers' raising the price of a specialty, after he has induced them to stock, and frankly, we do not care to court the ill will of the trade.

In reference to discontinuing this preparation, we admit that Coco-Quinine was entirely original with your house, but we also make this claim for preparations Warner and The Searle and Hereth Co. market. To illustrate, we claim originality of Elixir Salicylic Comp., Tinct. Digitalis, Fat Free Tritica, Pils. Cascara Cathartic (Dr. Hinkle), and we beg to inquire whether you and the other members of the Homilia Club would agree to discontinue
40 or raise your price on preparations similar to the above mentioned and other specialties, which we can prove were originally introduced by us. We would not be satisfied to have you agree to do this, but we would expect the other manufacturers to accord us the same treatment as they accord you on Coco-Quinine.

The writer feels the matter is of sufficient importance for a personal interview, for there are many positions which could be taken, among which is the fact that possibly you are deriving as much benefit by our pushing and selling Quin-Coco as you are suffering loss, for does not the fact that several houses are pushing the same preparation, enlarge the market for said product? It is not always true that a monopoly of a certain preparation acts to the benefit of the owner. We are very unbiased in our position, and, of course,

would not think of replacing any new specialty you or any of our other friends place on the market, but really, we do not feel it is fair and just to go back of the returns, unless we shall profit by a condition which causes us a loss, provided we are entitled to said profit.

Respectfully yours, ——— ———.

Q. 154. Can you produce any other letters from the plaintiff or from Mr. J. K. Lilly?

A. Yes, I have another letter dwelling upon the same subject, dated October 6, 1909, signed J. K. Lilly, and a letter dated January 11th, 1910, from J. K. Lilly, which is not signed by him, but identified as his letter by a printed slip bearing the name of J. K. Lilly pinned to the original letter when received. They are as follows:

Mr. G. A. Pfeiffer. 10-6-09.

My Dear Mr. Pfeiffer:

I must confess to a degree of disappointment in the tenor of your letter under date of September 23, which arrived during my absence in the East.

41 Coco-Quinine was so entirely original with us and such a radical departure in the way of Quinine preparations that we have felt we were entitled to full consideration for it in the same manner that we have always endeavored to consider the rights of others in original, novel preparations. All reputable houses except yours have tendered this consideration and we were in hopes that you, in the light of our desire to work together to our mutual advantage, would at least consider our rights in the premises so far as not to cut under our prices.

It is beyond our power to meet the conditions outlined in your letter, for the reason that we cannot bind other manufacturers but it seems to me that there is an excellent opportunity for our two houses to extend full consideration. After all, it's just a matter between us and of course if this is your last word we will bow to your decision and have to be guided in the future by what we may consider our own best interests, although we much prefer to work together in a way that would serve the interests of both houses. If you can conceive of any way in which we could extend to you a consideration in return for making the same price that we do on Coco-Quinine, we will be very pleased to consider it. If not, then it is of course a closed chapter.

My observation has been that all of the houses profit by the proper consideration of others. If one gets out a specialty and puts money and effort behind it the others do not jump upon it like buccaneers; issue an imitation; cut the price and endeavor to profit by the efforts and expense of others. It seems to me that this is as it should be and if this principle is ignored everybody would be at everybody's throats and a very deplorable condition would result. This doesn't seem to be a sane proposition to me.

With best regards, I am,

Very truly yours,

(Sgd.) J. K. LILLY.

42

1-11-10.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

My Dear Mr. Pfeiffer:

I venture once more to address you on the subject of your Quin-Coco and the price thereof. Your action in pushing this preparation is directly in violation of one of the fundamental principles of the Homilia Club. If this Club means any one thing more than another, it means that members will not attempt to build up a business at the expense of a competitor. Coco-Quinine was absolutely and unquestionably original with our house and has been so recognized by all members of the Homilia Club. Only one manufacturer up to the time of your entering the Club made a preparation of that nature and upon taking the subject up with them, they immediately desisted from pushing it, and their preparation has virtually disappeared from the market.

You have taken our preparation bodily, simply transposing the name and are today energetically and actively offering it as a substitute for Coco-Quinine at $2.50 per five pint bottle against our $3.30. You are not creating any new demand to speak of, and are simply taking at a cut price, business that originated with and was built by Eli Lilly & Company.

There is no parallel to this condition in the Homilia Club and we file with you our earnest protest against your action in this matter. If you cannot see your way clear to withdraw this preparation from the market, we ask that you change the name to one that has not the slightest resemblance to Coco-Quinine and increase your price so that the lowest price to the retail trade will be $3.30 per 5 pt. bottle or $8.50 per dozen pints making no better prices in packages larger than 5 pint bottles.

In making this request we are keeping well within the spirit and the wishes of the Homilia Club such as are being carried out
43 every day by the members thereof.

We trust that you will receive this letter in the spirit in which it is sent and give same your kind and early consideration.

Very truly yours,

——— ———.

Q. 155. I hand you a letter signed J. K. Lilly. Did you receive this at about the time it bears date, and is it from Mr. Lilly?
A. I did, and it is signed J. K. Lilly. It is in the following words:

"Josiah K. Lilly,
Indianapolis.

2-2-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

DEAR MR. PFEIFFER:

Under separate cover there is coming to you a Red Lilly Catalogue for the current year.

Trusting that you will accept it with my compliments and best wishes for a profitable year for your good house, I am,

Very truly yours,
(Signed) J. K. LILLY."

Mr. Bradford: The introduction of this letter is objected to as having no bearing on the subject matter of this suit.

Q. 156. There is a reference in this correspondence to the "Homilia Club." What was that?

A. That was a fraternal organization of some of the prominent drug manufacturers for the purpose of discussing and solving the difficulties, common to all. It was especially helpful when arranging to meet the requirements of the Pure Food and Drugs Act of 1906. This being a new act, the regulations and rules for enforcement were more or less vague and indefinite. It was also
44 used as a register of preparations marketed by the different firms. This registration was under two classes. Class A embraced preparations on which the manufacturer claimed use of name only. Class B embraced preparations on which the manufacturer claimed ownership of both name and formula or product.

A booklet of these names was issued and distributed among the members, a copy of which I produce. This is the second issue of this booklet.

Q. 157. Please look at this booklet and state whether you find any registration of Eli Lilly and Company products in it?

A. I do, on the first page there are products listed under both classes, class A and class B. There is a note at the bottom of the page reading as follows:

"Class A, name only.
"Class B, name and formula."

Q. 158. State if Lilly's Coco-Quinine is registered and classified there and in which class?

A. It is registered in class A.

Mr. Rawle offers the booklet of the Homilia Club produced by the witness in evidence and particularly the registrations therein of Eli Lilly & Company.

The booklet is marked "Defendant's Exhibit Homilia Registrations".

Q. 160. Can you give the members of the Homilia Club?

A. I can remember most of them at the time I was a member. They were as follows:

Ernest Stauffen, of Sharp & Doehme; George S. Merrell, William S. Merrell & Company; F. K. Strearns, of Frederick Stearns & Company; Stuart Wyeth, of John Wyeth & Bro.; Milton Campbell, of H. K. Mulford & Company; W. A. Sailer, John Wyeth & Bro.; E. G. Swift, of Parke, Davis & Company; E. H. Nelson, of Nelson, Baker & Company; J. K. Lilly, of Eli Lilly & Company;
45 G. A. Pfeiffer, of William R. Warner & Company.

Q. 161. Did you have any discussion with Mr. Lilly in regard to referring this subject to a meeting of the Homilia Club?

A. Mr. Lilly and I talked of this subject at one time personally, when we happened to meet at Atlantic City. I am unable to give any definite outline of the conversation. I had forgotten that this interview took place until some time ago. Mr. Lilly refreshed my memory and I remembered the fact that the interview was had, but not what was discussed other than Quin-Coco was discussed during the interview. There was correspondence passed between us regarding referring the matter to a meeting of the members of the Homilia Club.

Q. 162. Then what did you do?

A. Before the next meeting of the Homilia Club I resigned from the Club.

Q. 163. What were your reasons for resigning?

A. There were several reasons. One was the question of salesmen, and the other was the question of Quin-Coco; and after conferring with the other members of the firm we decided that it would be advisable that I resign.

Q. 164. What was the "salesmen" reason?

A. One of the questions which the Homilia Club endeavored to regulate was the hiring of salesmen of the firms represented in the club by other members of the club. The plan was no house should approach a salesman of the other firm and should not hire this salesman until laying the matter before the firm employing the salesman.

Q. 165. You objected to this?

A. We did.

Q. 166. Why?

A. We did not like it and we did not think it was fair to the salesman.

Direct examination closed.

46 Cross-examination:

Mr. Bradford, without waiving objections, cross-examines as follows:

By Mr. Bradford:

X Q. 167. What reply did you make to the letter of January 11th, 1910, from Mr. J. K. Lilly?

A. I have a copy of my reply dated January 14th, 1910, reading as follows:

"Mr. J. K. Lilly,
c-o Eli Lilly & Company,
Indianapolis, Ind.

MY DEAR MR. LILLY:

Your letter of 12-1-10 received, and after being considered by the different members of the firm will be answered.

Respectfully yours."

——— ———.

X Q. 168. What further answer did you make?

A. I have the copy of my reply dated January 25th, 1910:

"Mr. J. K. Lilly.

DEAR MR. LILLY:

After further consideration of your letter of 1-11-10, we have decided that the subject is of too much importance to adjust through correspondence, and will be very glad to go over the matter with you in person some time when you are in the East, and when you can find it convenient to call at the office. Should the writer go West prior to your coming East, he will stop off at Indianapolis. The reason for this plan is our fear that correspondence might lead to unnecessary arguments.

Respectfully yours,

——— ———.

X Q. 169. Did any conference follow this letter of January 25th, 1910, and if so with whom and where?

A. I do not remember any.

47 X Q. 170. When was the conversation with Mr. Lilly at Atlantic City,—before or subsequent to this correspondence?

A. My recollection is that it was before any of it, before all of it.

X Q. 171. Did you have any correspondence with Mr. Lynn on this subject?

A. I don't remember.

X Q. 172. Did you have any conference with Mr. Lynn on this subject?

A. I do not remember any special conference. Mr. Lynn and I might have talked the matter over after the adjournment of the meeting of the Homilia Club of New York City. That is the extent of my recollection, and what was said at that time I could not say.

X Q. 173. I hand you a copy of letter dated February 14th, 1910, and ask you if that recalls any facts to your mind, and to state what the letter is, if you recognize it?

A. This is a letter dated February 14th, 1910, addressed to Mr. C. B. Lynn, reading as follows:

"DEAR MR. LYNN:

Subject: Coco-Quinine.

After further consideration, we feel it preferable that you register the complaint you have against us with all members of the Homilia Club and we will reply thereto. We consider your position raises an issue upon which each of the members of the Homilia Club should pass judgment.

Very respectfully yours."

——— ———.

I would conclude that that is a letter I wrote Mr. Lynn.
X Q. 174. Who is the Mr. Lynn to whom your letter is addressed?
A. Mr. Lynn, General Manager of Eli Lilly & Company.

By Mr. Rawle:

X Q. 175. Here present?
A. Here present.

48 By Mr. Bradford:

X Q. 176. I hand you copy of another letter dated March 7th, 1910, and ask you if you recognize it and if you will read it into the record and state what it is?

A. This letter is dated March 7th, 1910, and it is addressed to Mr. J. K. Lilly, Indianapolis, Ind. Immediately above Mr. Lilly's name are the following names: Ernest Stauffen, George S. Merrell, F. K. Stearns, Stuart Wyeth, Milton Campbell, W. A. Sailer, E. G. Swift, E. H. Nelson. The letter reads as follows:

"DEAR MR. LILLY:

I am today forwarding my resignation to Mr. Nelson, Secretary of the Homilia Club. This action is due to the fact that the firm I represent cannot meet your requirements on Quin-Coco, and for the further reason that when accepting membership, the writer was under the impression that preparations which were on the market prior to the formation of the club were not covered by the resolution adopted on new Specialties. This position we feel is confirmed by the minutes of the Homilia Club, and knowing that the Homilia Club was and continues to be a benefit to the members, rather than cause it any friction, the firm deem it advisable that I resign.

Very cordially yours,

G. A. PFEIFFER."

P. S.—Copy of this letter has been mailed to all the members of the Homilia Club."

X Q. 177. What was the substance of the resolution referred to in this letter relating to new specialties?

A. I have no definite memory as to the verbiage but the thought, as I recollect it, was that the Homilia Club would not discuss the question of priority of rights in a product which had been marketed prior to the formation of the Homilia Club.

X Q. 178. Did not this also cover the matter of registration with the club?

49 A. Perhaps it did. I could not state positively.

X Q. 179. Assuming that it did, would not this be a reason why Coco-Quinine could not be registered with that club in Class B by Eli Lilly & Company at that time?

Mr. Rawle: I object to the question as based upon an assumption and because the minutes of the Homilia Club are the best evidence, and because the witness has stated that he has no definite recollection of the verbiage of the minutes.

The Witness: That would depend upon the wording of the specific clause. It might have such an effect.

X Q. 180. Is it not true that you find in this exhibit list, products registered in Class A by other houses, the exclusive right to which products was and has been freely acknowledged by all manufacturers?

Mr. Rawle: That is objected to because the registrations of other houses are irrelevant and because the registration in the Homilia list by Eli Lilly & Company of Coco-Quinine claims only the right to the name "Coco-Quinine" and to nothing else.

Mr. Bradford: Counsel's last assumption is probably based upon a misunderstanding of the rules of the club as defined in the resolution the witness is testifying concerning.

The Witness: Yes, that is true. I find Adrenolin preparations registered in Class A by Parke Davis & Company. I know, however, that this product is protected by trade-mark and formula patent. No other firm could, if they chose, make or market this preparation.

X 180. Is it not true that except for the resolution to which you have referred, Parke Davis & Company might have registered these products in Class B?

50 Mr. Rawle: That is objected to because the language of the resolution is not testified to and because the act of Parke Davis in registering its product has nothing to do with the registration of Coco-Quinine by Eli Lilly & Company, which speaks for itself, independently of the registration of any other product of any other house.

The Witness: Parke Davis & Company could of course have registered their product under any class they saw fit, it being their own product?

X Q. 181. It was not a new product, at that time, was it?

Same objection.

A. I do not know. I do not know when they first marketed it.

X Q. 182. Do you have in your possession a copy of the Homilia Club resolution which was referred to in your letter of March 7, 1910?

A. I have turned all my papers over to my counsel, and I will look it up and if I find it I will produce it.

Adjourned until Friday morning, Nov. 26th, 1915, at 9.30.

Continuation of Depositions at the Office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Friday, November 26th, 1915, at 9.30 a. m.

Present: Parties as before noted.

G. A. PFEIFFER.

Cross-examination resumed.

By Mr. Bradford:

X Q. 183. Have you found the Homilia Club resolution which was referred to just prior to adjournment Wednesday?

51 Mr. Rawle: That is objected to because it does not sufficiently appear that these are the authentic records of the Homilia Club.

The Witness: I found what purported to be copies of the minutes and am unable to find in these the specific resolution covering a division of products in Class A and Class B. There are references to classification of products in Class A and Class B in these minutes, but I was unable to find the resolution specifically covering this subject.

X Q. 184. Your letter of March 7, 1910, to Mr. Lilly correctly states your understanding of the rules of the club as to this matter, I assume?

Mr. Rawle: That is objected to because the rules of the club must speak for themselves when the authoritative copy of the rule is proved, and because the witness' understanding of the rules is not relevant or admissible, and because the rule is not in itself admissible evidence, but only what the plaintiff did under the rule.

The Witness: The letter expresses an understanding which I then had and which I now have regarding specialties. It does not fully express our reasons for resigning, inasmuch as the question of "salesmen" affected all members of the Homilia Club, while the question of Quin-Coco affected Eli Lilly & Company alone and we did not feel it advisable to start a correspondence regarding the other question with the other members.

X Q. 185. On Wednesday I asked you if you remembered any conference with Mr. Lynn, General Manager of Eli Lilly & Company on this subject, and at that time you were unable to remember any except possibly a reference to it following a meeting of the Homilia Club in New York City. I ask if you have thought the matter over

since, and if so, if you have recalled any other conference with Mr. Lynn on this subject?

52 A. I have not thought the matter over especially, but without refreshing my memory, I cannot state of any other conference. I might answer that that I stopped off at Indianapolis visiting the firm of Eli Lilly & Company once upon my way to St. Louis, but at that time I do not remember of the subject of Quin-Coco or Coco-Quinine being mentioned. Neither do I know the time of this visit.

X Q. 186. From your direct testimony I understood that you are a registered pharmacist. I would like to inquire if you are also a graduate of a school of pharmacy?

A. I took one term in the Illinois College of Pharmacy, Chicago, Illinois, but did not graduate.

X Q. 187. As a pharmacist, do I understand you to say that there are no other syrups except chocolate or cocoa capable of holding the crystals of quinine sulphate in suspension?

A. No, I would not say that, but I would say that there is none that I know of which has the other advantages of chocolate in this preparation.

X Q. 188. These other advantages include, as I understood your direct testimony, a palatable taste?

A. That is one.

X Q. 189. This taste is calculated to make the product popular?

A. It helps.

X Q. 190. What therapeutic advantage has the chocolate or cocoa in this preparation, if any?

A. As regards the actual therapeutic action of quinine it has none, but as regards aiding in making a palatable preparation, it aids in bringing out the full therapeutic action of the quinine, which in some other mixtures might be retarded.

X Q. 191. In what other mixtures for example?

A. In a mixture where the appearance of the product was not appetizing or in a mixture that was not so acceptable to the stomach.

53 X Q. 192. What mixture, for example, would not be so acceptable to the stomach?

A. A mixture which was distasteful to the patient.

X Q. 193. Won't you be a little more specific and suggest some mixture that would be distasteful to the patient?

A. One with a flavor or taste, color or appearance which would be nauseating or objectionable to the patient.

X Q. 194. In the samples of preparations introduced as "Pfeiffer Experiment No. 1 and No. 2," I understand that there is no yerba santa in either?

A. No yerba santa in either of them?

X Q. 195. So far as pertains to quinine as masked in either preparation, the masking is effected then solely by the syrup used, that is in the one case by the "simple" syrup and in the other case by the chocolate syrup?

A. By the chocolate syrup, no other flavors or other ingredients of any kind. One is a mixture of a simple syrup and quinine.

The other is a mixture of cocoa and quinine, with the same proportion of cocoa and same proportion of quinine as in Quin-Coco.

X Q. 196. The sample containing cocoa also contains a simple syrup, does it not?

A. Sugar is the base of the syrup of cocoa.

X Q. 197. Are there any other syrups than chocolate or cocoa having the advantages of making a liquid preparation opaque?

A. There might be. I know of none I could mention.

X Q. 198. How about maple or licorice?

A. Licorice, unless I am mistaken, is soluble and will give the preparation a dark color, while cocoa is insoluble and its effect on the preparation is different on account of this difference in character. Maple I have not had any experience with and do not know.

X Q. 199. Is it not common practice in the preparation of liquid medicines, to color them with simple coloring ingredients for
54 the purpose of making them opaque?

A. I never heard of an ingredient added to a liquid preparation for color only which was not soluble in the liquid preparation.

X Q. 200. You spoke of Quin-Coco being brought out by Pfeiffer Chemical Company in response to a demand for a preparation of this character. Will you explain more fully the nature of these demands?

A. They were requests we received from the trade for such a product.

X Q. 201. Did these requests come to you personally and if so from whom were they received?

A. They may have, but on account of the length of time since the product was marketed, I would be unable to state specifically.

X Q. 202. Do you remember of seeing any letters containing such requests?

A. I do not remember.

X Q. 203. Do you remember having any conversation with any of your traveling men on this subject?

A. I do not.

X Q. 204. You do not recall any statements made to you by any of your traveling men in reference to a demand in the trade for a preparation to sell in the place of the Eli Lilly & Company preparation, Coco-Quinine?

A. I do not. I might add that I personally keep a folder in which requests, verbal or written, for additions to our line, are filed. I go over this folder with the other members of the firm, also with our salesmen, and after the decision has been made, all the material is destroyed, so any requests or statements which have been received have long since been destroyed. I always talk over with our travelers when seeing them the question of new preparations. If the question of Quin-Coco was discussed, it was discussed with our travelers just as I discuss the advisability of marketing or adding other new
55 products. Sometimes when in doubt about adding a new preparation we submit the matter to our salesmen for a vote. Whether or not this was done with Quin-Coco I don't remember.

X Q. 205. Please state fully what was done in the fall of 1906 by the Pfeiffer Chemical Company in bringing out the preparation which you call Quin-Coco?

Mr. Rawle: That is objected to as not affecting the rights of this defendant.

The Witness: I would be unable to answer that question for the reason that at that time I was in Chicago in charge of the Searle & Hereth Laboratories.

X Q. 206. Who had charge of the work of bringing out this preparation for the Pfeiffer Chemical Company in the fall of 1906?

Mr. Rawle: The same objection is made.

The Witness: Being away from the laboratory I could not state.

X Q. 207. Was any of the preparation made and sold during the fall of 1906?

A. From personal knowledge I could not state.

X Q. 208. When was this preparation first considered in marketable form and placed upon the market by your concern?

Mr. Rawle: That is objected to unless it refers to the defendant.

The Witness: I think it was in the fall of 1906, but I am unable to state positively. It may have been a little prior to the fall or it may have been towards the latter part of the year.

X Q. 209. Was any considerable quantity of this preparation made either during 1906 or 1907 and sold by your concern?

A. I can only answer that by comparison, by stating that there was less sold then than we sell now.

56 X Q. 210. What concern first introduced to the trade a liquid preparation of quinine sulphate colored and flavored with cocoa?

A. My understanding is that the firm that first introduced it and detailed it in a large way was Eli Lilly and Company.

X Q. 211. The preparation which they marketed under the name of Coco-Quinine?

A. Yes.

X Q. 212. Was or was not the Eli Lilly & Company preparation one that was popular in the trade in 1906?

A. I would say that Coco-Quinine was known by the trade, but I could not say as to the extent of its popularity.

X Q. 213. Do I understand from your direct testimony that Quin-Coco is not manufactured in the Philadelphia laboratories of William R. Warner & Company?

A. Yes. That would require the explanation that the Searle & Hereth Company share with the William R. Warner & Company the building occupied by William R. Warner & Company.

X Q. 214. What is the relationship between the Searle & Hereth Company and the William R. Warner & Company?

A. William R. Warner & Company, is distributor for the products of the Searle & Hereth Company.

X Q. 215. What is the distinction as to the ownership between the two corporations?

A. The Searle & Hereth Company is a corporation of the State of Illinois. William R. Warner & Company is a corporation of the State of Pennsylvania.

X Q. 216. Are not both corporations owned by the identical persons?

A. They are not.

X Q. 217. In what respect do the ownerships differ?

A. William R. Warner, Jr., owns an interest, a substantial
57 interest, in William R. Warner & Company, and has no interest whatever in the firm of the Searle & Hereth Company.

X Q. 218. What is the relationship between the Pfeiffer Chemical Company and the Searle & Hereth Company on the one hand and William R. Warner & Company on the other?

A. The Pfeiffer Chemical Company is a corporation incorporated in the State of Missouri, the stockholders of which are different than either those of the Searle & Hereth Company or those of William R. Warner & Company.

X Q. 219. Is it not true that the controlling interest in each corporation is owned by the same individuals?

A. It is.

X Q. 220. Is it not true that Searle & Hereth Company except in name has no active existence, but the preparations sold under its labels are manufactured in the chemical laboratories of the Pfeiffer Chemical Company in St. Louis and the laboratories of William R. Warner & Company in Philadelphia?

A. No. The Searle & Hereth Company has a legal existence, makes its reports to the State, reports the income tax covering its profits to the national government and fanufactures its own products.

X Q. 221. But has no independent laboratories?

A. It has independent laboratories, just as much as William R. Warner & Company and the Pfeiffer Chemical Company.

X Q. 222. Where are the laboratories of the Searle & Hereth Company located?

A. St Louis, Missouri, and Philadelphia, Pa.

X Q. 223. What is the difference in the identity of the Searle & Hereth Company laboratories in Philadelphia and the laboratories of the William R. Warner & Company in Philadelphia?

A. They are in the same building?

X Q. 224. Are they not identical?

A. They are together.

58 X Q. 225. Is there any difference watever?

A. Yes. Each firm's products are made from each firm's formula, each preparation is made as an individual entity.

X Q. 226. Do not the same chemists and employees conduct the operations of the different concerns, the same laboratories?

A. Yes.

X Q. 227. Is not the same thing true of the laboratories in St. Louis?

A. Yes.

X Q. 228. Do you regard Quin-Coco as a Searle & Hereth formula?

A. Yes. It is so filed in our formula binders.

X Q. 229. When did you acquire the Searle & Hereth Company?

A. June, 1906.

X Q. 230. Did you find Quin-Coco formula among the Searle & Hereth formulas?

A. No, and there are other formulas now put out under the Searle & Hereth which were not in the Searle & Hereth formulas at that time, new products which we have added since 1906.

X Q. 231. May I inquire why the Searle & Hereth label is used for the Quin-Coco product instead of the label or the Preiffer Chemical Company, which I understand originally brought it out?

A. The reason was that when the Searle & Hereth Company affiliated with the Pfeiffer Chemical Company, the Pfeiffer Chemical Company had marketed a line of pharmaceuticals. As they also manufactured a line of patent medicines, it was difficult to introduce the goods and the line was not at all popular. After the affiliation, the Searle & Hereth line of pharmaceuticals being established, the Pfeiffer Chemical Company line of pharmaceuticals was discontinued, and the leading items in the Pfeiffer Chemical Company line were remarketed under the Searle & Hereth label. That was the reason Quin-Coco was transferred.

59 X Q. 232. You regarded your ownership of the Searle & Hereth Company as giving you the right and privilege of adopting the Searle & Hereth label for any product you saw fit; is that not so?

A. Yes.

X Q. 233. You considered this practice your privilege in order to utilize the good-will of the Searle & Hereth Company you had purchased to your best advantage?

A. Yes.

X Q. 234. Were Searle & Hereth originators of a combination of calomel and bismuth?

A. I could not say that they were the first firm to ever mix calomel and bismuth, but they marketed and made popular a special combination of these two ingredients under the name Calolactose.

X Q. 235. Is it not true that so-called specialties of many concerns in many instances are substantially well known formulas, marketed under special names and made popular by special effort?

A. That is probably true to a certain degree. How common that practice is I would be unable to state.

X Q. 236. Referring to the blue list, "Plaintiff's Exhibit Document No. 3," are not many of the items on this list common prescription items?

A. Many of the preparations are prescribed and many sold in original packages and some both.

X Q. 237. I note on this list that you give the original product, the original manufacturer and the original manufacturer's price,

the prominent location on the circular. Was there any purpose in this?

A. That was necessity, because this information required more room inasmuch as it was unnecessary to state the manufacturer's name on our product.

X Q. 238. Why was it necessary to state the manufacturer's name and manufacturer's price as to the original product?

A. As a matter of information.

X Q. 239. You mentioned that your travelers use their
60 spare time, or some of it, in detailing special products to the physicians. Can you give any estimate as to the proportion of your travelers' time that can be so classified?

A. I would saw a small proportion of their time.

X Q. 240. What specialties do they detail?

A. That depends upon the traveler. Some travelers take a liking to one product and push that product. Others take a liking to a different product.

X Q. 241. The traveler is allowed to use his own judgment then?

A. Very largely. It is only done in his spare time and we feel he is the best judge of his territory, and the work so done is entirely voluntary on his part. It is not a requirement from the firm.

X Q. 242. What have you to say of your product Quinimel as a medium for masking the taste of quinine sulphate?

A. It is a good product. It is weak in that it does not hold the quinine in suspension. The quinine precipitates on standing.

X Q. 243. That is used more for extemporaneous combining, I presume; I mean for immediate administration?

A. Yes. The Quinimel is intended as a medium for extemporaneous preparation and for masking the taste of other bitter substances other than quinine also. Quinimel is a vehicle only, containing no quinine or other drug with definite therapeutic action.

X Q. 244. Your statement as to the value of your sales of Quin-Coco for the year 1914 I assume was made after inspection of your sales records and is as accurate as you can make it?

A. We do not keep a statistical record of Quin-Coco sales. This is based upon the laboratory records as to the amount made.

X Q. 245. What do your laboratory records as to the amount made show in gallons?

A. I could not state.

61 X Q. 246. Your laboratory records would show this, I presume?

A. Yes, with the explanation that we marketed this same product under another name, in proprietary formula, under the firm name of Preiffer Chemical Company, under the name of Dr. Hobson's Sweet Chocolate Quinine, and it would be impossible to state how much was marketed under the name of Quin-Coco, and how much under the name of Dr. Hobson's Sweet Chocolate Quinine.

X Q. 247. Do your figures refer to the product of St. Louis laboratories alone or the St. Louis laboratories combined with the Philadelphia laboratories?

A. Combined.

X Q. 248. How long has the preparation been on the market under the Dr. Hobson's label?

A. Several years. I could not state exactly how many.

X Q. 249. Do you keep a record sales of the Dr. Hobson's product?

A. We do not.

X Q. 250. In your testimony Wednesday, relative to your instructions to salesmen, you referred to a typewritten memorandum for the purpose of refreshing your memory. When was this typewritten memorandum prepared?

A. That memorandum was an evolution of points I had been taking up with the salesmen, this being the last list, and as near as I can remember, this was first adopted in the early part of 1914.

X Q. 251. Do physicians as a rule specify the make when prescribing items which are commonly referred to as "general line" items; I think you have used the term "general lines"; is not that correct?

A. I am really not any longer competent to testify as to present practice, but I feel the practice varies. Some do and some do not. Some consider, if it is a line item, any maker's product would be satisfactory. Others have a preference for a certain maker's
62 line, and specify. The various houses aim to encourage specification for their particular products.

X Q. 252. You have mentioned I think that propably one-third of the jobbers in the United States had sent you orders for this item, Quin-Coco. Can you state approximately the proportion of your sales of this one item that goes through the jobber's hands?

A. I could not say, but I would say a small proportion.

X Q. 253. One per cent?

A. I would say more than that as an opinion.

X Q. 254. You mentioned the fact that your house does not advertise in the medical journals. Is there any reason for this?

A. Our house formerly quite largely advertised in the medical journals. We discontinued doing so because we thought it did not pay.

X Q. 255. By "our house" do you mean William R. Warner & Company or Pfeiffer Chemical Company, or both?

A. William R. Warner & Company.

X Q. 256. Does the Pfeiffer Chemical Company advertise in the medical journals?

A. Never, to my knowledge.

X Q. 257. Have you ever advertised Quin-Coco in the medical journals?

A. Never, to my knowledge.

Redirect examination.

Mr. Rawle: I re-examine without waiving any objections.

By Mr. Rawle:

R. D. Q. 258. Referring to the typewritten pages you used yesterday to refresh your memory, about teaching your salesmen, you say

it is an evolution. How far back does it go in substance, that is how far back did you teach your salesmen along the lines indicated on these typewritten sheets?

63 A. This vest pocket memorandum which I have had over eight years was the beginning of making notes for conferring with the travelers.

R. D. Q. 259. And that has been gradually enlarged into the typewritten sheets?

A. It has.

R. D. Q. 260. How far has the teaching been the same, independently of whether you used that vest pocket book or the typewritten sheets?

A. The general policy has been the same.

R. D. Q. 261. As a matter of fact, is not the business of these affiliated corporations carried on entirely by yourself, your brother, Mr. H. Pfeiffer, both living in Philadelphia, and Mr. G. D. Merner, living in St. Louis?

A. We three have personal charge and control of the business of the several concerns.

R. D. Q. 262. What does "detailing" mean in respect of selling drugs to physicians, and is the term applied to dispensing doctors?

A. Detailing as commonly understood means demonstrating either by literature, samples, or personal visit to the physician. Detailing is done both to the prescribing and dispensing physician. It may also be done in a limited way to the druggist.

R. D. Q. 263. State whether or not it is usual and proper that salesmen selling competing goods should be informed as to competitor's prices for his goods?

A. This to a greater or less degree is almost necessary in order to meet the arguments of the buyer.

R. D. Q. 264. In this case chocolate and cocoa have often been used more or less interchangeably. State whether or not in current talk among laymen and even among those in the drug business, they are often used interchangeably, though not accurately?

A. They are.

R. D. Q. 265. When you became connected with William R. Warner & Company in 1908, was that corporation represented in the Homilia Club and by whom?

A. It was, by Mr. Frank M. Ramsay. Shortly after my
64 connection with William R. Warner & Company, Mr. Ramsay's services were discontinued, and I understand his membership in the Homilia Club was dropped or lapsed.

R. D. Q. 266. Soon afterward you were elected?

A. Later I was elected as a member.

R. D. Q. 267. While the membership of the club consisted of individuals and not of the corporation, they were employed by, and were in the club as representatives for their respective houses?

A. That was my understanding.

R. D. Q. 268. Do you happen to know whether Mr. Joshua K. Lilly was the Registrar of the club?

A. Yes, he was, at least for a time. I am informed that the Homi-

lia list, second issue, in evidence, was published at the offices and under the supervision of Mr. J. K. Lilly.

By Mr. Bradford:

R. D. Q. 26-. As Registrar of the club?
A. As Registrar of the Homilia Club.

By Mr. Rawle:

R. D. Q. 270. In the drug manufacturing business, state whether or not there is any more or less common practice of calling the attention of a competitor to trade derelictions on the part of one or more of that competitor's salesmen.

Mr. Bradford: Objected to as not re-direct examination, immaterial and irrelevant.

The Witness: It is done. How common the practice is I am unable to state.

R. D. Q. 271. Will you state whether or not anyone representing the Lilly Company ever complained to the defendant in respect to the matters here in controversy, as to an unfair method of selling Quin-Coco?

A. I have no recollection of ever receiving a letter or a complaint from Eli Lilly & Company regarding the acts or methods of
65 any one of our salesmen. I do remember of our St. Louis office at one time complaining to Eli Lilly & Company regarding the acts of one of their travelers, and my recollection is that the matter was amiably adjusted.

R. D. Q. 272. State whether or not in your opinion Quin-Coco S. & H. is inferior to the Lilly product of Coco-Quinine in stability or other qualities?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: We consider it equal in therapeutic action and a superior product from a pharmaceutical standpoint.

R. D. Q. 273. You have been asked whether you advertise your products and you replied that you did not. Can you state whether or not, for this reason, and for any other reason, the cost of selling goods for your house is lower than that of competitors?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: Not knowing the cost of selling of other firms, I do not know whether our cost of selling is less or more, but not spending any money in advertising in the medical journals, it is not necessary to add this to our selling cost. The selling cost as I use the term here includes both advertising and salesmen's expenses and other expenses for exploiting products.

R. D. Q. 273. Has it been your practice to employ head salesmen or salesmen having some supervision over the travelers?

A. Yes.

R. D. Q. 274. To what extent have such head salesmen had to do with the teaching travelers the proper method of selling goods?

A. To the extent of following our instructions as regards our policies and as regards posting the men on the various products.

66 R. D. Q. 275. And as to trade morals and as to morals of selling the goods?

A. Yes, that is part of our instructions.

R. D. Q. 276. State how far your instructions to your head salesmen were along the same lines as those to your travelers that you have testified to?

A. I often reviewed this list with the head travelers.

Recross-examination.

By Mr. Bradford, without waiving objections, as follows:

R. X Q. 278. As I understand it now, in addition to yourself, a "head salesman" taught your traveling men how to sell goods. Will you please explain a little more fully the methods employed by these head salesmen in teaching the travelers, I mean were their instructions wholly in the office or were these head salesmen put upon the road with the travelers and by example as well as by instruction authorized to teach your travelers?

A. The head salesmen worked with the regular salesmen both in the office and on the road. They sold goods with the regular traveler, often doing the selling themselves, leaving the regular salesmen watch their work, and then this would be reversed and the head salesmen would watch the regular salesmen work.

R. X Q. 279. Besides yourself, who else gave instructions to the head salesmen and also to the regular travelers?

A. Mr. Henry Pfeiffer, Philadelphia, Mr. G. D. Merner, St. Louis.

R. X Q. 280. Did these gentlemen also accompany salesmen on their trips?

A. Mr. Henry Pfeiffer years ago did this work. I don't remember of Mr. Merner ever working with the regular salesmen himself.

R. X Q. 281. Is it not a fact that Quin-Coco is as close a duplicate to Coco-Quinine as it is possible for your laboratories to make it?

67 A. We add nothing to Quin-Coco to make it like Coco-Quinine. Quin-Coco is the result of the ingredients all of which are necessary to the making of the product.

R. X Q. 282. By "the product" I assume you mean a product both in appearance and therapeutic action like Quin-Coco?

A. By "product" I mean Quin-Coco itself.

R. X Q. 283. Is not "detailing" usually considered important in the introduction of the new specialties?

A. Formerly it was considered the only method, but at present far less detailing is done. It is an efficient method of introducing a new product. However, the expense of personal detailing is so high as to, in many cases, make it unprofitable. I would say the practice of personal detailing with samples has diminished a great deal in recent years.

Mr. Rawle: Having just been able to procure copies of the third and fourth "Issues" of the registration list of the Homilia Club, following in sequence the second issue of the same club list offered in evidence yesterday, I now offer these two issues in evidence in respect of the registration therein of Coco-Quinine by Eli Lilly & Company in Class A and of "The Lilly Print" on the back of the cover, as indicating the printer of these two issues.

Mr. Bradford: The introduction of these lists is objected to except as a whole and for all the information they contain. If offered as exhibits as a whole for the information of the court no objection to their introduction is made, and it is admitted that they were published by the Registrar of the Homilia Club, Mr. J. K. Lilly, the President of the complainant corporation, and at complainant's publishing department.

The issues referred to are marked by the stenographer,
68 Defendant's Exhibit, Homilia Registration, numbers 2 and 3 respectively. GUSTAVUS A. PFEIFFER.

Deposition closed.

HENRY PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. Please state your name, age, residence and occupation?

A. Henry Pfeiffer; age, 58 years old; residence, 6809 York Road, Philadelphia; occupation, manufacturing pharmaceuticals and patent medicines.

Q. 2. Have you ever been in the retail drug business; and if so, where, and how long?

A. I was in the retail drug business in Cedar Falls, Iowa, and for ten years about.

Q. 3. And after that?

A. After that went into the drug manufacturing business in St. Louis, in the firm of Allan Pfeiffer Chemical Company, nine years; then with the Pfeiffer Chemical Company and Searle & Hereth and William R. Warner. I am the President of William R. Warner & Company.

Q. 4. I understand that the business is controlled and managed by you and your brother, G. A. Pfeiffer and G. D. Merner entirely?

A. Yes.

Q. 5. What is your general department of the work, broadly speak*nig*?

A. I devote the most of my energy and time to the selling end, engaging salesmen, and training them, also in the financial and business ends.

Q. 6. Do you have considerable to do with training the travelers when they are first taken on?

69 A. Yes.

Q. 7. Also you have been absent in the last five or six years going around the world and traveling more or less, have you not?

A. I have been away from the business about the last five years, from one-half to two-thirds of my time.

Q. 8. What is your method of preparing the travelers to go out on the road and what line of instruction do you give them?

A. We give them samples and catalogues, "Salesmen's Confidential" and verbal instructions.

Q. 9. Have you any written rules which you impress upon them and have done so for some years; if so produce them?

A. I have a vest pocket memorandum which I have had for 13 or 14 years, this same book (producing memorandum book).

Q. 10. Have you taught the new travelers from that?

A. I have taken this up with them after they had been with us some time, after they had started out. I did not take this up with them at the time they started so much as I did after they were with us.

Q. 11. What rules or directions do you find in that vest pocket book, bearing on the question of how to deal with competitors' like products?

Mr. Bradford: Objected to unless the book is to be introduced as a whole.

Q. 12. Using this vest pocket book merely to refresh your memory, state what, if any, teaching you gave the travelers as to how to deal with competitors, as to talking about competitors' products?

A. Always taught them to let the other fellow alone, that we had all we could do to handle our own business.

Q. 13. Who do you mean by "the other fellow?"

A. The other competitors.

Q. 14. What do you mean by "letting alone?"

A. I mean not to waste their time talking about competi-
70 tors, but to put their entire efforts and energies on our samples, on our line that we manufacture and sell them.

Q. 15. How do you teach them with regard to a careful observance of trade morals and honesty in traveling for your house?

A. We always felt that our line gave us great possibilities, and if we got what we were entitled to we would be satisfied. It was not necessary to lie or misrepresent to get that business.

Q. 16. Did you take up with them the rules in the "Salesmen's Confidential" and discuss those?

A. Yes.

Q. 17. I hand you a copy of "Salesmen's Confidential and Manual," 1913–14, and call your attention to the 86th and 87th pages thereof. On page 86, notice rules 16 and 17, and on page 87 the seven rules indicating "Our Policy in Dealing with the Trade." Please look at those rules and state how far you took up those subjects in teaching your salesmen?

A. We constantly made an effort to keep our salesmen from talking too much about our competitors. We felt it was in our own line, that every knock was a boost, for the other fellow. That has been our policy, to keep from mentioning or recognizing the other people in our selling talk.

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Q. 18. Did you teach that policy to your salesmen?

A. That is what we talked to the salesmen.

Q. 19. Will you state whether or not it was strongly impressed upon them as the policy of the house?

A. It was so strongly impressed upon him that when we found a man that made statements he could not prove, we invariably called his attention to it, and if he did not change we would discharge him.

Q. 20. State whether or not your travelers were employed at the will of the house and could be discharged at any time?

A. All of our travelers were subject to discharge on written notice to the last named address.

71 Mr. Rawle: I offer in evidence the "Salesmen's Confidential and Manual" produced by the witness and particularly as to pages 86 and 87 thereof.

The book referred to is marked by the Stenographer, Defendant's Exhibit, Salesmen's Confidential.

Q. 21. Please read into the record Rules 16 and 17 and the seven clauses indicating your policy and also the seven lines on top of page 87?

A. On page 86 I read as follows:

"16. That it pays to adhere strictly to the truth at all times."

"17. That it don't pay to speak ill of or even mention your competitor."

On the top of page 87 I read:

"The Salesman's Creed.

"To respect my profession, my company and myself.

To be honest and fair with my company, as I expect my company to be honest and fair with me.

To think of it with loyalty, speak of it with praise, and act always as a trustworthy custodian of its good name.

To be a man whose word carries weight at my home office.

To be a booster, not a knocker; a pusher, not a kicker; a motor, not a clog."

At the bottom of page 87 I read:

"Our policy in dealing with the trade is briefly stated:

1. We believe in honesty and fair dealing.

2. To supply the best quality of products.

3. To sell goods as low as possible, consistent with quality.

4. To ship orders promptly.

72 5. To fill orders complete.

6. To never speak ill of a competitor.

7. To accord courteous treatment."

Q. 22. In your opinion, would one of your salesmen who suggested to a retail druggist that he should buy your product, Quin-Coco, and that he could supply it on prescriptions or on sales over the counter, when the Lilly product, Coco-Quinine, was called for, be an honest salesman?

A. No.

Q. 23. State whether or not you have ever had any information or knowledge, except from the testimony in this case, that any salesman of William R. Warner & Company had ever suggested to any retail druggist that he could dispense William R. Warner & Company's product, Quin-Coco, on a physician's prescription, or a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 24. If you had had such information, that any salesman had done so, state whether or not that would have been contrary to his orders and your teaching and in violation of the selling rules of your house?

A. Yes, it would.

Q. 25. State whether or not you have ever in any way, directly or indirectly, directed, authorized, or suggested to any one of your salesmen that he should or might suggest to any retail druggist that he could dispense your product, Quin-Coco, on physician's prescriptions, or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

Q. 26. State whether or not you have ever, in any way, directly or indirectly authorized or suggested to any one of your head salesmen that he should or might suggest to any of your travelers that the traveler should or might suggest to any retail druggist that
73 he could dispense you product, Quin-Coco, on physician's prescriptions or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 27. State whether or not you have ever had any information or knowledge, except by the testimony in this case, of a retail druggist selling or dispensing your product, Quin-Coco, on physician's prescription or on a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 28. State whether or not you have ever, directly or indirectly, authorized any retail druggist to do so or in any way whatsoever suggested or represented to any retail druggist that he could do so?

A. I have not.

Q. 29. From your experience as a retail druggist and since, what is your opinion as to whether an energetic retail druggist can push the sale of a given product or preparation and create a market for it?

A. They can sell most anything they want to sell.

Q. 30. From your experience as a retail druggist, and since, what is your opinion as to the honesty of retail druggists as a class in the conduct of the drug business?

A. I consider them honest and reliable. I would say they are above the average.

Q. 31. Robert J. Groves, a witness called on behalf of the plaintiff in this case, testified as follows:

"Q. 12. Will you please state in substance, as near as you can remember, what you would say to the druggist when you solicited his order for 'Quin-Coco,' using the language exactly as you would if talking to the druggist?

A. In calling on the druggist, if I found that he was a user of 'Coco-Quinine,' I used my best efforts to sell him 'Quin-
74 Coco,' pointing out to him that the product was equally as good as 'Coco-Quinine,' and cost him less money, and could be dispensed on prescriptions and sold over the counter as 'Coco-Quinine.'

Q. 13. On whose authority did you make such statements and representations to the druggists?

A. On the authority of William R. Warner & Company.

Q. 14. By whom were you given the instructions or authority in this matter?

A. I am not sure whether it was Mr. Hagaman or Mr. H. Pfeiffer."

Please state whether or not you ever gave Robert J. Groves such instructions or authority?

A. I did not.

Q. 32. Lemuel B. Hardy, a witness called on behalf of the plaintiff in this case, testified as follows:

"Q. 5. Please state what representations or statements you made to the druggists when you solicited their orders for 'Quin-Coco,' as near as you can remember?

A. I stated to the druggists that it was the same thing in color and contents as 'Coco-Quinine' with the exception that it flowed a little more freely, and that they could use it as a substitute for 'Coco-Quinine,' from the fact that it contained both quinine and cocoa, and the advantage they had in buying 'Quin-Coco' was the cheapness in price, cheaper than 'Coco-Quinine.' I demontsated to them also that it was the same color, and I have had them to taste of it to see that it was the same taste.

Q. 6. On whose authority did you make such statements when soliciting orders for 'Quin-Coco' from the retail druggists?

A. Well, I got authority from Mr. McNulty at one time I remember, and I am sure Mr. H. Preiffer instructed me on that, too."

75 Please state whether or not you gave Lemuel B. Hardy any such instructions or authority?

A. I did not.

Q. 33. C. J. Thurman, a witness called on behalf of the plaintiff in this case, testified as follows:

"Q. 7. Please explain the methods and arguments you employed in soliciting orders for 'Quin-Coco' and where you obtained your authority for such methods and arguments?

A. * * * We were also instructed by office managers, circular

letters to salesmen, etc., to push this 'Quin-Coco' as a substitute for 'Coco-Quinine', the same as per instructions from Mr. Garvin. This 'Quin-Coco' was one of the best selling specialties of the company.

Q. 8. Do you recall the names of any officers or men in authority from whom you obtained instruction or information relative to the sale of 'Quin-Coco' as a substitute for 'Coco-Quinine' other than Mr. Garwin? If so, please state.

A. Yes, sir. There was Mr. Garfield Merner, who was manager of the St. Louis Company. Mr. H. Pfeiffer, who was president of the Pfeiffer Chemical Company, and has traveled with me on the road at numerous times. That is about all that I can recollect I got direct instructions from.

* * * * * * *

Q. 9. You spoke of Mr. H. Pfeiffer traveling with you or being with you on some of your trips. Was he with you on some of the trips when you pushed the sale of 'Quin-Coco'?

A. Yes, sir.

Q. 10. Did he participate with you in pushing this specialty?

A. The fact of the matter is that Mr. H. Pfeiffer knew very little about pharmaceuticals and he invariably left the selling of pharmaceuticals to me at the time he was with me, but his instructions
76 were always given to me privately. Mr. Pfeiffer never claimed to know anything about the pharmaceutical line, but he did a great deal of the selling of the Pfeiffer Chemical Company line while with me."

Please state whether or not you gave any instructions or information to C. J. Thurman, relative to the sale of Quin-Coco as a substitute for Coco-Quinine, and whether or not the statement that you did so, as made by that witness, is true?

A. I gave no instructions, and the statement is not true.

Q. 34. The same witness, C. J. Thurman, further testified as follows:

"Q. 12. Did your representations to the retail druggists include instructions to them as to how they could dispense it, and if so, what did you tell them on that point?

A. We were instructed by the Company to tell the trade that this preparation of 'Quin-Coco' could be used and dispensed on calls for 'Coco-Quinine'; and that it could be also used on prescriptions for 'Coco-Quinine' without the knowledge of the physician or the patient, as the preparation of 'Quin-Coco' was exactly the same as 'Coco-Quinine'."

Please state whether or not you ever gave such instructions to this salesman, C. J. Thurman?

A. I did not.

Q. 35. The same witness, C. J. Thurman, testified as follows:

"Q. 81. When did Garwin give you instructions? Was it when you started in 1903?

A. Well, it was a little later than they began putting out this lis probably 1905.

Q. 82. And was that the time Merner talked with you?

77 A. Yes, and later on.

Q. 83. How much later?

A. Well, up to the time that I left the employ of the Company December, 1912.

Q. 84. What did he say to you?

A. Well, his instructions to us were about the same as M Garwin's; that these preparations were exact substitutes for th original preparations named by the other companies. He also in structed us that 'Quin-Coco' could be used on doctor's prescription where 'Coco-Quinine' was specified, and for us to show the druggi how much he could save by buying this substitute and replacer pr paration from our company, and that there was no use of a druggi paying the price for these original preparations when he could bu something that would answer all purposes and save him quite little money.

Q. 85. Anything else?

A. No.

Q. 86. What did Mr. H. Pfeiffer say to you?

A. Well, his instructions were practically the same as were give by Mr. Garwin and Mr. Merner, although Mr. H. Pfeiffer has been o the territory with me a great many times and possibly has said mor than Mr. Merner in regard to pushing these different preparation substitutions and replacers."

Please state whether or not you gave such instructions to Mr. C J. Thurman as a traveling salesman?

A. I did not.

Q. 36. What would have been the policy of your company in re gard to C. J. Thurman as a salesman if you had learned that he ha pursued such methods in pushing the sale of that product, Quin Coco?

A. We would have reprimanded him and requested him to sto making such statements, and, if continued, would have discharge him.

78 Q. 37. Did you ever have any knowledge of Thurman making such statements?

A. No, sir.

Q. 38. Did he ever make such in your presence when you were traveling together?

A. No.

At 1:15 o'clock p. m. a recess was taken until 2:15 o'clock p. m.

2.15 p. m.

Present: Parties as before noted.

Mr. Rawle: The direct examination is closed.

Cross-examination.

By Mr. Bradford:

X Q. 39. As I understand your direct testimony, the concerns known as William R. Warner & Company, the Pfeiffer Chemical Company and the Searle & Hereth Company are controlled by yourself, Mr. G. A. Pfeiffer and Mr. G. D. Merner, and that this control is in all directions, that is, the manufacturing and selling and other directions?

A. The officers are not the same of the different companies. We manufacture under working arrangements with one another. The stockholders are different, and they are separate and distinct live corporations.

X Q. 40. That does not answer my question. I understood you to tell Mr. Rawle that the three companies named are all controlled by the same people?

A. Yes, the business is managed by us three.

X Q. 41. It is also controlled by you three, is it not?

A. I don't know about that. There are some mighty big 79 stockholders beside ourselves in this business.

X Q. 42. As a matter of fact, don't you three gentlemen own the majority of the stock of each of the three corporations?

A. Yes.

X Q. 43. I assume that the same policy prevails in the management of the business of the several corporations. Is this true?

A. Not necessarily, no.

X Q. 44. If it is not true in what particular is it not true?

A. Well, I cannot give you any specific answer on that. I mean, I could not at this moment say any particular item where it does not come in.

X Q. 45. The salesman representing one concern also represent the other concerns, do they not?

A. Yes, sir.

X Q. 46. The instructions to your salesmen are alike for the several concerns?

A. I would not say that, no.

X Q. 47. What would you say in respect to that?

A. My answer would be, I have not any specific instance in mind, but I would not say that our instructions were the same to our men on one proposition as it would be on the others, because we have got some conflicting propositions.

X Q. 48. The same traveling men handle the same line of products, do they not, that is, the products sold under the labels of the various concerns named?

A. No, they do not. Not all of them.

X Q. 49. Do you have traveling men whose lines are confined to products of William R. Warner & Company?

A. No.

X Q. 50. Do you have traveling men whose line is confined to the products of the Pfeiffer Chemical Company?

A. Well, I will say, in the first instance, that when yo
80 spoke—what are the three companies you have in mind now
X Q. 51. My questions have been directed to William R Warner Company, the Pfeiffer Chemical Company and Searle & Hereth Company; I have not included the numerous other concern affiliated with your organization, although I do not object to you making your answer as general and comprehensive as you wish.
A. That last question that I answered, what was that questio and the answer?

(The stenographer read the following question and answer:

"Q. Do you have traveling men whose lines are confined to prod ucts of William R. Warner & Company?
A. No.")

The Witness: That is correct.

X Q. 52. Have you any further answer to make?
A. What was the question and answer before that?

(The stenographer read the following question and answer:

"Q. The same traveling men handle the same line of products do they not, that is, the products under the labels of the various con cerns named?
A. No, they do not. Not all of them.")

The Witness: That is correct.

X Q. 53. How many traveling men have you handling the sale of the Warner line and the Pfeiffer line and the Searle & Hereth line combined?
A. I cannot say,
X Q. 54. Have you any?
A. We have.
X Q. 55. Who are they?
A. One is Charles C. Besore.
X Q. 56. What territory does he cover?
81 A. He covers the City of Philadelphia.
X Q. 57. Which line does he not carry?
A. He does not carry the Pfeiffer line.
X Q. 58. Do you think of any others?
A. I have none in mind now.
X Q. 59. My only purpose in asking you the original question was to find out whether or not in your general instructions to salesmen they are the same regardless of the line of goods carried?
A. I would say the "Salesmen's Confidential" applies to all sales men excepting such items that they do not handle.
X Q. 60. Please explain your methods in teaching or instructing salesmen who are to represent your concerns on the road?
A. Well, we give them a sample case, we give them catalogues, we give them the "Salesmen's Confidential," and make personal

visits to them, and try to speed them up on such items where they have not produced a satisfactory business.

X Q. 61. Do you ever have or have you ever traveled with any of these salesmen?

A. I have.

X Q. 62. Did you ever make trips with Mr. C. J. Thurman?

A. I have.

X Q. 63. In what territory?

A. In Nebraska.

X Q. 64. Any other territory?

A. I do not recollect any other.

X Q. 65. Were you ever with Mr. Thurman when he sold Quin-Coco to a retail druggist?

A. I do not recollect that I was.

X Q. 66. Did you ever have any talk with Mr. C. J. Thurman relative to Quin-Coco?

A. Not to my knowledge.

X Q. 67. You never mentioned it to him?

A. Well, I do not recollect of ever mentioning it to him.

82 X Q. 68. Did you ever talk to him about Coco-Quinine?

A. Not that I know of.

X Q. 69. Do you recall the names of any retail drug stores in Nebraska that you visited in company with Mr. Thurman?

A. I do not.

X Q. 70. How long ago was this?

A. Well, I would say six or seven years ago. Maybe longer.

X Q. 71. What other salesmen have you made trips with?

A. I have not visited any of them for a number of years.

X Q. 72. Do you recall the names of any that you have taken trips with on the road for the purpose of instructing them in their duties?

A. No, I do not positively.

X Q. 73. Did you ever make a trip with Mr. Groves?

A. No, I never did.

X Q. 74. Did you talk with Mr. Groves on the subject of Quin-Coco?

A. Not that I recollect of.

X Q. 75. Did you ever talk with Mr. Groves on the subject of Coco-Quinine?

A. Not that I know of.

X Q. 76. Did you ever talk with any of your salesmen on the subject of Quin-Coco?

A. I would be unable to give any specific case.

X Q. 77. Do you remember talking with any of your salesmen with reference to Coco-Quinine?

A. I do not.

X Q. 78. Do you remember Mr. L. B. Hardy?

A. I do.

X Q. 79. Were you well acquainted with him?

A. I knew him, yes.

X Q. 80. Did you ever make any trips with him?

A. I have.

83 X Q. 81. Was the subject of Quin-Coco ever broached between you and Mr. Hardy?

A. I cannot recollect that it was.

X Q. 82. Or the subject of Coco-Quinine?

A. I cannot recollect.

X Q. 83. Who was the man in your concern who first proposed to bring out Quin-Coco?

A. I don't know.

X Q. 84. Were not you the man?

A. I do not recollect.

X Q. 85. Was not the first work of preparation of Quin-Coco done at your direction?

A. I cannot say.

X Q. 86. Was it not done by your direction?

A. I cannot say.

X Q. 87. And was it not done for the express purpose of producing an article to take the place of Coco-Quinine Lilly and sell in the place of it?

A. I would say not.

X Q. 88. Do you remember when the manufacture of Quin-Coco was begun?

A. I do not.

X Q. 89. Do you remember of demands ever coming in to your house for an article to sell as a substitute for Coco-Quinine?

Mr. Rawle: I object to that question, implying that such demands did come in, in the terms in which counsel has put his question.

A. I do not.

X Q. 90. Do you remember that any demands ever did come to your house for a liquid preparation of quinine sulphate embodying cocoa or chocolate?

A. I do not.

X Q. 91. Do you know why your article Quin-Coco was brought out and put on the market?

A. I expect it was because there was a demand for such an article.

X Q. 92. Where did you travel with the salesman Hardy?

84 A. Somewhere in the south.

X Q. 93. You do not recall the territory?

A. I do not.

X Q. 94. When did you first hear of a liquid preparation of quinine sulphate flavored and colored with chocolate or cocoa?

A. I cannot say.

X Q. 95. Who first introduced such a preparation to the medical profession, so far as you know?

A. I don't know.

X Q. 96. Did you ever hear of Eli Lilly & Company's preparation called Coco-Quinine?

A. I have.

X Q. 97. Did you ever hear of it prior to 1906?

A. I could not say.

X Q. 98. Prior to 1906 you were quite familiar with drugs and medicinal preparations, were you not?

A. I was familiar with drugs and medicinal preparations.

X Q. 99. Were not you spending considerable time during that period visiting the drug trade?

A. I was.

X Q. 100. Was not a considerable part of your traveling in the interests of your house, in the southern section of the country?

A. It was everywhere.

X Q. 101. And you say that you are unable to state whether or not you ever heard of the Lilly preparation, Coco-Quinine prior to 1906?

A. I am.

X Q. 102. Are you willing to swear that you never did hear of it?

A. I am not.

X Q. 103. Do you say again that you knew nothing of the methods of the salesman C. J. Thurman as outlined in his deposition on behalf of the complainant herein, in pushing some of the product Quin-Coco?

A. How is that question?

85 X Q. 104. Read it.

(Question read.)

A. I do.

X Q. 105. Did you ever instruct any salesman as to how he should push the sale of Quin-Coco?

A. Not that I recollect.

X Q. 106. Do you know a gentleman by the name of Alvah Lee Kelton?

A. I do.

X Q. 107. Did you know him prior to 1907?

A. I did.

X Q. 108. Who was he?

A. He was a salesman.

X Q. 109. For whom?

A. For the Pfeiffer Chemical Company.

X Q. 110. Did you ever travel with him?

A. I did.

X Q. 111. Did you ever discuss the subject of Quin-Coco with Mr. Kelton?

A. Not that I know of.

X Q. 112. What territory did you travel with Mr. Kelton?

A. Tennessee and Kentucky.

X Q. 113. Was the Lilly product Coco-Quinine ever mentioned between you and Mr. Kelton?

A. Not that I know of.

X Q. 114. Among the equipment of a salesman do you include what has been termed here the "Blue List?"

A. Yes.

X Q. 115. For what purpose was this "Blue List" used?

Mr. Rawle: That is objected to as not proper cross-examination.

A. The "Blue List" was used so that the salesmen could quote the correct price on the item that the dealer wanted.

X Q. 116. Did you use this list in instructing your salesmen?

86 A. Probably I did.

X Q. 117. What is the date of the last issue of this "Blue List?"

A. I cannot say.

X Q. 118. What would you say to the salesman in reference to the item in this "Blue List," in giving him instructions?

A. I do not recollect.

X Q. 119. What did you instruct your salesmen to be their chief duty?

A. Get as many orders as they could.

X Q. 120. From your exhibit, "Salesmen's Confidential," at the top of page 81, I infer that the compensation of your salesmen depends altogether upon their sales of goods, is that true?

A. Not entirely, no. They get a salary and expenses, and if they produce enough business they get a commission.

X Q. 121. On the front page of this exhibit I find these words: "Use discretion in meeting competition; don't quote lower prices than necessary to secure orders." This indicates the policy of your house, does it not?

A. We have got one price—probably put there as a caution.

X Q. 122. The same paragraph continues:

"In any event, do not quote below minimum prices stated in this list."

What have you to say as to this?

A. This "Confidential" gives special prices on quantities. When those quantities were not bought, they were not entitled to those prices.

X Q. 123. How long has it been since your "Salesmen's Confidential" was first printed, and distributed to your salesmen?

A. I don't know.

X Q. 124. Is it not a fact that the blue list referred to is

87 chiefly a list of popular selling remedies, a market for which has been created by other houses and for which your house in the second column lists a substitute?

Objected to by Mr. Rawle as not proper cross-examination.

A. It is not.

X Q. 125. In what particular is the supposition of my previous question in error?

A. There are a number of our own preparations on there and the list was not gotten out with a view of substituting other remedies, but for the convenience of the salesman to be able to be in a position to quote a price on the article the man wanted and get our correct name.

X Q. 126. Are you willing to swear you did not mention Coca-

Quinine or Quin-Coco to Mr. Kelton, one of the witnesses for complainant herein?

A. I am not.

X Q. 127. Are you willing to swear that you did not mention Quin-Coco or Coco-Quinine to Mr. Groves, one of the complainant's witnesses herein?

A. I am not.

X Q. 128. Are you willing to swear that you did not mention Quin-Coco or Coco-Quinine to Mr. Hardy, one of the complainant's witnesses herein?

A. I am not.

X Q. 129. Are you willing to swear that you did not mention Quin-Coco or Coco-Quinine to Mr. Thurman, one of the complainant's witnesses herein?

A. I am not.

X Q. 130. Is your recollection as to the answers to the questions propounded to you by counsel for defendant as clear, accurate and positive as your recollection as to the answers to the questions propounded to you by me?

A. Where I positively know I say yes, and where I am in doubt I cannot say.

88 X Q. 131. Do you remember of any conferences with the complainant, or with any representative of the complainant relative to the marketing of Quin-Coco by your house prior to the beginning of this suit?

A. I cannot recollect personally, but it seems as though there was a conference of some kind, but I couldn't say,—give the details or anything about it—would not know in fact, don't know what the result of it was, I have forgotten the result.

X Q. 132. Do you remember who the conference was with?

A. If I recollect right it was Mr. Lynn.

X Q. 133. Do you remember where it was?

A. It seems as though it was in the Manufacturer's Club.

X Q. 134. In this city?

A. In this city. Of course it is vague.

X Q. 135. Do you remember who was present besides you and Mr. Lynn?

A. I couldn't say.

X Q. 136. Was Mr. G. A. Pfeiffer present?

A. Probably he was.

X Q. 137. Do you remember what was said by you to Mr. Lynn in reference to this product at that time?

A. I do not.

X Q. 138. Do you remember what Mr. Lynn said to you in reference to the product?

A. I do not.

X Q. 139. Do you remember whether or not what he did say was in the nature of a protest against your manufacturing and selling Quin-Coco?

A. I cannot remember.

HENRY PFEIFFER.

Deposition closed.

89 WILLIAM HAYWARD STONE, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your age, name, residence and occupation?

A. My name is William Haywood Stone; age 49; residence, Wayne, Pennsylvania; occupation, Assistant Superintendent of H. K. Mulford & Company.

Q. 2. Are you a graduate in chemistry, and if so where and what have been your successive employments in life?

A. I am a graduate in the Chemical Course in the University of Vermont, in 1899, and then became connected with Parke, Davis & Company from September 1st, 1889, to January, 1901, in charge of various manufacturing departments. Then I went to New Orleans, Louisiana, with the Nickell-Stone Chemical Company, until April, 1903; Meyer Bros. Drug Company, St. Louis, from April, 1903, to February, 1904; February, 1904, to date with H. K. Mulford & Company.

Q. 3. With H. K. Mulford Company have you had to do with chemical matters?

A. In the manufacture of pharmaceuticals?

Q. 4. Yes.

A. Yes, in the manufacture of pharmaceuticals.

Q. 5. In February, 1904, when you went to H. K. Mulford & Company, state whether or not they were marketing a chocolate syrup of quinine?

(Objected to as immaterial, irrelevant and incompetent.)

A. They were.

Q. 6. State whether or not this product has been ever since then listed and sold by that house?

(Same objection.)

A. It has.

90 Q. 7. I show you a bottle that has already been offered in evidence. Is this the product that you put out and the dress.

(Same objection.)

A. It is.

Q. 8. When you first had knowledge of that product, did it contain yerba santa?

(Same objection.)

A. No, sir.

Q. 9. Then, did you add yerba santa?

(Same objection.)

A. Yes, sir.

Q. 10. And what did the yerba santa take the place of in the preparation?

(Same objection.)

A. It took the place of licorice.

Q. 11. Has your house found there was a market for this product?

(Same objection.)

A. Yes, sir.

Q. 12. Where?

(Same objection.)

A. All over the United States.

Q. 13. From whom do your orders come?

(Same objection.)

A. From the retailers and the dispensing doctors and jobbers. Branch houses.

Q. 14. Do the ingredients of this preparation appear on the bottle as you have made it since about 1904?

(Same objection.)

A. The main medicinal ingredients appear on the bottle.

Q. 15. Say which?

(Same objection.)

91 A. Quinine and chloroform appear there as two of the ingredients.

Q. 16. Is cocoa one of the ingredients, and has it always been since you knew of it?

(Same objection.)

A. Yes, sir.

Q. 17. As a chemist having knowledge of a preparation of cocoa and quinine sulphate, together with yerba santa, will you state whether or not in such a preparation the cocoa has any effect in disguising the bitter taste of the quinine?

A. I consider it does; yes, sir.

Q. 18. In what form is the quinine sulphate in such a preparation?

A. It is in a crystalline form.

Q. 19. Will you state whether or not the quinine sulphate is in suspension in such a preparation?

A. It is.

Q. 20. As bearing on the question of disguising the bitter taste of the quinine in the mouth, what effect does the cocoa have in such a preparation when in the mouth of the person taking it?

A. I consider it acts through its flavor and the cloying effect of cocoa would have on the glands of the mouth.

Q. 21. Will you state whether or not chocolate and cocoa are popular flavors?

A. They are.

Q. 22. Can you say whether or not you consider them the most popular flavor?

A. I can only answer that from the general use of chocolate syrup in the soda fountain, and as a drink upon the breakfast table.

Q. 23. Do you know of any other ingredient in such a preparation that could satisfactorily replace the cocoa?

A. No, sir.

(Direct examination closed.)

92 Mr. Bradford, without waiving objections, cross-examines as follows:

Cross-examination.

By Mr. Bradford:

X Q. 24. Do you know when the particular bottle of syrup, quinine and chocolate, referred to in your direct examination, was manufactured?

A. I do not. I could tell you by looking up the records.

X Q. 25. Is it a comparatively recent manufacture?

A. Comparatively.

X Q. 26. Or one of your first?

A. It would be comparatively recent, as far as time goes. It would be over a year old, at least.

X Q. 27. I note on the label the following:

"Each dose should be followed by water, for if allowed to remain in the mouth too long the bitter taste of the quinine will be developed."

What does this mean?

A. It means that some of the syrup will remain in the mouth, and the quinine sulphate will slowly dissolve, developing a bitter taste.

X Q. 28. For what purpose is yerba santa used in such preparations?

A. For disguising the taste of quinine.

X Q. 29. For what purpose is the syrup of chocolate or cocoa used?

A. It is used as a pleasant vehicle, also to assist in the disguising of the quinine.

X Q. 30. What part does it play in disguising the taste of the quinine?

A. It is pleasant and a syrupy chocolate flavor, and its action on the glands of the mouth tends to cloy the taste.

X Q. 31. Is it not a fact that yerba santa completely disguises the taste of the quinine without the chocolate?

93 A. It does it very well. I cannot say completely.
X Q. 32. Does the chocolate do anything more than any other syrup in giving a distinctive flavor?
A. I think it would.
X Q. 33. Would not peppermint, orange, lemon, vanilla or many other syrups perform a like function if used?
A. Not to the extent chocolate would, in my opinion.
X Q. 34. Why not?
A. Because chocolate cloys the taste more.
X Q. 35. Do not other syrups do the same?
A. Not to that extent.
X Q. 36. If the taste of the quinine is disguised by the yerba santa, why could not any other common syrup be used as a flavoring?
A. Because yerba santa has been reported to have a peculiarly cloying effect on the glands of the mouth
X Q. 37. Did you ever attempt to make a syrup preparation of quinine sulphate with other flavoring syrups than chocolate or cocoa?
A. No, sir.
X Q. 38. What other liquid medicinal preparations can you name using chocolate or cocoa as the flavoring syrup?
A. None that I know of.
X Q. 39. Your reference to the popularity of this syrup, then, does not refer to medicinal preparations?
A. No, sir. May I have read the previous question and answer?

(The stenographer read the following question and answer:

"Q. What other liquid medicinal preparations can you name using chocolate or cocoa as the flavoring syrup?
A. None that I know of.")

The Witness: I thought you said syrup, not "medicinal."
94 I would have to answer that differently, then.
X Q. 40. As a flavoring syrup, I said.
A. I thought you said medicinal syrup.
X Q. 41. You may correct your answer.
A. I will change my answer on that.
X Q. 42. You may correct it.
A. Cocoa Emulsion Lilly.
X Q. 43. That is the only one?
A. That is all I can think of.

WILLIAM HAYWARD STONE.

CHARLES E. MCNULTY, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Charles E. McNulty; age, 32; residence, Brasher Falls, New York; occupation, traveling salesman for William R. Warner & Company. I have been in their employ since April 1, 1907.

Q. 2. Have you acted in that capacity all through?

A. I have not. I acted in that capacity, I judge, for about thr years. I cannot give you the exact date. At the end of that time took the position of assistant sales manager, which I held up to abo the middle of October, 1913, at which time I was employed as a sistant to the manager, and placed in charge of some of the branche That employment continued until July, 1914, at which time I too up the position of assistant sales manager again, continuing unt January 1, 1915. From that time to the present I have been oc cupying the territory of Central New York, selling goods.

Q. 3. Were you ever in the retail drug business; and if so, whe and where?

95 A. I was at Norwood, New York, from March, 1903, t April, 1907.

Q. 4. From your experience in the drug business, give your opin ion as to whether a druggist can push a given drug or a preparatio and create a market, more or less?

A. I know that he can take any certain product and create a busi ness for it.

Q. 5. Among what customers or persons could he create a market?

A. Among the general public,—laity.

Q. 6. How far could he get his doctors interested?

A. He could create a market for the product by showing it to his physicians or by demonstrating its value to the laity where there is a demand for a preparation of this kind.

Q. 7. How often do your salesmen call on their retail druggist cus tomers a year?

A. Approximately four times.

Q. 8. What percentage of the druggists in any given territory do they solicit?

A. They have instructions to visit them all.

Q. 9. As Assistant Sales Manager in the defendant company, did you have to do with teaching or instructing these salesmen in the proper method of selling goods for the house and the policy of the house with respect thereto?

A. I did.

Q. 10. What did you teach them as to the particular question of selling goods which came into direct competition with like goods of a competitor?

A. I taught them to sell our preparations on the merits of the various preparations, not to mention a competitor at all, to be strictly honest and adhere to the truth at all times. That was the basis.

Q. 11. If one of your salesmen should in any way suggest to a retail druggist that he could supply a given article of Warner in the place of a similar article supplied by another house, when the

96 latter was called for by a prescription or over the counter, would he be in your opinion an honest salesman?

A. He would not.

Q. 12. If such conduct on the part of a salesman had been brought to your attention as assistant sales manager, what would you have done?

A. I should inquire of him the circumstances connected with it and inform him that it was not the policy of the house to continue practices of that kind and warn him against repetition, with the penalty of being discontinued.

Q. 13. That is, dismissed?

A. Yes.

Q. 14. Has it ever been brought to your attention that any of your salesmen had been guilty of such misconduct except so far as you have heard it in this case?

A. No.

Q. 15. State whether or not you ever, acting for your house, authorized or suggested to any of your salesmen that he should do that thing?

A. I positively did not.

Q. 16. State whether or not you have ever, acting for your house, authorized or suggested to any retail druggist to dispense Quin-Coco S. & H., when Coco-Quinine, Lilly, was called for by prescription or over the counter?

A. I have not.

Q. 17. Have you ever had personal knowledge of a retail druggist doing that thing except so far as you have heard it in this case?

A. No.

Q. 18. How many items were there on the list which the salesmen you instructed were to sell?

A. Embracing the various firms, and considering the possible duplication of labels in various sized packages and so forth, I would say sixteen or eighteen thousand.

Q. 19. In teaching your salesmen, did you single out the Quin-Coco particularly?

97 A. I did not.

Q. 20. Please state the territory covered in the last five or six years by Warner's salesmen whose names have been mentioned in this case, Nottingham, Moon, Rogers and Starring?

A. The territory covered by Mr. Nottingham has been Georgia, Eastern and Central parts of the State, and the Western, excepting a portion immediately adjacent to Atlanta. Without a map that is as definite as I can give it.

In the case of Mr. Moon he covers the State of Virginia.

Mr. Rogers has covered the Eastern half of Michigan, but is now occupying the Western half since a year or two.

Starring has occupied the Eastern half of Michigan for two or three years.

Q. 21. Can you give me the respective territories into which the Southwestern and Gulf States are divided and the men who work them?

A. Approximately; Mr. Richards has the southern section of Texas, including the cities of Houston, Galveston and San Antonio, and some considerable outside country territory in Texas.

Mr. J. E. Jones covers the city of New Orleans and the southern section of Mississippi as well as Mobile, Ala.

Mr. McCarthy covers southern Alabama.

Mr. George Plaissance covers the northern section of Alabama.

Mr. W. H. Doster covers Florida. He had at one time a small section of southern Georgia.

Mr. Du Vall occupies the western Tennessee territory.

Mr. Gonzales covers Arkansas.

Mr. Wilkins occupies the northeastern section of Texas.

Q. 21½. Is the blue list still in use by the salesmen?

A. I could not say.

98 Q. 22. On this list are there any articles distributed by Warner against which there does not appear *on* the other column any competing article?

Objected to by Mr. Bradford on the ground that the list shows for itself.

The Witness: I think there are.

Q. 23. Do you know Alva L. Kelton, who testified in this case and who was formerly a Warner salesman?

A. I have known him.

Q. 24. Do you know whether or not he was discharged from the employ of this company?

A. I know he was discharged from the employ of William R. Warner & Company.

Q. 25. Who personally gave him his discharge?

A. I did.

Q. 26. At a personal interview?

A. Yes.

Q. 27. For what reason did you discharge him; state only facts which were admitted to you by him face to face; that is, something with which you charge him and which he admitted he had done?

A. The cause of his dismissal was that he, while being a married man with a family, had met and promised to marry a lady from Texas.

Q. 28. State whether or not he admitted those facts to you face to face?

A. He did.

Q. 29. State whether or not he admitted to you that the date had been fixed for his marriage to this lady from Texas.

(Objected to as leading, immaterial and irrelevant.)

(Question withdrawn.)

99 Q. 30. State whether or not he made any admission to you as to whether or not a date had been fixed for his marriage to the lady from Texas?

(Objected to as entirely immaterial and irrelevant and incompetent.)

A. He did admit the date had been set.

Q. 31. What did he say he had done, if anything, just before the date fixed?

(Same objection.)

A. I cannot recall just what he said he had done. In order that I may get the question clearly, do you mean what he told me he had done?

Q. 32. Did he say anything to you about how he had avoided turning up on the day he promised to marry the lady from Texas?

(Same objection.)

A. He admitted having written a letter to her stating that because of a message which had been received it would be impossible for him to meet her on the appointed day, that he found it necessary to go to Chicago to visit his mother who was ill, and that they would meet later.

Q. 33. What do you mean by "meeting" in these two uses of that word?

(Same objection.)

A. I mean that they would be married.

Q. 34. Upon his admitting these facts to you, what did you do?

(Same objection.)

A. I found it necessary to discontinue his services with the firm?

Q. 35. On the spot?

A. On the spot, yes.

Mr. Rawle: Direct-examination closed.

100 Mr. Bradford, without waiving objections, cross-examines as follows:

Cross-examination.

By Mr. Bradford:

X Q. 36. Did Mr. Kelton mention Quin-Coco in relation with the lady from Texas?

A. I don't recall that he did.

X Q. 37. Did he say anything about Quin-Coco in connection with this subject?

A. I cannot recall that he did.

X Q. 38. Do you think Kelton to be a truthful man?

A. Other than for the testimony I have previously given—I want to change that. No.

X Q. 39. Do you mean that you do not believe what he said in regard to the lady from Texas?

A. No, I do not mean that.

X Q. 40. Please explain what you do mean?

A. I mean that in making arrangements to marry this lady from Texas, when he had a wife with whom he had been living, that he was not truthful.

X Q. 41. A moment ago, in answer to a previous question, you started to say that other than as to the matter concerning which you

had just been testifying, then changed your answer to "No." Do you mean outside of this particular matter that Mr. Kelton, in your judgment, is a man worthy of belief?

A. I would not say so.

X Q. 42. Please state what other acquaintance you have had with Mr. Kelton, I mean aside from your visit to him on the occasion you have testified about?

A. None.

X Q. 43. Were you familiar with his reputation as a salesman?

A. Yes.

X Q. 44. How was he regarded as a salesman?

A. The question is not clear to me.

X Q. 45. Was he regarded as a man who followed the policy of the house in selling goods?

101 A. He was not.

X Q. 46. In what respect did he not?

A. Because he did not live within the moral meaning of their instructions to him while selling goods.

X Q. 47. Were his selling methods in harmony with the policy of the house?

A. I cannot say.

X Q. 48. Did you ever hear anything derogatory to Mr. Kelton's character or reputation other than the one incident to which you have testified?

A. Yes.

X Q. 49. While he was in your employ?

A. Yes.

X Q. 50. How long before he was discharged?

A. Two days.

X Q. 51. Would you mind telling what this report was?

A. The report was made to me by the manager of our St. Louis office that it had been intimated to him that Mr. Kelton had rather sporty tendencies, and that the case which I have heretofore mentioned might tend to prove the intimation.

X Q. 52. Do you regard the trait mentioned, that is, sporty tendencies, as wholly incompatible with honesty in business dealings?

A. I feel they have a tendency to impair honesty.

X Q. 53. Other than Mr. Kelton's so-called sporty tendencies, do you know of anything derogatory to his character or reputation?

A. I do not.

X Q. 54. As a business man?

A. I do not.

X Q. 55. Did the house ever find anything dishonest in his reports or his other dealing with them?

A. If so, they never called my attention to them.

X Q. 56. In instructing salesmen in their duties, what equipment were they given?

A. In the instruction of salesmen, what equipment were

102 they given? I am afraid you will have to make that a little more clear to me, if you please?

X Q. 57. Did you use in your instructions any printed matter or

furnish them with any printed matter to enable them to remember your instructions?

A. Yes.

X Q. 58. What?

A. The "Salesmen's Confidential and Manual."

X Q. 59. Anything else?

A. That constituted the regular equipment and instructions.

X Q. 60. Was not the so-called "Blue List" also furnished?

A. Not as a regular part of the equipment, no.

X Q. 61. Under what circumstances was that furnished?

A. That was not furnished as a part of the instructions under any circumstances.

X Q. 62. Under what circumstances was it furnished?

A. It was furnished in the instance of our employing salesmen, more particularly those who had a lack of previous pharmaceutical training.

X Q. 63. Did you ever instruct any salesmen specifically in reference to pushing Quin-Coco?

A. I did not.

X Q. 64. Did you ever travel with any salesmen when they were selling Quin-Coco?

A. I have traveled with many of the Warner salesmen and Quin-Coco always constituted a portion of the line which we were representing.

X Q. 65. Did you personally sell Quin-Coco?

A. Yes.

X Q. 66. Can you give the names of any customers to whom you sold Quin-Coco?

A. I don't think I can.

X Q. 67. In what territory, if you recall, did you sell Quin-Coco?

103 A. As far as I know, I have sold some of it in the many territories that I have traveled in, which is a large portion of the United States, all but the extreme western.

X Q. 68. As I understood your testimony, the Warner salesmen are expected to call on all of the retail druggists in their territory approximately four times a year. Does this keep them pretty well occupied?

A. I believe it does.

X Q. 69. Do they have very much spare time?

A. Not if they do that, with the other work that is allotted to them.

X Q. 70. What other work is allotted to them?

A. Calling on physicians.

X Q. 71. What proportion of their time is devoted to such work?

A. It varies in the various territories.

X Q. 72. Approximately, as an average?

A. I would say a quarter.

X Q. 73. What salesmen, for example, use a quarter of their time in calling on physicians?

A. Mr. Moon.

X Q. 74. Any other?
A. I believe there are?
X Q. 75. Can you name any?
A. I would say the condition is quite general, varying to such an extent that it would be impossible for me at this time to give you any reliable information on it.
X Q. 76. Do you refer to dispensing physicians or prescribing physicians?
A. I refer to both.
X Q. 77. About what proportion of the time would be devoted to each class?
A. I have never known any special allotment of time devoted to each class.
X Q. 78. Is your house doing considerable detail work at this time?
A. More or less, yes.
104 X Q. 79. Is it more now or less than a year ago?
A. I have no knowledge of any change.
X Q. 80. Is it more now or less than it was three years ago?
A. I would say about the same, I think.

(Redirect examination, without waiving objections, by Mr. Rawle.)

Redirect examination.

By Mr. Rawle:

R. D. Q. 81. When the complainant's proofs were taken in this case in the South, you joined counsel for the defendant at Memphis, didn't you?
A. I did.
R. D. Q. 82. And continued until that trip in the South was finished at Atlanta some three weeks later?
A. Yes.
R. D. Q. 83. State whether or not the salesmen of the Lilly Company joined the party taking the testimony at some point within the territory of such salesmen?
A. At each point I recall some salesmen for Eli Lilly & Company having been present.
R. D. Q. 84. State whether or not a number of the Lilly salesmen, to your knowledge, collected in New Orleans, and spent two or three days there with the party?
A. I believe that a portion of the Lilly salesmen force did assemble at New Orleans and spent a portion of their time with the party, either collectively or individually.
R. D. Q. 85. Was Kelton connected with St. Louis as a center, or Philadelphia?
A. Mr. Kelton covered the territory over which the St. Louis office has jurisdiction.
R. D. Q. 86. And was he, ordinarily speaking, under your jurisdiction?

A. Yes.

R. D. Q. 87. Had you seen him before you discharged him for any length of time?

A. I had not.

105 R. D. Q. 88. Had you ever seen him before that incident arose?

A. I had not.

R. D. Q. 89. Do you have jurisdiction as assistant sales manager over the St. Louis end of the business?

A. Yes.

R. D. Q. 90. Was this special discharge of Kelton, that you have related here, a special assignment from the company to you, to attend to the matter?

A. Yes, sir.

Recross-examination.

(Recross-examination without waiving objections, by Mr. Bradford.)

By Mr. Bradford:

R. X Q. 91. During the taking of complainant's depositions, while you were accompanying defendant's counsel, were the complainant's salesmen present in the room while the witnesses were being examined?

A. No, as far as I recollect. I do remember one instance, but I cannot state specifically which instance.

R. X Q. 92. On this trip do you recall being in Houston, Texas?

A. Yes.

R. X Q. 93. Do you recall while being in Houston a witness by the name of William O. Schuler, who introduced as an exhibit of your product a purchase from the Hardy Street Drug Store, R. H. Fonville, proprietor?

A. Do I remember of him presenting an exhibit?

R. X Q. 94. Do you?

A. I do.

R. X Q. 95. Do you recall visiting Mr. Fonville at his store at the close of the deposition?

A. Yes.

R. X Q. 96. Do you recall what you said to Mr. Fonville on that occasion?

(Objected to as not proper recross-examination, and as irrelevant.)

106 A. I do not recall that I made any statements, no.

R. X Q. 97. Do you recall what Mr. Fonville said to you on that occasion?

(Same objection.)

A. One of the things.

R. X Q. 98. Do you still insist that you never had any informa-

tion from any druggist that he was substituting your product when the Lilly product was called for?

A. Yes, sir.

By Mr. Rawle:

R. X Q. 99. I meant to ask you whether you had heard of any passing off by druggists, and excluding from my question any such information that you might have had from the evidence of this case. Did you so understand it?

A. I did.

By Mr. Bradford:

R. X Q. 100. Was Mr. Fonville a witness in this case?

A. I cannot say. To my knowledge he was not.

Mr. Bradford: It is admitted by counsel for the complainant that during the taking of plaintiff's depositions the salesmen in the territory adjacent to New Orleans were called in for the purpose of a conference and to obtain from them such information as they might be able to give to assist counsel in obtaining witnesses and taking proofs. Those salesmen were not, however, in the witness room during the taking of any depositions.

CHAS. E. McNULTY.

JAMES DAVID KING, called as a witness on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. Give your name, age, residence and occupation?

107 A. My name is James David King; age 41 years; residence, Haddonfield, New Jersey; occupation, pharmacist and chemist.

Q. 2. In whose employ now are you and how long have you been there?

A. With Henry K. Wampole & Company. I have been there 18 years as pharmacist and chemist.

Q. 3. Had you a chemical education?

A. Graduate in 1898 of the Philadelphia College of Pharmacy. I went with Wampole in 1899.

Q. 4. State whether or not that house has put out a chocolate quinine mixture, and if so when?

Objected to by Mr. Bradford as immaterial, irrelevant and incompetent.

The Witness: It was listed in our pharmaceutical list which was gotten out in April 1906.

Q. 5. I hand you a bottle which has been offered in evidence. State if that is one of your products?

Same objection.

A. That is one of our products.

Q. 6. What ingredients does it contain, as shown by the label?

Same objection.

A. Quinine sulphate, yerba santa and chocolate.

Q. 7. State whether or not it has been listed and sold by your house ever since?

Same objection.

A. Yes, and sold ever since.

Q. 8. Has it been marketed and where?

Same objection.

A. It has a market I guess all through the United States, wherever our trade extends to.

Q. 9. Has it always been made of those same ingredients?

Same objection.

108 A. Always, yes.

Q. 10. In preparations of this sort, with quinine and chocolate or cocoa, with other suitable ingredients, what part does the chocolate or cocoa play in respect of disguising the bitter taste of the quinine?

A. Without chocolate or cocoa products, you would have an entirely different preparation.

Q. 11. Assuming that you have chocolate or cocoa products, does it play any part?

A. It certainly disguises it, yes. Originally in the cocoa there are tannins present, but through the fact that so much starch is present, it suspends uniformly, and the great thing is to prepare that syrup of chocolate. The thoroughness of the emulsion, the fact that the starch makes a homogeneous preparation, with suspensive qualities, of course holds the quinine so intimately that it masks the taste.

Q. 12. Will you state whether or not cocoa and chocolate are popular flavors?

A. I should think so, yes,—used at all soda fountains.

Q. 13. Do you know of any other ingredients that might take the place of chocolate or cocoa in connection with quinine to make up a tasteless syrup of quinine with equally satisfactory results?

A. I do not know of any syrup that you could suspend quinine in as you can with a syrup of chocolate or cocoa.

Q. 14. Have you any opinion as to whether a retail druggist can, if he chooses, push the sale of any particular drug or preparation and make a market for it?

A. I suppose he can, yes.

(Direct examination closed.)

Cross-examination.

By Mr. Bradford:

X Q. 15. What other liquid medicinal preparations do you know of that are colored and flavored with cocoa?

109 A. Off-hand I cannot think of any different product outside of that in my practice. That tablet work of course is used a great deal.

X Q. 16. When did you first learn of any liquid preparation of quinine sulphate colored and flavored with cocoa?

A. When this was brought out, in my note book I found away back in 1903 I made preparations of such a product. I don't know if it was marketed at that time. It was under a different title.

X Q. 17. Did you ever hear of Lilly's Coco-Quinine?

A. I have heard of Lilly's Coco-Quinine.

X Q. 18. Did you ever hear of Lilly's Coco-Quinine before you made up that preparation?

A. I don't know. I have not any recollection of it.

X Q. 19. How did you happen to make up your first preparation?

A. At the demand of the superintendent.

X Q. 20. Who was the superintendent?

A. Mr. W. E. Danner.

X Q. 21. Where is Mr. Danner now?

A. Mr. Danner has charge of our Canadian plant.

X Q. 22. Where is that located?

A. Perth, Ontario, Canada.

X Q. 23. For what purpose is the Yerba Santa used?

A. That is used on account of the tannin constituents.

X Q. 24. For what purpose?

A. It also helps to disguise.

X Q. 25. To what extent does it help to disguise?

A. Just to the extent of palatability, just to the extent that product of ours is. Some people claim it is not entirely disguised, but we always thought it was fairly well disguised by the conjunction of those two products.

X Q. 26. To what two products do you refer?

A. To the chocolate syrup, which of course has Yerba Santa, soluble constituents which of course contain tannins, that give it a flavor and help to disguise it. That is a part of the syrup.

110 That is made into the syrup of course all in together.

X Q. 27. Have you made up a preparation composed of simple syrup plus the cocoa, plus the quinine, at the rate of 2 grains per teaspoonful and tested it as to its bitterness?

A. No.

X Q. 28. Do you know whether such a preparation would be bitter?

A. I don't know. I have never tried that, not just the simple syrup.

X Q. 29. You never have tried then, any preparation without the Yerba Santa?

A. I cannot definitely tell if I have or if I have not.

X Q. 30. Have you ever made any such preparation?

A. I did not bring my note book along. I suppose I might have seen right there just what the early experiments were.

X Q. 31. Have you ever tried any preparation containing Yerba Santa without the chocolate or cocoa?

A. No, I have never seen any preparation without——

X Q. 32. Have you ever tried to use any preparation without the cocoa by substituting some other flavoring extract or syrup?

A. I have tried plain chocolate and I have tried cocoa and chocolate.

X Q. 33. With what results?

A. The chocolate by itself does not do as well as if you mix more cocoa and more chocolate. You always make an emulsion which is more uniform and which does not separate.

X Q. 34. As I understand you, you cannot testify of your own knowledge whether a preparation containing Yerba Santa and some other syrup than the chocolate or cocoa would be an efficient liquid quinine preparation?

A. No, I have no experience that way. Off hand, of course, the fact of such a product would indicate that we could not uni-
111 formly suspend quinine in that kind of a mixture. You must have some product—I suppose you could make a starchy product that could possibly suspend, but I do not know, I have not any knowledge.

X Q. 35. You merely followed the instructions of your superintendent?

A. Yes, I was told to make up a chocolate preparation which would suspend quinine in it.

X Q. 36. Were you given a sample of any other product to follow when you made this up?

A. Not that I recall, no.

JAMES D. KING.

Adjourned until Saturday morning, November 27th, 1915, at 9.30 a. m.

Philadelphia, Pa.,

Saturday, November 27, 1915--9.30 a. m.

Present: Parties as before noted.

CHARLES H. LA WALL, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

A. Charles H. La Wall. Forty-five years of age. Residence, 4912 Walnut Street, Philadelphia, Pa. Occupation, analytical chemist and pharmacist. My office is at No. 39 South 10th Street, Philadelphia, Pa.

Q. 2. State at what college you graduated, and your subsequent work.

A. I graduated at the Philadelphia College of Pharmacy in 1893. During the time that I attended college, and subsequently, until
112 1904, I was employed by Smith, Kline & French Company, wholesale druggists and manufacturing pharmacists of Philadelphia, and during that time I was connected with various departments, principally the analytical chemical department. In 1901 I commenced to teach pharmacy in the Philadelphia College of Pharmacy and occupied the position of instructor until 1906. From that time to the present I have been Associate Professor of Pharmacy. In 1904 I left the employ of Smith, Kline & French Company and became associated with Dr. Henry Leffman, the Philadelphia chemist of high reputation, and three years later succeeded to his practice, he retiring from active work. Since 1904 I have been a chemist of the Department of Agriculture of Pennsylvania, working under the Dairy and Food Division. From 1907 until 1912 I was a per diem chemist in the United States Department of Agriculture engaged in the examination of drugs entering the Port of Philadelphia. I am at present consulting chemist of the State Health Department of Pennsylvania, and have been since 1907. I am also chemist to the State Pharmaceutical Examining Board of Philadelphia. Since 1907 I have been a member of the Revision Committee of the National Formulary published by the American Pharmaceutical Association. Since 1910 I have been a member of the Revision Committee of the United States Pharmacopœa, and have charge of the sub-committee concerned with the standardization of the inorganic chemicals.

Q. 3. Have you examined medical and pharmaceutical works and journals for the purpose of finding preparations of chocolate or cocoa with quinine or cinchona? If you have, please produce such literature on the subject as you deem best?

A. I have, and have the books with me arranged in chronological order.

From "New Remedies" by Robley Dunglison, M. D., published by Blanchard & Lea, Philadelphia, 1851. On page 631, among the typical prescriptions given to illustrate the methods to be fol-
113 lowed in administering drugs, with the signature sign indicating the prescription, is the following prescripton:

Quin. Sulphate, ¼ gr.
Chocolate, 6 grains.
Sugar of Milk, 2 grains.
Mix and form a powder."

1861. This is "Allgemeine Pharmacopœ" by Dr. F. L. Strumpf. Publishers, C. F. Winters, Leipzig and Heidelberg.

One page 453 is a preparation entitled "Pasta cacao, cum. china extractor." Translated: "Cocoa paste, a chocolate paste with cinchona extract." The synonym is given, "chokolanda chinæ," which means "chocolate cinchona."

"Kakas Teid, zuker, je 12, china extrakt 1th gehorig gemischt und in tafeln gethilt."

I translate this as follows:

"Cocoa mass and sugar, each 12 parts, cinchona extract 1 part. Mix thoroughly and divide into tablets."

The American Journal of Pharmacy, vol. 40, page 517, by Merihew & Son, printers, 1868, third series, vol. 16.

"On Syrup of Chocolate as a Vehicle for Quinine.

SIR:

At the suggestion of Dr. C. R. Prall, of this city, I have prepared a syrup of chocolate as an excipient for the administration of quinine, and find it to answer the purpose so admirably and to disguise the taste of the quinine so perfectly, that I send it to you for publication, although our experience with it so far has not been satisfactory, as in one case in which it was given, the child, a girl of 14 years, took xxxii grs. of quinine in 48 hours, (combined in this syrup) without any effect for which it was given, viz., chills and fever. It was supposed from this that the chocolate so affected the quinine as to destroy its anti-periodic properties, so the physician discontinued its use, and gave the sulphate of quinia in pills.

114 Since then, I have observed that a very small quantity of acid *sulph.* aromat., added to a solution of quinine in the syrup develops the bitter of the quinine intensely, the suggestion then arises, would it not be advisable to administer a small quantity of the acid or lemonade after the quinine and chocolate, to render it soluble in the stomach. None of the physicians I have mentioned it to have had an opportunity to try it since suggested, but will do so on an opportunity presenting. I advance the idea and let the profession follow it up, for it is decidedly the best excipient yet known for disguising the taste of quinine, and if it can be brought into general use, will be invaluable as a vehicle in the administering of quinine to children.

I prepare the syrup of the strength of two ounces of cake chocolate to the pint, shave the chocolate, mix it with the sugar and proceed as for simple syrup, but it is necessary to be very careful, or it will burn. One party that has tried making the syrup, has had difficulty in keeping it, as it will ferment. I have had no trouble in that way as yet. I use the full quantity of sugar and let it boil for five or ten minutes, and strain before it is cold.

Yours, &c.,

JAS. KEMBLE."

"The Druggists' Circular and Chemical Gazette," volume 15, 1871, New York; L. V. Newton, M. D., publisher and proprietor. January, page 27:

"Quinquina-Chocolate. Dr. Heuze, in Les Mondes of June last says that he has succeeded in preparing an extract of Peruvian Bark so as to possess no unpleasant bitter taste, and this is mixed with pure chocolate paste, so as to form a readily portable, and at the same time an agreeably dietetic medicine."

The same journal for the following year, 1872, February, page 40:

115 "Cocoa or chocolate, if the quinia sulphate is not in large proportion, conceals the taste to a great extent, provided it be used of a sufficient strength as in the solid or semi-fluid state."

This paragraph is taken from a lengthy article in which the subject of disguising the bitterness of the cinchona alkaloid is discussed very fully. The article is quoted from Dr. Purnell of Maryland, as appearing in the "American Journal of Pharmacy."

"A Practical Treatise on Materia Medica and Therapeutics," by Roberts Barthelow, third edition, revised, D. Appleton & Company, New York, 1881, page 147:

"A sufficient dose of quinia may easily be enclosed in a chocolate caramel."

"A Treatise on Therapeutics" by H. C. Wood, M. D., LL. D., J. B. Lippincott & Company, Philadelphia, 1883:

"A dose of the powder (referring to quinine) is best covered by chocolate or by licorice."

"Materia Medica and Therapeutics" by Charles D. F. Phillips, M. D., P. Blakiston & Sons Company, Philadelphia, 1886, page 375:

"Quinine is now sold in definite doses in a wafer, or wafer and chocolate, or in capsules; the chocolate covers the taste."

"Hand Book of Materia Medica, Pharmacy and Therapeutics" by Samuel O. L. Potter, M. A., M. D., P. Blakiston & Sons & Company, Philadelphia, 1887, page 154 (it must be the first edition, it does not give any edition):

"The persistently bitter taste of quinine and its salts is best obviated by administering them in pill form made with glycerine as an excipient, or by using licorice, eriodyction or chocolate to cover the taste, if given in solution or powder."

"The Diseases of Infancy and Childhood" by L. Emmett Holt, A. M., M. D.; Applenton & Company, New York, 1897, page 1083:

116 "This is in the administration of quinine to children":

"When the dose required is not large, as in the milder cases, the lozenges of the tannate of quinine combined with chocolate answers the purposes admirably, for these are so nearly tasteless that children will take them without difficulty."

Mr. Rawle: Defendant offers the foregoing works and journals in evidence as to the parts read and places the volumes at the disposal of the plaintiff's counsel for further examination and cross-examination.

Mr. Bradford: Complainant objects to the introduction of the

books and all evidence based thereon, except in so far as it may relate to the product and questions involved in this suit.

Q. 4. What have you to say about the professional standing of Dr. Roberts Marthelow and Dr. Horatio C. Wood, whose works you have produced and quoted from?

A. They are both very eminent in the profession of medicine in Philadelphia, or have been. Dr. Barthelow is dead and Dr. Wood has retired from practice.

Q. 5. How about Dr. Dunglison?

A. That is too far back for me to answer, except that these books are in the library as works of reference.

Q. 6. Is not Dr. Dunglison author of a number of medical works?

A. I don't know. I am not a physician.

Q. 7. Are you familiar with the preparations known as "Coco-Quinine Lilly" and "Quin-Coco, S. & H."?

A. I am only from the standpoint of having made analyses of both to ascertain their general properties and conformity to claims made upon the label.

Q. 8. State whether or not you find that the two preparations respectively conform to the claims made on their labels?

117 A. I find that they do essentially.

Q. 9. Dr. John M. Francis, a witness called for the plaintiff in this case, has testified in regard to "Coco-Quinine Lilly" as follows:

"X Q. 13. Basing your answers upon such knowledge of 'Coco-Quinine Lilly', please say whether, if the quinine sulphate is not in solution at the time of combining the ingredients as you understand them, solution of the quinine sulphate would follow such combining?

"A. I believe that the greater portion of the quinine sulphate would exist in the preparation in solution."

What have you to say about this?

A. In the specimens which I examined, the greater portion of quinine sulphate was not in solution, but was in suspension, as shown by a microscopic examination of the preparation in which the crystals of quinine sulphate were plainly visible, and were capable of being identified by appropriate tests.

Q. 10. How far did you find this to be true of "Quin-Coco, S. & H."?

A. Microscopically, the two specimens were indistinguishable.

Q. 11. As to the quinine sulphate?

A. Yes.

Q. 12. State whether or not in your opinion the cocoa in these two preparations plays a functional part therein, giving your opinion for your belief?

A. It does, because the cocoa possesses suspending qualities which enables a more permanent preparation to be made, and because it is of a characteristically agreeable flavor, which would be acceptable to a large number of the persons who would be called upon to take it.

Q. 13. What is the consistency of the preparations as produced by the cocoa?

A. It makes it thicker, and gives it what might be called
118 sheathing properties in obscuring the taste of anything that might be incorporated with it.

Q. 14. How would such sheathing properties act?

A. By obscuring or deadening the sense of taste, and by preventing substances from being brought into solution in contact with the glands of taste. This is a mechanical function and not a chemical property.

Q. 15. Is there any particular word which is sometimes used to designate the consistency?

A. Yes, the word viscosity would be correctly applicable to such a preparation.

Q. 16. What does colloidal mean? State also whether that word applies to the mixtures?

A. Colloidal means opposed to crystalline in character. Colloidal substances, among which are starches and gums, have a marked property as suspending agents. The starch in the cocoa would communicate some of this colloidal character to a preparation in which it was used.

Q. 17. What have you to say of chocolate or cocoa as a popular flavor?

A. In my experience, it is one of the most universally acceptable flavors.

Q. 18. State whether or not in your opinion any other ingredient could be substituted in such a preparation for the cocoa and give as satisfactory a result?

A. In my opinion, there could not.

Q. 19. What can you say about coloring chocolate preparations? Is it feasible?

A. Chocolate has a brown color, which is an integral property of the substance. The possibilities of modifying a brown color are limited, and any attempt in that direction I believe would result in making a preparation which would be less attractive in appearance.

Q. 20. How is the color in chocolate developed?

A. By the roasting of the raw chocolate bean, the color and flavor are simultaneously produced.

Q. 21. How far is the same true of coffee, both as to the
119 coloring in the coffee preparation and as to the roasting?

A. Coffee and chocolate are alike in that respect, that in the raw or unroasted state they possess neither an attractive flavor nor an attractive color, while in the roasted state they possess both.

Q. 22. State whether or not chocolate or cocoa in your opinion is the most suitable ingredient for this preparation, and give your reasons for your opinion?

A. Cocoa, because it contains less fat than chocolate. The excess of fat in the latter preparation would make it difficult, if not impossible, to make a satisfactory pharmaceutical product.

Q. 23. State the difference between chocolate and cocoa?

A. Cocoa is chocolate from which a portion of the fat has been

removed by mechanical means. Chocolate contains about 50 per cent. of fat. Cocoa contains from 15 to 25 per cent. of fat.

Q. 24. You have said that you have for some time been a member of the Committee of the American Pharmaceutical Society on the National Formulary. Please explain what the National Formulary is and by what authority or agency it is prepared and published?

A. The National Formulary is a book published under the authority of the American Pharmaceutical Association, the national association of pharmacists. The Committee of Revision of the National Formulary is appointed by the American Pharmaceutical Association for the purpose of bringing the National Formulary up to date, dropping old substances and introducing new substances, and revising the texts of such substances as are retained. The Committee, which consists of fifteen members, carries on its work largely by correspondence, with occasional meetings of all or part of the Committee for personal conference. Such personal conferences occur about once a year, the balance of the work being carried on
120 by correspondence, and the minutes of such personal conferences being made a matter of record.

Q. 25. What have you to say as to the manner in which new drugs or formulæ or preparations become known and ultimately find their way into the National Formulary?

A. The National Formulary Committee is called upon to provide standards for preparations in order that uniformity in such preparations may be produced throughout the whole of the United States. Many formulas find their way into the National Formulary after the preparations which they represent have originally been proprietary in character, and have subsequently been made by different manufacturing houses, not always working by the same methods. The necessity for standardization then becomes important, and the preparation is admitted.

Q. 26. How far has this been the history of the growth of the National Formulary?

A. It has *has* been the history of a number of the individual preparations of the National Formulary, of which I might mention as an example essence of pepsin, which was originally a proprietary preparation of Fairchild Brothers & Foster, and still is.

Q. 27. Go on with its history and its growth.

A. This preparation was made not only by Fairchild Brothers & Foster, but subsequently by many, if not all, pharmaceutical manufacturers. The National Formulary adopted a formula for the sake of the uniformity which would be produced of the preparation. Also the "Compound Digestive Elixir" was originally introduced by, I think, the Arlington Chemical Company.

Q. 28. Was it put out by others?

A. Many manufacturers put similar preparations upon the market under different names. The preparation was finally adopted and standardized by the National Formulary Committee.

121 Q. 29. Does this fairly show the growth of the scope of the National Formulary?

A. With regard to a number of the preparations, yes, although the

majority of the preparations are not of a proprietary nature or history.

Q. 30. Can you give some idea of how many probably had proprietary origin?

A. Only in a rough way. I should say that there were at least a dozen. Probably more.

Q. 31. What classes furnish the membership of the American Pharmaceutical Association?

A. Retail and wholesale druggists, chemists, educators, and many others interested in pharmacy or its collateral branches.

Q. 32. Have you ever been a registered pharmacist?

A. I have been a retail pharmacist and am a registered pharmacist under the Pennsylvania law at the present time. I am also a chemist working along pharmaceutical lines and a teacher in pharmacy.

Q. 33. State whether or not the National Formulary Revision Committee, of which you are a member, has ever considered placing in the National Formulary a preparation similar to the preparations here in controversy, Quin-Coco and Coco-Quinine?

Mr. Bradford: Objected to, as *whether* this Committee may have under its consideration can be of no possible value as evidence in this case. Moreover, the preceding questions and answers based upon the National Formulary are thought to have no pertinency herein. However, objection thereto is withheld for the value of the general information in the record.

A. It is, and I have the original bulletins of the Commitee showing the reference in the work of the Committee to such a similar preparation. These bulletins are sent by mail to the various members of the Committee of Revision of the National Formulary and comprehend all the work of the Committee in a form which is available for study by the members.

122 In circular letter No. 20, February 5th, 1910, on page 104, in a list of additions approved unanimously by all members voting, twelve in number, I read verbatim, as follows:

"Vote on Individual Additions.

"1. Additions approved by all members voting (12).
"Syr. quinine with chocolate, —."

On page 465:

"The following articles have been added: —."

Then on page 466:

"Syrup of quinine with chocolate."

This bulletin was a copy of the report of the National Formulary Revision Committee to the American Pharmaceutical Association, dated August 17th, 1911.

I produce a volume, the Journal of the American Pharmaceutical Association, January to December, 1913. On page 169, Exhibit 2:

"Articles for which text is not yet completed by Committee D, reported as unsettled by Mr. Cook, August 9th, 1912. —. Class B, No. 6, syrup of quinine with chocolate."

In the same bulletin, not this last quotation, but in the same bulletin of the National Formulary previously referred to, of August 1911, page 494, No. 61:

"Syrup of quinine and chocolate. Committee B," that being the reference of the Committee to whom it was referred.

This was referred to the whole Committee, of which Beringer was the General Chairman.

In bulletin No. 40 of the Committee on National Formulary, issued January 5th, 1912, in the list of non-pharmacopœal articles used in the formulas of the N. F. for which standards must be supplied, quoting from page 542 of the same bulletin, is included on page 543 the title "cacao preparata," or prepared cocoa.

In bulletin No. 47 of the Committee on National Formu-
123 lary, dated January 27th, 1912, on page 630, heading "Sub-Committee B" next line, "New Formulas":

The following new formulas are yet to be reported:

"No. 9, syrup of quinine with chocolate."

In bulletin No. 62 of the National Formulary, December 5th, 1913, page 997, heading, "Summary of Special Assignments made at Nashville * * * to Mr. Beringer:"

"No. 1, syrup of quinine and chocolate."

Bulletin No. 75 of the National Formulary Committee, August 15th, 1914, page 1202, heading, "List of Preparations admitted to the N. F. 4, No. 1."

Page 1232 of the same bulletin, "Syrupus quininæ et cacao—(No satisfactory formula yet devised)."

That is the history of the preparation in the National Formulary so far as I know.

Q. 34. Can you explain what is meant by the words just quoted by you, "No satisfactory formula yet devised."

A. It means that the sub-committee or individual to whom the preparation was referred for the construction of a satisfactory formula had not been able to combine the ingredients in a way that would make a preparation that would be pharmaceutically satisfactory.

Q. 35. State whether the "Construction of a satisfactory formula" means anything more than the names of the ingredients, and if so, what does it mean?

A. Yes. It means that not only must the names of the ingredients be known, but the precise method of combining those ingredi-

ents must be worked out by actual experimentation. No analysis of the finished preparation will give the information necessary for a satisfactory working formula for the preparation. As an example we can state that eggs, sugar, butter and flour are common ingredients in the making of a cake. You can take those same in-
124 gredients and by *coming them* together in different ways make a number of different kinds of cakes.

Q. 36. Then I understand that "formula" not only includes the idea of the ingredients to be used, but the precise method of making the article out of those ingredients?

A. That is correct. A formula in one sense may be simply an enumeration of the ingredients of a preparation. A working formula such as would be necessary for an authoritative book of standards would include specific directions as to how each step of the combination was to be effected.

Q. 37. Is the working formula of "Quin-Coco" or "Coco-Quinine" known to your Committee?

A. I can only speak of myself and the records of the Committee. So far as I know, they are not.

Q. 38. Is the formula of those two different preparations in the more restricted sense known to you or your committee?

A. The names of the ingredients are known.

Q. 39. From the label?

A. Not altogether.

Q. 40. How far is it possible to take a preparation and by analytical chemistry to ascertain the presence of cocoa and the proportion in which it is present?

A. The analysis of a preparation containing cocoa would not show cocoa as an entity, but would give factors whereby the presence of cocoa or its amount would have to be inferred, and that roughly.

Q. 41. How far is this true of other or many other preparations containing an organic ingredient?

A. That is true of many organic substances both of vegetable and animal origin, because so many vegetable or animal substances contain constituents which belong to the same class, that cannot be separated, that the accurate knowledge concerning the constituents used in a preparation can hardly ever be directly ascertained by analysis.

125 Q. 42. By "belonging to the same class," state whether or not you mean belonging to the same class as is found in other constitutents of the same preparation?

A. As I understand your question, the results of an analysis would give the ingredients found in the finished preparation. Many of those constituents thus found might be common to two or three of the original substances used in the preparation, and others might be modified by some step in the process. Therefore, the detailed statement of the results found upon analysis will never give more than a general idea of the composition of a vegetable preparation of this type.

Q. 43. Refer briefly to the United States Pharmacopœia and state what that is, and who has charge of it?

A. The United States Pharmacopœia is an authoritative book of standards recognized by the Federal and many state laws, which is published by the authority of a convention of delegates from recognized medical and pharmaceutical colleges meeting in Washington every ten years. At the convention is elected by these delegates a Board of Trustees who have in charge the business matters connected with the Pharmacopœia. At this same convention is also elected by these delegates a revision committee to whom is assigned the actual work of revision of the book. This Committee organizes, elects its officers and chairman of sub-committees, makes assignments of the work and carries on its operations both by correspondence and by personal meetings.

Q. 44. How far is the National Formulary authoritative and recognized as such by the United States and some state laws?

A. The National Formulary is recognized equally with the United States Pharmacopœia under the Federal Food & Drugs Act, and in the laws of many states.

Q. 45. Give an instance of how a preparation originally
126 proprietary has found its way into the United States Pharmacopœia?

(Objected to as incompetent, irrelevant and immaterial.)

A. The preparation originally known as cataplasm of kaolin was originally and is still a proprietary preparation known by the name of antiphlogistin. This preparation was manufactured by pharmacists throughout the country, and the necessity for greater uniformity led to its standardization by the Revision Committee of the United States Pharmacopœia.

Q. 46. By whom was it originally put out as a proprietary medicine?

(Objected to as immaterial, incompetent and irrelevant.)

A. By the Denver Chemical Company, I believe.

Q. 47. State whether or not there are other preparations in the U. S. P. which were originally proprietary and then were put out by a number of other houses, and then standardized?

(Same objection.)

A. There are.

Q. 48. Can you give an idea how many? A great many or a few?

A. I don't know exactly how many. I should say at least ten or twelve.

Q. 49. What is theobroma?

(Objected to on general principles.)

A. Theobroma is a generic name of the plant from which chocolate is obtained. It is also applied to the substance "chocolate" by some writers.

(Direct examination closed.)

127 (Mr. Bradford, without waiving objections, cross-examin as follows:)

Cross examination.

By Mr. Bradford:

X Q. 50. I understood you to testify that you had analyzed bo complainant's product known as "Coco-Quinine" and defendan product known as "Quin-Coco" and found them microscopical identical. Is this correct?

A. That is correct.

X Q. 51. Did you detect in the other steps of your analysis di ferences, and if so, what were they?

A. I could detect no essential difference between the two prepar tions expressed in terms of the analytical data which I obtained.

X Q. 58. Did you taste them both?

A. I did.

X Q. 53. And observed the color of both of them?

A. I did.

X Q. 54. What other substances do you have in mind in referrin to starches and gums with colloidal properties?

A. Acacia, tragacanth and starches derived from cereals or an other vegetable source.

X Q. 55. You stated that chocolate would not be available for us in medical preparations, or I think you said would not be possibl to use with therapeutic success in medical preparations. Will yo please explain why?

A. I did not say anything about therapeutic success. I said tha the large amount of fat in chocolate would probably render it unsatis factory from the pharmaceutic standpoint. The cocoa would b superior to chocolate on that account.

X Q. 56. Have you in your experiments made up a preparation or preparation of quinine sulphate in liquid form colored and flav ored with any other syrup than chocolate or cocoa?

128 A. No, I have done no constructive work on the prepara tion. My work has been entirely analytical.

X Q. 57. In your experience as a druggist or pharmacist, when did you first become acquainted with any liquid preparation containing quinine sulphate preparation in permanent form for dispensing at drug stores on prescription and on call?

A. My retail experience was so long ago that no liquid prepara tions of quinine sulphate, I believe, were in existence at that time.

X Q. 58. When was that experience?

A. Prior to 1892.

X Q. 59. When did you first learn of the Eli Lilly & Company preparation known as "Coco-Quinine?"

A. Shortly after I began to teach at the College of Pharmacy, which was in 1900.

X Q. 60. At that time had you known of any other similar prepar ation on the market?

A. I had not.

X Q. 61. You spoke of cocoa or chocolate being a popular flavor. What other liquid medicinal preparations have you in mind that contain this flavor?

A. I know of none in the liquid form.

X Q. 62. What would you say as to the probability of different manufacturers employing cocoa as an ingredient in a liquid medicinal preparation being likely to obtain this product of identical color and consistency?

A. They would have to have some standard to go by in order to maintain uniformity in any preparation that they would prepare.

X Q. 63. What is the principal ingredient in these preparations, Coco-Quinine and Quin-Coco, used as an agent for disguising the bitter taste of quinine sulphate?

A. Yerba Santa. That is only demonstrable by the flavor, however, not by chemical test.

X Q. 64. Have you prepared syrup preparation of quinine sulphate and cocoa with the Yerba Santa, and if so, what did you discover concerning the taste?

129 A. I did no experimental work on the preparation, made no experiments as to the qualities of the various ingredients in disguising the bitter taste of the quinine.

X Q. 65. You spoke of the impracticability of changing the color of chocolate preparations. How about liquid medicinal preparations not containing the chocolate; is it or is it not common practice to color them with other substances?

A. It is common practice in many preparations to add an ingredient which has only coloring value.

X Q. 66. What colors are used or may be used for this purpose?

A. Caramel is very commonly used. So is cochineal, so is cudbear.

X Q. 67. All various shades?

A. They can get the various shades of brown and red by the use of those and in some preparations they use coal tar colors, which give them an unlimited range.

X Q. 68. It is also true, is it not, that chocolate itself has a large variety of shades?

A. That is true, depending upon whether it has been prepared by plain expression or by expression after treatment with alkali, and also depending upon the quality or source.

X Q. 69. I notice some of the quotations from old publications referred to speak of tannate quinine. Is this quinine bitter in the same sense that quinine sulphate is?

A. No, not nearly so much.

X Q. 70. Is it difficult to disguise this taste?

A. I have never had any personal experience with it, but I am told that really the tannate makes the more bitter preparation under some circumstances than the sulphate, and in others it is more easily disguised.

X Q. 71. Is not quinine tannate in itself practically tasteless?

A. Very much so, compared with the sulphate.

(Cross-examination closed.)

130 Redirect examination.

By Mr. Rawle:

R. D. Q. 72. You have referred to various shades of chocolate. Would the use of any of these various preparations of chocolate sensibly affect the color of the preparation when you used chocolate in the quantities usual in making chocolate syrups?

A. Yes, I should think they would, from my knowledge of the different shades of chocolate on the market.

R. D. Q. 73. You have said in effect that in order to obtain identical color and consistency in a preparation by different manufacturers they would have to have a standard; state whether or not by a "standard" you mean fomula?

A. No. What I meant was this, that a manufacturer who establishes a preparation or who makes any preparation, in order to suit his trade must always have that preparation of the same shade or color, and otherwise physically identical, and in order to maintain that uniformity he would have to establish a standard for himself to which his subsequent product must conform every time.

R. D. Q. 74. If you wish to color a liquid preparation, would you ever use chocolate for that purpose, knowing it to be an insoluble article?

A. Not for purely coloring purposes, because to get enough color you would have to communicate the chocolate flavor, which would make it distinctive in that respect.

(Deposition closed.)

CHARLES H. LA WALL.

A recess was taken until 2 o'clock P. M.

131 After Recess.

SYLVESTER J. HAGAMAN, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence, and occupation?

A. Sylvester J. Hagaman; age, 39; residence, 1235 South 53rd Street, Philadelphia; occupation, drug manufacturing business.

Q. 2. Where are you now employed, and in what capacity, and how long have you been in the employ of that concern?

A. I have been in the employ of William R. Warner & Company over 20 years. I began as an office boy. About 15 years ago I became a traveling salesman and have been at it ever since, for this firm. In the last 5 years I have acted as Assistant Sales Manager from the Philadelphia office. I have nothing to do with the part of the business that centers at St. Louis. I have done a certain amount of traveling on the road while I have been Sales Manager.

Q. 3. And what authority have you as Assistant Sales Manager in taking on and discharging, as well as in overseeing your traveling salesmen?

A. I have the authority to engage or discharge a man.

Q. 4. When you engage men, what investigations do you make as to their moral worth, reputation and so forth?

A. We make a very thorough investigation as to their honesty and reliability.

Q. 5. In what directions do you so investigate?

A. We investigate through their past employers, through the retail drug trade, and investigate what other references they might give.

132 Q. 6. Do you report the result of your investigations of any particular man you have taken on to the home office?

A. I report after I have engaged him.

Q. 7. State whether or not you take part in the teaching new men the business they are undertaking and the proper method, from the standpoint of your house, by which they should carry on the business?

A. We teach largely through the "Salesman's Confidential and Manual."

Q. 8. How thorough is the drilling of each new salesman you take on in that Manual?

A. I would ask you to explain that a little further.

Q. 9. State whether or not you go into the subject in connection with the manual fully, and how fully?

A. I take up the different parts of the manual, beginning with page 79, Policy of the House, Interest on Past Due Accounts; Collections—all the way through, laying stress on "What a Salesman Should Know," and especially these clauses:

"16. That it pays strictly to adhere to the truth at all times."

"17. That it don't pay to speak ill or even mention a competitor," page 86.

On page 87 our policy in dealing with the trade is briefly stated. Then there are seven statements.

Q. 10. What do you teach them as to the necessity of entire honesty in their dealings with their customers?

A. Teach them to be thoroughly honest and reliable.

Q. 11. Do you consider it honest in a salesman to suggest to a retail druggist that the retail druggist could sell the salesman's product when the competing product of another manufacturer was called for on prescription or over the counter?

A. I consider it dishonest.

Q. 12. State whether or not you have ever had it called to
133 your attention as Assistant Sales Manager that any of the salesmen under you had done such a thing?

A. I never have.

Q. 13. If any of your salesmen should do such a thing and it was brought to your attention, what course would you pursue?

A. I would say they would be reprimanded, and if they did it again it might mean loss of their position. I would say, however, this thing has never come up.

Q. 14. In your opinion, from what you know of them, state whether or not you believe that the Warner salesmen are and have been since you have acted in that capacity an honest set of men?

A. I would say very much so.

Q. 15. How often in each year do you see each of them?

A. That is up to Mr. Pfeiffer. We have no stated time for seeing them.

Q. 16. Which Mr. Pfeiffer?

A. It depends on which Mr. Pfeiffer is there. If Mr. H. Pfeiffer is there, it is he, and if not, Mr. G. A. Pfeiffer.

Q. 17. Do they assemble at the home office every year?

A. No. I take it you mean, "Do they all?" There is no arrangement by which they report at the home office at any particular time.

Q. 18. Do you have supervision over the work they do in the sense that you know how much they have accomplished in selling goods?

A. Only while I am with them.

Q. 19. Do you make a practice to travel with any one or more of them at times—do you join them in their work among their customers and travel with them for a greater or less time?

A. I do.

Q. 20. And observe their methods of selling goods?

A. Yes.

134 Q. 21. Have you ever authorized or suggested to one of your traveling salesmen that he should or might suggest to retail druggists that they could sell Quin-Coco, S. & H., on prescriptions of doctors, or over the counter, when Coco-Quinine, Lilly, was specifically called for?

A. No.

Q. 22. How often do your salesmen visit the retail druggists in their territory?

A. I would say four times a year.

Q. 23. State whether or not they are directed or expected to call on practically all of the retail druggists in their territory?

A. Yes.

Q. 24. To what extent do they call upon physicians in their territory?

A. I would say about 25 per cent.

Q. 25. Are these the dispensing physicians or both dispensing and prescription writers, and which most?

A. I would say that 25 per cent. represents the total doctors that our men call on.

Q. 26. Are they prescription doctors?

A. They are both prescription and dispensing physicians.

Q. 27. Can you make any approximate statement as to the prevalence of dispensing doctors in different parts of the country—I mean what percentage of the doctors dispense?

A. I would say in the North and East 40 per cent. In the South, except in small towns, none.

Q. 28. What does the doctor do in respect to the drugs he administers or prescribes, which makes him a dispensing doctor?

A. A dispensing doctor is a man that carries and dispenses his own medicine.

Q. 29. Exclusively or only partly?

A. I would say it would be hard to draw a line. I understand a dispensing doctor is a man that might write some and dispense some, too.

135 Q. 30. State whether or not, in your opinion, a retail druggist can create a market for a given medical preparation?

A. He can.

Q. 31. In what way?

A. By making counter displays and by pushing it both with his customers and physicians.

Q. 32. In training a new salesman and starting him out on the road, how many items is he entrusted to sell approximately?

A. He is entrusted to sell all our lines, I would say over 5,000 items.

Q. 33. If he is going out on the road to sell 5,000 items of drugs, do you, in teaching him his duties, dwell on any particular and individual drug?

A. I would say not.

(Examination-in-chief closed.)

Cross-examination.

By Mr. Bradford:

X Q. 34. How many items over 5,000 are there in the several lines handled by your house?

A. I don't know.

X Q. 35. In teaching salesmen, do you give them any equipment to aid them in remembering your teachings; if so what?

A. They have our regular outfit, including this "Salesman's Confidential and Manual."

X Q. 36. Also the so-called "Blue List"?

A. Not necessarily.

X Q. 37. Why not the "Blue List"? Why is not that necessary?

A. That is not part of the things that we take up with the salesmen. That is not a part of the things that we take up with our travelers.

X Q. 38. When you are giving them their education in their duties?

A. Yes.

136 X Q. 39. When instructing salesmen for the house have you ever taken up with them the product known as Coco-Quinine?

A. I would say not.

X Q. 40. Does this apply to each and every salesman employed by your house?

A. Yes.

X Q. 41. And from the beginning of your official career as assistant sales manager to the present time?

—. ——.

X Q. 42. Did you ever mention Quin-Coco to your salesmen?
A. I should say that that was a sample carried regularly in our case and not especially mentioned.
X Q. 43. Then as I understand, your instructions to your salesmen are of a general character and cover the entire line without specifying any particular specialty or item?
A. Correct.

(Deposition closed.)

S. J. HAGAMAN.

Adjourned to meet at St. Louis on Monday, December 6th, 1915, at 9:30 A. M.

Pursuant to adjournment at Philadelphia, November 27, 1915, depositions of witnesses produced on behalf of the defendant in the above entitled cause, taken at Room 144 Planters Hotel, St. Louis Missouri, beginning on oMnday, December 6th, 1915, before Edward W. Tobin, acting as Special Examiner, it is hereby stipulated by counsel for the plaintiff and counsel for the defendant that the witnesses shall be sworn by Edward W. Tobin as Deputy Clerk of the United States District Court in and for the Eastern Division of the Eastern District of Missouri.

Appearances:

E. W. Bradford, Esq., for Plaintiff.
Francis Rawle, Esq., for Defendant.

137 It is agreed between counsel for plaintiff and counsel for defendant that these depositions may be taken in shorthand by William H. Corcoran and afterwards transcribed in typewriting and then signed by the witnesses:

GARFIELD D. MERNER, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Garfield D. Merner, age 32; 7124 Waterman Avenue, St. Louis County, University City, Missouri, Manager of St. Louis office William R. Warner & Company.
Q. 2. State the general course of your business experience since you first went into the drug business?
A. On August 2nd, 1899, my father and I engaged in the retail drug business at Allison, Iowa, as partners. We continued the business there until the Sume*m*r of 1902, when we sold out and on August 1st, 1902, I started as a traveling salesman for the Pfeiffer Chemical Company, continuing as such until the Spring or Summer of the following year, when I entered the employ of two uncles

of mine who were engaged in the retail drug business at Oelwein, Iowa. In the latter part of December, 1903, I came to St. Louis and entered the employ of the Pfeiffer Chemical Company, beginning at the bottom of the ladder, which was the bottling department. My ambition was to become identified with the concern in a managing capacity. I was perfectly willing to begin at the bottom, the intention being to work in the different departments. I worked in
138 various capacities in the house, and finally became identified with the management to a greater or less degree, about 1905. I have been manager of the St. Louis Branch since sometime in 1908.

Q. 3. I understand that the business is entirely managed from two head offices, Philadelphia and St. Louis?

A. It is.

Q. 4. And you have charge as manager of the St. Louis end of the business?

A. Yes.

Q. 5. Particularly, what part of the United States does your office cover?

A. The northern peninsula of Michigan, Wisconsin, Indiana, Kentucky, Tennessee, Alabama, and all territory in the United States west.

Q. 6. State whether or not you are a trained pharmacist or chemist?

A. I am not.

Q. 7. State who, in the management of the entire business, east and west, has to do with the formulas?

A. Mr. G. A. Pfeiffer.

Q. 8. How about the advertising?

A. Mr. G. A. Preiffer has charge of that.

Q. 9. How far are your duties as manager entirely commercial?

A. My duties are the commercial side of the business.

Q. 10. What different companies, if any, operate the St. Louis laboratory?

A. There are several different companies affiliated together here who have their laboratories in the same building.

Q. 11. Name them.

A. The Pfeiffer Chemical Company, William R. Warner & Company, Searle & Hereth Company, Dr. Earl S. Sloan Co., Incorporated, H. E. Bucklen & Company, and other companies.

Q. 12. Is the corporate organization of the Searle & Hereth Company kept alive?

139 A. Yes.

Q. 13. Will you state whether or not the St. Louis laboratories are carried on for the joint account for the companies you have indicated?

A. They are.

Q. 14. How many salesmen have these companies on the road, and how many of them report to the St. Louis house, who work from the St. Louis house under your direction?

A. In the neighborhood of seventy-five or eighty salesmen; be-

tween forty and forty-five under the management of the St. Louis office.

Q. 15. State how far the number has varied running back to 1908.

A. Might vary by ten.

Q. 16. State what is the practice of your salesmen with regard to calling on their customers in their respective territories, a certain number of times a year?

A. They call from six times to one time a year, varies according to the territory, certain towns in a territory they might call oftener, and other points not so frequently.

Q. 17. Upon whom do they call?

A. Retail druggists, hospitals, physicians, veterinarians and so forth.

Q. 18. Upon all the retail druggists in their territory?

A. They are expected to call upon all retail druggists whose credit is good, provided they can do so without too great an expense.

Q. 19. Can you state the respective territories of your salesmen as they have been in the past and are now, confining your answer to the eastern states of your St. Louis territory and running west to include Iowa, Missouri, Arkansas and Texas?

A. The territory has been changed some since 1908, and is substantially as follows: Northern Wisconsin and the northern peninsula of Michigan, Southern Wisconsin, Northern Indiana.
140 Southern Indiana, Cincinnati, Ohio, and Eastern Kentucky. The balance of Kentucky. Eastern Tennessee. Western Tennessee and Northern Mississippi. Northern Alabama including the City of Birmingham. The City of Mobile and territory contiguous to it. Part of Louisiana and part of Mississippi. Part of Louisiana, Southern Mississippi and part of Alabama. Southern Illinois, including part of Kentucky. Central Illinois. Northern Illinois, part of the City of Chicago. Part of City of Chicago. Part of the City of Chicago and suburbs. Northern Minnesota. Southern Minnesota, Northeast Iowa, part of Illinois. Western Iowa. Southern Iowa, Northeast Missouri. Southeast Missouri. Northern Arkansas. City of St. Louis, the suburban territory adjacent to it. East St. Louis, Illinois and nearby territory in Illinois. Kansas City, Missouri and suburb and Kansas City, Kansas. Eastern Texas, part of Louisiana and I think part of Arkansas. Southern Texas. West Texas, central Texas. Part of Texas. Part of Oklahoma. Part of Oklahoma and part of Arkansas.

Q. 20. You have a separate salesman working in each of those respective territories?

A. Yes.

Q. 21. How far have they been substantially the same subdivisions, territorially, since 1908?

A. Those are substantially the divisions. Sometimes territory is vacant which happens right at present.

Q. 22. State among what class of customers you have found a market for your product, Quin-Coco?

A. Physicians and druggists.

Q. 23. How about jobbers?

A. By druggists I mean wholesale and retail.

Q. 24. Upon what calls either by prescription or over the country, are sales made to the ultimate consumer of Quin-Coco?

141 A. Sales are made of Quin-Coco on prescriptions when Quin-Coco is specified in the prescription. They can be made over the counter when the ultimate consumer asks for Quin-Coco or asks for a preparation of chocolate and quinine or a sweet preparation of quinine and so forth.

Q. 25. From your experience as a retail druggist and in the drug manufacturing business, can a retail druggist push the sale of a given preparation and create a market for it if he chooses?

A. He can.

Q. 26. How can he do it?

A. In the case of pharmaceutical preparations he can detail it to doctors in his vicinity with a view of them specifying the product on prescriptions. He can also demonstrate it to the laity. He can advertise it if he choose.

Q. 27. From your familiarity with the stocks of pharmaceuticals ordinarily carried by retail drug stores, will you state whether or not a more or less well stocked drug store constantly carries the same pharmaceutical preparations made by different houses which are pharmaceutically or medicinally similar and can be used interchangeably in prescriptions or sales over the counter?

Mr. Bradford: Question objected to as immaterial, irrelevant and incompetent.

A. They do.

Q. 28. If a prescription calling for such a preparation, or a customer calling for it, in neither case mentions the name of the maker, what can the druggist do?

Mr. Bradford: Same objection.

A. Fill it with any manufacture.

Q. 29. Assume that the prescription specifies a particular drug and it has the name of a particular maker on it, or that the call over the counter is the same, what is the duty of the dispensing druggist?

A. It is his duty to fill the prescription with the product

142 of that manufacturer.

Q. 30. State whether or not that is a recognized duty in the ethics of the retail drug business?

A. It is.

Q. 31. State whether or not it is considered dishonest or unethical in the retail drug business to do otherwise?

A. It is.

Q. 32. What is your opinion on the subject as to whether it is dishonest to do otherwise?

A. My opinion is that it is dishonest to do otherwise.

Q. 33. State whether or not in your opinion a retail druggist who would do otherwise would be an honest man?

A. He would not be an honest man.

Q. 34. When did you become manager of the St. Louis house and what change in the general management of the business happened at that time?

A. I became manager in 1908 of the St. Louis house which was made possible from the fact that Messrs. H. and G. A. Pfeiffer moved to Philadelphia at that time.

Q. 35. Since then what have you had to do with the teaching of new salesman that have been taken on?

A. As manager of the St. Louis office I have been in charge of the salesmen and correspond with them and go over matters concerning their work there in the house.

Q. 36. Who usually looks over the new salesmen, whose duty is it to see them?

A. Our assistant sales manager.

Q. 37. Then when do you see them?

A. I do not always see them; that differs in cases; sometimes I see a man before he is employed, but most frequently afterwards, that may be a month afterwards.

Q. 38. When you see them after they are taken on, how far do you instruct them as to their duties.

143 A. I do not attempt to instruct them very thoroughly as to their duty. When they are in the house I have one or more conversations with them.

Q. 39. How far do you take up the question of honesty as essential to a salesman in such a conversation, with the new man?

A. It is my aim to always impress upon a salesman the importance of being honest.

Q. 40. Have you made use of the "Salesman Confidential" in these talks with these new salesmen?

A. I told them to study the Salesman Confidential as they would a "text book" and master it.

Q. 41. Does each of these new salesmen receive a copy of that salesman confidential?

A. Yes, and he gives a receipt for it.

Q. 42. If he loses it would he get another one?

A. Yes.

Q. 43. How far, in reference to the "Salesman Confidential" have you called attention to the printed matter on pages 86 and 87?

A. Inasmuch as the statements of the "Confidential" are clearly set forth, it is not my custom to go over it in detail. As I stated in my previous answer, I aim to impress upon the salesmen the importance of studying this book.

Q. 44. Can you state whether or not you have talked to new salesmen as to the proper attitude they are to adopt in regard to their competitors. I refer you to number 17 on page 86 of the Salesman Confidential.

A. It is my aim to caution salesmen not to talk about their competitors or speak ill of them.

Q. 45. When a new salesman comes to the house in St. Louis, state whether or not he is given a house training and to what extent?

A. When new salesmen come to the house we aim to have them

visit each department in the house and spend some time in each department, the object being to familiarize them with the manner in which the goods are put out by our company, and with the
144 goods themselves and so forth.

Q. 46. Does this familiarizing with the departments, including such departments as the printing, bottling and so forth?

A. We aim to have them visit all departments, even the power plant.

Q. 47. Give the names of some of them?

3. The power plant, bottling department, shipping department, finishing department, printing department, manufacturing department and so forth.

Q. 48. I understand that this house teaching covers only what I might call the manufacturing of the goods to be sold, is that correct?

A. It covers manufacturing of the goods and the goods themselves.

Q. 49. Now, as to the policy of the house in the sale of the goods, who gives instructions on that?

A. The assistant sales manager and the office.

Q. 50. State whether or not the foreman in charge of the different manufacturing departments, in the house that you have spoken of have anything to do with the policy of the house in selling goods or authority therein?

A. They have not.

Q. 51. Mr. C. J. Thurman, a witness called on behalf of plaintiff, testified (Plaintiff's Record, p. 606, and so forth):

"Q. 6. While you were selling the Warner line or the line of the Pfeiffer Chemical Company, did you sell a product which was called Quin-Coco?

A. Yes, sir, I did.

Q. 7. Please explain the methods and arguments you employed in soliciting orders for Quin-Coco and where you obtained your authority for such methods and arguments?

A. Quin-Coco was sold under the Searle & Hereth label. The preparation of Quin-Coco was put on the market by the
145 Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co., but was not pushed to any extent until after the purchase of the Searle & Hereth Co. We were instructed principally by Mr. Garwin who had charge of the pharmaceutical laboratory for the Pfeiffer Chemical Co. at that time. We were instructed by Mr. Garwin to recommend to the trade that the preparation of Quin-Coco was exactly the same as the preparation of Coco-Quinine put out by Eli Lilly & Co.; to tell the trade that Quin-Coco was identical with Coco-Quinine and our argument to get business on this preparation was to explain to the trade that our preparation of Quin-Coco was much cheaper and would answer every purpose of the Coco-Quinine and to explain to them how much money could be saved by buying Quin-Coco instead of Coco-Quinine. We were also instructed by office managers, circular letters to salesmen, etc., to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin. This Quin-Coco was one of the best selling specialties of the company."

Please state whether or not this Mr. Garwin had at any time any authority from you or from your company to give any such instructions whatever to salesmen?

Mr. Bradford: Question objected to as immaterial and irrelevant.

A. He did not.

Q. 52. State whether or not this Mr. Garwin ever had any authority from you as manager of the business or from the company to give any instructions to salesmen as to the sales policy of the house?

Mr. Bradford: Question objected to as irrelevant and immaterial.

A. He did not.

146 Q. 54. The witness for plaintiff, Thurman, in the testimony just quoted to you, mentions instructions "of office managers"; please state whether or not there was any manager except you having authority in the premises?

Mr. Bradford: Same objection.

A. I was the only manager.

Q. 55. State whether or not there was any other person who had authority to give instructions to salesmen in respect to the sales policy of the house?

Same objection.

A. There was not.

Q. 56. State whether or not in your last answer you confined yourself to persons employed in the house as contra-distinguished from any assistant sales manager on the road?

Same objection.

A. I did.

Q. 57. Who has been assistant sales manager on the road of late years, your assistant on the road?

A. Mr. Henry J. Ritayik and Charles E. McNulty, both of them connected in that capacity in this territory during late years.

Q. 58. The same witness, C. J. Thurman, in his testimony I have previously read to you on the record, refers to instructions "by circular letters to salesmen," what have you to say about circular letters to salesmen, who had charge of those?

A. All circular letters sent to salesmen are under the supervision of either Messrs. H. Pfeiffer, G. A. Pfeiffer or myself.

Q. 59. Explain a little more thoroughly, please, what the system was?

A. Either one of the three of us edited the letters; with possibly rare exception, in each case the letter is approved by either one of the three of us.

147 Q. 60. Are they sent out from either office?

A. It is the practice to send the same letters from both houses, Philadelphia and St. Louis offices.

Q. 61. Do you mean to say send the same letter to all salesmen, whether he comes from the St. Louis or Philadelphia office?

A. The object is all salesmen on the force receive the same circular letters.

Q. 62. When one of these letters was put in form and sent out from the Philadelphia office, state whether or not a copy of it was sent to the St. Louis office for your inspection?

A. These letters are made or printed on a duplicating machine. When the Philadelphia office edits a letter it is their practice to make sufficient copies for the St. Louis office and forward these copies to this office. The same practice holds true when the letter is edited by the St. Louis office. Each office distributes a copy to its own salesmen.

Q. 63. State whether or not you see the circular letters?

A. I do.

Q. 64. State whether or not any one of such circular letters ever contain instructions to salesmen such as are stated by the witness, C. J. Thurman in his testimony which I have read to you on the record, viz: "to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin."

Mr. Bradford: Question objected to as incompetent, the letters themselves being the best evidence.

Q. 65. State whether or not any one of such letters contained any instructions of any kind to your salesmen as to pushing the sale of Quin-Coco as a substitute for Coco-Quinine.

Same objection.

A. They have not.

148 Q. 66. In instructing your new salesmen or any salesmen as to the policy of the house in selling goods, how many separate items of goods do those salesmen have on their list for sale, approximately, covering the entire line?

A. It runs into the thousands.

Q. 67. Approximately what class of goods did it cover in a broad classification?

A. Pharmaceuticals, perfumeries, package preparations, patent medicines.

Q. 68. Can you give approximately the number in thousands?

A. I have never counted them. I would assume there were about four thousand.

Q. 69. How many perfumery items were there and how important were they?

A. Perfumery is a very important department, comprising possibly as many as two hundred and fifty items or more.

Q. 70. In instructing your salesmen as to the sales policy of the house, state whether or not you take up individual items or single items for special coaching?

A. Owing to the wide extent of the line itself, it is practically impossible, although there may have been times when one or more items were mentioned. In coaching salesmen it is my practice to speak of the line in general.

Q. 71. Do you remember ever coaching them specifically on t product Quin-Coco?

A. I cannot remember any instance where I have, but I m have mentioned it.

Q. 72. I have read to you on the record question number 6 a question number 7 of the questions put to C. J. Thurman, and t answers thereto; I now read the following from the testimony C. J. Thurman:

"Q. 8. Do you recall the names of any officers or men in a thority from whom you obtained instruction or informati
149 relative to the sale of Quin-Coco as a substitute for Co Quinine, other than Mr. Garwin? If so, please state.

A. Yes, sir. There was Mr. Garfield Merner who was manag of the St. Louis Co."

What have you to say as to this testimony of C. J. Thurman?

A. I did not instruct Mr. Thurman to sell Quin-Coco as a su stitute for Coco-Quinine.

Q. 74. State whether or not you remember to have talked to J. Thurman on the subject of the sale of Quin-Coco, specifically?

A. I do not.

Q. 75. What is the best of your belief whether you ever did not?

A. I did not. I cannot recall that I did. I do not believe I di

Q. 76. Would you have had any occasion to do so?

A. When he visited the house, which he did, I believe, annuall or oftener, I always had a conversation with him, and I may hav talked about this preparation.

Q. 77. Do you remember doing so?

A. I do not.

Q. 78. If you did so, state whether or not you would have in structed him to do what Mr. Thurman testified you instructed hi to do, and give your reasons for your answer?

A. I would not have so instructed him because I considered it di honest and contrary to good business.

Q. 79. C. J. Thurman, a witness for plaintiff, testified as follow

"Q. 12. Did your representations to the retail druggist include in structions to them as to how they could dispense it and if so, wha did you tell them on that point?

A. We were instructed by the company to tell the trade that thi preparation of Quin-Coco could be used and dispensed o
150 calls for Coco-Quinine; and, that it could also be used o prescriptions for Coco-Quinine without the knowledge of th physician or the patient, as the preparation of Quin-Coco was exactl the same as Coco-Quinine."

State whether or not you ever gave such instructions or any in structions of that kind to C. J. Thurman?

A. I did not.

Q. 80. State whether or not there was anybody besides yourself at the St. Louis office who had authority to give instructions on that subject?

Mr. Bradford: Question objected to as immaterial and irrelevant.

A. There was not.

Q. 81. The same witness, C. J. Thurman, testified as follows:

"X Q. 82. And was that the time Merner talked with you?
A. Yes, and later than that.
X Q. 83. How much later?
A. Well, up to the time that I left the emloy of the company, December, 1912.
X Q. 84. What did he say to you?
A. Well, his instructions to us were about the same as Mr. Garwin's; that these preparations were exact substitutes for the original preparations named by the other companies. He also instructed us that Quin-Coco could be used on doctor's prescriptions where Coco-Quinine was specified and for us to show the druggist how much he could save by buying this substitute and replacer preparation from our company and that there was no use of a druggist paying the price for these original preparations when he could buy something that would answer all purposes and save him quite a little money.
X Q. 85. Anything else?
A. No."

151 Also on the top of page 628 of plaintiff's record, the witness sought to correct his testimony as follows:

"Mr. Merner has said other things to me along the same lines as my answer to the preceding X Q. 84."

State whether or not you ever gave such instructions to C. J. Thurman, and whether or not his testimony is true?

A. I have no recollection of any specific conversation concerning these preparations with Mr. Thurman, but if, as it is possible, we did discuss Quin-Coco, I am emphatic in stating that I never instructed him that Quin-Coco could be used on doctor's prescriptions where Coco-Quinine was specified.

Q. 82. You have not covered all the testimony quite, of C. J. Thurman which I read to you; please do so?

A. As I understand, he states that my instructions were that "these preparations" were exact substitutes for the original preparation named by the other companies, I did not so instruct him.

Q. 83. Referring to all the testimony of C. J. Thurman, which I have quoted you above in various questions, please state whether or not C. J. Thurman told the truth in his answer to those questions?

A. From the testimony quoted in your questions, I consider in the main Mr. Thurman did not tell the truth.

Q. 84. My last question was intended to ask you whether or not C. J. Thurman, in his answers which have been read on the record,

told the truth as to instructions which you gave him in regard t the sale of Quin-Coco as a substitute for Coco-Quinine?

A. He did not.

Q. 85. When and how was Thurman's employment as salesm for your company terminated?

A. I do not remember the exact year, but I think it was i December, 1912. (Witness refers to book containing testimony.)

152 Mr. Bradford asks the examiner to note that at this poin the witness' attention was called to the testimony of Thurma by Mr. Rawle and the date stated in Mr. Thurman's answer wa accepted by the witness in making his answer.

Q. 86. Did you personally have to do with the cancellation o his contract as a salesman of the company?

A. I did.

Q. 87. Can you fix the date by your memory or without referenc to the record?

A. I cannot.

Q. 88. How near can you come to it?

A. Within a year or two.

Q. 89. Who cancelled his contract and what cause as expressed t him personally by you?

A. As I recall it, I cancelled the contract by letter. What I state in that letter, I cannot remember. But I cancelled the contract fo the reason that we were not satisfied with Mr. Thurman's result and for some time he had been more or less out of harmony with us

Q. 90. Was this stated in the letter to Mr. Thurman?

Mr. Bradford: Question objected to as the letter itself is the bes evidence, or a copy thereof if the original cannot be produced.

A. I do not recall the exact contents of the letter.

Q. 91. Have you a copy of it, or have you the Thurman file?

A. Yes, I have the Thurman file and I am confident a copy of i is in the file.

Q. 92. Please make a search at your office and produce the copy if you can find it.

A. I will do so.

Q. 93. What I want to ascertain mainly is this, did Mr. Thurman resign of his own motion or was he discharged as of the motion o the company?

A. He was discharged of the motion of the company.

153 Q. 94. In plaintiff's testimony reference has been made of a Warner salesman named L. C. Gill, what do you know about him personally?

A. I understand he resides at Muskogee, Oklahoma, and my understanding is that at times he suffers a lapse of some of his mental faculties.

Q. 95. Have you recently looked him up and did you get his location and condition?

A. In July of this year we again employed him after an absence believing that he had fully recovered He worked for us in th

capacity of traveling salesman for some weeks and then dropped out of sight. We found him at Salt Lake City and we were informed, in fact, that he seemed to lack will power and decision, and we arranged for him to be sent to Muskogee, which is the home, I think, of his wife's parents or his parents.

Q. 96. Will you state whether or not your investigation lead you to believe that his mental faculties are somewhat impaired?

A. This incident mentioned above when he dropped out of sight, and the report of the gentlemen with whom we were in correspondence at that time substantiated that opinion.

Q. 97. State whether or not you have ever had any information or knowledge, except from the testimony in this case, that any salesman of William R. Warner & Co. had ever suggested to any retail druggist that he could dispense William R. Warner's product, Quin-Coco, on a physician's prescription or sell it over the counter when Eli Lilly & Company's Coco-Quinine was specifically called for?

A. I have not.

Q. 98. If you had had such information that any of your salesmen had done so, state whether or not that would have been contrary to his orders and to your teachings and in violation of the selling rules of the house?

A. Yes, it would have been contrary to our teaching and 154 in violation of the selling policy of the house.

Q. 99. If one of your salesmen had done so to your knowledge, state whether or not you would have considered him an honest salesman?

A. I would not.

Q. 100. If such conduct on the part of a salesman had been brought to your attention, state what you would have done?

A. I would have told him that this was contrary to our selling policy and warned him not to do it again.

Q. 101. On what penalty if he did it again?

A. Dicharge.

Q. 102. State whether or not you have in any way directly or indirectly, directed, authorized or suggested to any one of your salesmen that he should or might suggest to any retail druggist that he could dispense your product Quin-Coco on a physician's prescription or on calls over the counter when Eli Lilly & Company's Coco-Quinine was specifically called for?

A. I have not.

Q. 103. State whether or not you have ever in any way directly or indirectly authorized or suggested to any one of your assistant sales managers that he should or that he might suggest to any of your traveling salesmen that such traveling salesman should, or might state to any retail druggist that he could dispense your product Quin-Coco on a physician's prescription or on calls over the counter where Eli Lilly & Company's Coco-Quinine was specifically called for?

A. I have not.

Q. 104. State whether or not you ever had any information or knowledge except by the testimony in this case of a retail druggist selling your product, Quin-Coco, on physicians' prescriptions or on

calls over the counter when Eli Lilly & Company's Coco-Quinine wa specifically called for?

A. I have not.

Q. 105. State whether or not you have ever directly o
155 indirectly authorized any retail druggist to do so, or in an way whatsoever suggested or represented to any retail druggis that he could do so?

A. I have not.

Q. 106. You have stated that you have been manager of the St. Louis office since in 1908 and since that time the defendant has bee selling Quin-Coco. Please state whether or not you have ever re ceived from Eli Lilly & Company, the plaintiff, any complaint o any act on the part of your salesmen in the sale of Quin-Coco?

A. The St. Louis office has never received any such complaint.

Direct examination closed.

At this point a recess was taken until 2 p. m. of the same day.

Pursuant to recess at 2 p. m., December 6, 1915, the further takin of these depositions was had as follows:

Cross-examination.

By Mr. Bradford:

Mr. Bradford, without waiving objections, cross-examines as fo lows:

X Q. 107. Do your duties require you to visit the retail trade i the sale of the preparations of your house?

A. Not to any appreciable extent since coming into the hous That was in December, 1903.

X Q. 108. In your work of instructing salesmen, have you eve made trips with them to the retail trade?

A. Before I had any position in connection with the management I recall one trip where I spent about three days with a salesman, I think that was in 1905. In one or more instances I have visite retail druggists in company with salesmen.

X Q. 109. Can you give use the name of a salesman with whom you made a trip in 1905?

156 A. W. S. Meloy.

X Q. 110. In what territory?

A. Southern Illinois.

X Q. 111. During these three days did you call upon the retai druggists in this territory and witness the methods of the salesman?

A. Yes.

X Q. 112. In pushing the sale of goods of your house?

A. Yes.

X Q. 113. Did you participate with him in the sale of the good

A. Yes.

X Q. 114. Please name any other salesman with whom you ha visited the retail trade in the sale of the goods of your house?

A. That really is the only visit I can recall where I visited the trade in company with a representative in the sale of the goods. I recall several calls that I made with another salesman on retail druggists, but they were more in the nature of friendly visits than anything else.

X Q. 115. On these visits referred to in your last answer, you were not on business of selling goods?

A. That was not my intention. I was simply in that city visiting a salesman and he introduced me to several druggists.

X Q. 116. Give us the name of this salesman?

A. H. L. Roy.

X Q. 117. In what city?

A. Kansas City, Missouri.

X Q. 118. I think you stated in your direct testimony that Mr. Thurman was discharged because he had been out of harmony with the house for some time. Please explain more fully in what particulars Mr. Thurman was out of harmony with the house.

A. I stated that was one of the reasons, I stated his being
157 out of harmony was one of the reasons. As an illustration of this disposition on his part, I recall a conversation he and I had at luncheon; he spoke in more or less glowing terms of a competitor, and I told him in effect it might be a good plan for him to work for that concern.

X Q. 119. Do you remember when this was?

A. No, I do not remember the exact date.

X Q. 120. Do you remember where it was?

A. Yes.

X Q. 121. Please state.

A. At the St. Louis Lunch Room, located on the third floor of the building at the northeast corner of Fourth and Locust Streets in St. Louis, Missouri.

X Q. 122. As I understand, one of the cardinal principles and virtues of your house is to speak well of your competitors, isn't this true?

A. We do not employ our salesmen to go around and speak well of our competitors. We instruct them not to speak ill of our competitors.

X Q. 123. Do you recall what Mr. Thurman said in reference to this competitor which occasioned the remark you made to him?

A. I do not recall the exact language.

X Q. 124. Please state as near as you can recall what it was that Mr. Thurman said?

A. Impossible for me to quote him. I recall that it was, in effect, partly, at least, "it is a wonderful line and going fine," something like that.

X Q. 125. Wasn't there a question as to salary between you and Mr. Thurman?

A. At the conversation referred to above, I do not recall any connection with that, but there had been times gone by when there was more or less discussion about salary with Mr. Thurman. In fact I do not think he hardly ever let that subject alone.

X Q. 126. Did you ever hold out any promises or in any way lead

him to believe that you would raise his salary if he continued in yo
employment?

158 A. I never made him any promises I did not fulfill.

X Q. 127. When he would ask for a raise in salary, wh would you say to him?

A. I do not recall what I said to him exactly, but Mr. Thurm was working for us on a combination contract which paid him salary and a commission on certain excess, and I very likely e plained to him that if he would earn an increase he would get it commissions.

X Q. 128. Was Mr. Thurman's work unsatisfactory as to sale

A. Being dissatisfied with his salary I felt interfered with t results; besides his work as salesman was not entirely satisfacto to us.

X Q. 129. Did you find Mr. Thurman honest in his dealings wi the house?

A. Yes.

X Q. 130. Found him truthful in his dealings with the hous

A. Yes.

X Q. 131. Since your testimony this forenoon have you looke for the Thurman letter referred to in one of Mr. Rawle's question

A. Yes.

X Q. 132. Did you find it?

A. Yes.

X Q. 133. Have you got it with you?

A. Yes.

X Q. 134. Please read what it says.

A.

"Dec. 11, 1912.

FRIEND THURMAN:

The matter of your salary was brought up at the Conference of th Stockholders recently held here, their decision being that we woul be unable to make an increase.

After going into the matter thoroughly we feel it best t
159 make a change in your territory, and herewith terminate and cancel, to take effect at once, all agreements and contracts existing between us.

While our contract calls for no notice, as an expression of our good wishes we will pay your salary, but of course, not your expenses up to and including Dec. 31, 1912. Please return by freight or ex press all samples, merchandise, catalogues, etc. As soon as your sample and merchandise account is balanced we will make a state ment of the amount due you and send you a check to cover.

We take this opportunity to express our best wishes for the future success and prosperity which no doubt will be yours.

With kindest regards,

Cordially yours,

(Signed) PFEIFFER CHEMICAL COMPANY,
G. D. MERNER,
President.

G. D. M.—35."

X Q. 135. Did you have trouble of any kind with Mr. Thurman in the settling up of his accounts at the time the contract was terminated?

A. No, sir.

X Q. 136. Do you remember of having several conversations with Mr. Thurman in reference to pushing any particular items of your line?

A. I do not recall any specific conversation on that subject. As I have testified before, it was his custom to come to the house once a year.

X Q. 137. Or oftener, I think you stated?

A. His parents lived in Whitehall, Illinois, and sometimes on account of sickness or something else he would stop here en route.

X Q. 138. When was that?

A. At least he did that once or twice.

X Q. 139. He was one of the older men in your sales force, was he not?

160 A. Yes.

X Q. 140. Always enjoyed the confidence of the company?

A. Confidence is a pretty strong word.

X Q. 141. Well, if he did not enjoy your "confidence," in what respect would you modify that word?

A. I would say we extended him our confidence.

X Q. 142. You were in the employ of the Pfeiffer Chemical Company in the fall of 1906, were you not?

A. Yes.

X Q. 143. Were you in the manufacturing department at that time?

A. No, sir.

X Q. 144. Do you recall when Quin-Coco was first brought out by the Pfeiffer Chemical Company?

Mr. Rawle: Objected to as improper for cross-examination and as relating to transactions not binding the defendant.

A. I cannot recall the exact time.

X Q. 145. Do you have personal knowledge of the work that was done in the laboratories on this product at that time?

Same objection.

A. It is entirely out of my department.

X Q. 146. Did you have personal knowledge of the work carried on in reference to it even though it was out of your department?

Same objection.

A. As I stated, being out of my department, I do not recall that I ever *saw* any experiments or anything of that kind.

X Q. 147. What was your duty at that time?

Same objection.

A. My activities were along commercial lines. I did the buying and some corresponding.

X Q. 148. What was your position at that time?

161 A. I was buyer. I also had charge of the orders.

X Q. 149. Who was in charge of the manufacturing partment.

Same objection.

A. You are speaking of the fall of 1906?

X Q. 151. Yes?

A. As long as I know anything about, even to this day for th matter, Mr. G. A. Pfeiffer had charge of the formulas. During absence, part of 1906, no one filled the position. That is no took his place.

X Q. 152. You mean that the manufacturing department without a head at that time?

A. I do not think I would put it that way. The business simp went along in the regular channels.

X Q. 153. Do you mean that Mr. G. A. Pfeiffer prepared working formulas that were used in the preparation of the produ to be put out by your concern?

A. Well, I do not exactly understand the word "prepared" the I do not think he wrote them all out at all.

X Q. 154. Well do you mean that he has worked out the formul that were used by your concern?

A. Well, I am not qualified to speak of how he managed that partment. I am not a pharmacist. It is the department that I a not in touch with.

X Q. 155. Perhaps you can answer the question better this wa Please explain what you mean by Mr. G. A. Pfeiffer being in char of the formulas?

A. I mean that he approved all the formulas and as stated in t preceding answer, just what he does, I am not qualified to say, b I consider him and it is understood that the formulas are in h charge; for instance, I personally would not make a change in formula.

X Q. 156. This duty of G. A. Pfeiffer applies to both the St. Lou and Philadelphia laboratories does it not?

A. Yes.

162 X Q. 157. Who was in charge of the working force in th laboratory of St. Louis during the time inquired about?

A. I would say Mr. H. Pfeiffer was in charge of the business.

X Q. 158. In one of your answers you spoke of various depar ments, I assume that you have a head for each department, is tha true?

A. Yes.

X Q. 159. Who is the head of your manufacturing department?

A. Mr. Pfeiffer is head of our manufacturing department.

X Q. 160. When your salesmen visit the manufacturing depar ment is Mr. Pfeiffer there to show them through?

A. No, he is not. He is in Philadelphia.

X Q. 161. Who performs this duty?

A. Why, sometimes I take the salesmen through the plant and sometimes the superintendent or whatever the case might be.

X Q. 162. Who is the superintendent of the manufacturing department?

A. I guess you and I are using different terms. When I speak of the superintendent I speak of the man who has the title of superintendent of the plant.

X Q. 163. Who has charge of the actual work of compounding preparations in your laboratory in St. Louis?

A. W. S. Garvin.

X Q. 164. How long has Mr. Garvin held this position?

A. I cannot say exactly, but for some years.

X Q. 165. Since prior to 1906?

A. Prior to 1906, yes, he was in charge of all that portion of the laboratory prior to 1906. When I use the term laboratory I do not mean the entire plant.

X Q. 166. You mean the manufacturing department? Maybe I do not know what you understand by manufacturing depart-
163 ment, and that we have been at cross purposes.

A. He had charge of the working force in part of the manufacturing department prior to 1906.

X Q. 167. And continuously from then until the present time in St. Louis?

A. Yes.

X Q. 168. What are Mr. Garvin's duties in the position he holds?

A. Why his duty includes the supervision of the manufacture of products.

X Q. 169. Do you know who authorized the commencement of the manufacture of Quin-Coco in your plant?

Mr. Rawle: Objected to unless the date is given as subsequent to August 1908.

A. I cannot say accurately about that.

X Q. 170. Did you take part in any of the discussion preliminary to the beginning of this manufacture?

Same objection.

A. I do not think so.

X Q. 171. What were your duties with the house during 1907?

Same objection.

A. I did the buying, as I recall, I had charge of adjustments, and during part of the time I employed any new employes needed in the office, and did corresponding and so forth.

X Q. 172. And you assumed full charge of the St. Louis end of the business in the year 1908?

A. Yes, it was sometime in 1908.

X Q. 173. Were you accustomed during the years 1906 and 1907, to frequently visit the laboratory?

A. In my capacity as buyer I thought it advisable to visit the different departments.

X Q. 174. Were you especially interested in the new prepa-
164 rations brought out by the house from time to time?

A. Not any more so than in the enthusiasm of youth; a young man generally likes to see new things.

X Q. 175. As a young man fired with the enthusiasm of youth, was it not your custom to frequently visit the laboratory and notice experiments being made to bring out new products?

A. I had very lit-le to do with that in that particular.

X Q. 176. Did you ever see a bottle of Coco-Quinine in the laboratories of your St. Louis house in St. Louis?

A. Yes, I think I have.

X Q. 177. Do you remember when you saw a bottle of Coco-Quinine in the laboratory here?

Mr. Rawle: Objected to as irrelevant and not proper for cross-examination.

A. No, I do not remember at all. I think I saw one not so many months ago.

X Q. 178. Would you be willing to make an oath that you did not see a bottle there in the fall of 1906?

Mr. Rawle: Same objection, and because transactions in 1906 do not bind this defendant.

A. I consider I am making all my answers under oath. I have no recollection of seeing a bottle there in the fall of 1906.

X Q. 179. Can you state positively that you did not?

A. I have no recollection of it.

X Q. 180. What were your instructions to Mr. Thurman in reference to how he could sell Quin-Coco?

A. As I have previously testified, I have no specific recollection of discussing Quin-Coco with him.

X Q. 181. Do you remember discussing any other specific product in the pharmaceutical line with Mr. Thurman?

A. No, sir.

165 X Q. 182. Have you a file of the circular letters sent out to salesmen?

A. Yes.

X Q. 183. As I understand your direct testimony, a number of the salesmen may be working for the house for some months before you meet them?

A. Yes, there may be some men working for the house before I meet them.

X Q. 184. When the men are required to visit all of the departments of the house and familiarize themselves with the manufacture of your products and with the products themselves, is this true?

A. Of course, as indicated by the previous answer, they may work some months before visiting the house, but when they do visit the house it has been our custom to have them visit the various departments, to familiarize themselves with our goods and facilities and style of the packages and so forth.

X Q. 185. For what purpose, any other purpose than you have named, is this done?

A. I think the general term "familiarize" covers it pretty well. I might explain, for instance, the salesmen visiting the stock department and looking over the shelves might see the various containers in which the various goods are packed. Being thus familiar with that would assist him in selling such quantities.

X Q. 186. Does Mr. Garvin instruct these salesmen in his department as to the manufacturing end of the business?

A. I say that the object of a salesman visiting Mr. Garvin's department is to familiarize the salesman with the quality of the goods that he makes and to acquaint the salesman with the therapeutic value and other characteristics of the goods to a degree, yes.

X Q. 187. Is Mr. Garvin qualified to instruct salesmen in such respect?

A. He seems to do it satisfactorily.

X Q. 188. That is one of his duties, is it not?

A. Very incidental if at all.

166 X Q. 189. As a matter of fact, does he not spend considerable time on a salesman when he is in that particular department?

A. Not a great deal. We do not keep salesmen in the house very long when they are here on business.

X Q. 190. I suppose what is true with respect to Mr. Garvin is true in respect to the heads of other departments, is it not?

A. Yes, generally speaking, I would say that it is sort of qualifying by a trip through the house.

X Q. 191. As a matter of fact, not being a trained pharmacist or chemist I presume you would not assume to instruct them in reference to the therapeutic or medicinal value of preparations, would you?

A. Well, I would not go into any great detail in that line because I admit I am not qualified.

X Q. 192. This makes it necessary for someone else who is qualified to perform that duty?

A. I do not know that I would say that a successful salesman should be a therapeutist.

X Q. 193. You stated that your salesmen visited the drug trade, both retail and wholesale and also physicians; for what purpose do they visit physicians?

A. The purpose is two-fold; to sell the physician those items which he dispenses if at all; if he does not dispense, detailing him on some of our products.

X Q. 194. What do you mean by "detailing" him?

A. Detailing, in commercial parlance, I would say is personal advertising. I mean advertising by word of mouth.

X Q. 195. Well, in what respect, as to the uses for which your product can be put?

A. I am not an expert detail man, but as I understand it a detail man endeavors to demonstrate to a prescribing physician the efficacy and high quality of his products. In other words, endeavors to secure the good will of the physician for the product of his manufacturer.

167 X Q. 196. Does you- house do much of this detail work?

A. We do not employ exclusively detail men, but our sale men to a greater or less degree do this kind of work.

X Q. 197. In respect to the amount of work of this character don by your salesman in 1908, how much do they do today?

A. I presume, probably, very little more now than they did the

X Q. 198. Is it a fact that detail work is going out of style amon manufacturers?

A. Well, I am not really familiar with what other manufacturer are doing. I rather hold the opinion that there is not as much don by manufacturers through the medium of detailing as there was i former years. I rather believe that the detail man has with som physicians at least become more or less of a pest, and manufacturer recognize this.

X Q. 199. Do you wish to change your answer to the former question and where you stated that you thought more was done toda than formerly?

A. I understood and still believe your former question to have in quired whether our men are doing more detailing today than the did in 1908. I did not understand your question to inquire as t the general practice of other manufacturers.

X Q. 200. Well now, please answer with the understanding tha the question applies to the trade generally, including all manu facturers, how does the amount of detailing work today compar with the amount in former years, or from 1903 to five years ago?

A. I repeat that my previous answer covers that to the effect tha I do not know just what other manufacturers are doing, but it is my impression that they are not employing as many exclusive detailing men as formerly because there seems to exist the impression tha with some doctors at least, detail men have become more or less of a pest.

168 X Q. 201. In respect to detail men becoming a pest, what is the difference as to whether he is exclusively a detail man or only a partial or combination man, we will say, a detail man and salesman?

A. It is obvious that an exclusive detail man will call on doctors oftener than a combination salesman and detail man. A combination salesman and detail man is quite likely to call on physicians who send their prescriptions to the druggist whom this combination salesman and detail man calls on.

Mr. Rawle objects to this line of cross-examination as not proper cross-examination, and in any case as a repetition and excessively and unnecessarily prolonged.

X Q. 202. In your direct testimony you gave various divisions of the territory covered by your salesmen in the central section of the country, in respect to each of these divisions did you have a separate salesman?

A. Yes; that is my earnest endeavor to have a separate salesman in each of those divisions.

X Q. 203. And each salesman is expected to call on all of the retail

druggists in his territory from six to one times a year, and on what percentage of the physicians?

A. He is expected to call on all the retail druggists whose credit is good and who are accessible without incurring too great expense. As to the per cent. of dispensing physicians, it would be very difficult for me to say.

X Q. 204. Have you ever read the "Salesman's Creed," on page 87 of the Warner "Confidential Manuel"?

A. Yes.

X Q. 205. Do you know who was the author of this literary gem?

A. No, I do not know.

169 X Q. 206. Your instructions to your salesmen as to the "Salesman's Confidential" to study it included the entire book, I assume, as well as the particular pages to which counsel has called your attention?

A. Well, when I told them to study this book, I told them to study it from cover to cover, as I recall.

Cross-examination closed.

GARFIELD D. MERNER.

Subscribed and sworn to before me this 16th day of March, A. D. 1916.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the United States District Court in and for Eastern Division of Eastern Judicial District of Missouri.

HENRY J. RITAYIK, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and present occupation?

A. Henry J. Ritayik, twenty-nine, 2833 Magnolia Avenue, St. Louis, Missouri; assistant sales manager, William R. Warner & Company.

Q. 2. State consecutively what has been your course in life, since you have been a druggist, and when you began?

A. I began the drug business nine years ago and worked in the house, about two years, of William R. Warner & Company, and traveled in the territory for two years for Wiliam R. Warner & Company, and as assistant sales manager for five years for William R. Warner & Co.

170 Q. 3. What month and what year did you start this business.

A. I started September 28, 1906.

Q. 4. That was before William R. Warner & Co. affiliated?

A. Yes.

Q. 5. What date was that?
A. That was about in August, 1908.
Q. 6. Is that your entire connection with the drug business?
A. Yes.
Q. 7. As a salesman, what territory did you work?
A. Northern Indiana.
Q. 8. What are your powers as assistant sales manager in reg to hiring and discharging salesmen?
A. Well, as to hiring the men who spend six days with me, I struct him as to the policies of William R. Warner & Co., and I g erally leave him for three days and return three.
Q. 9. Have you the power to hire men and discharge men yo self.
A. Yes.
Q. 10. In taking on new salesmen, what amount of knowledge the drug business do you require?
A. We require registered pharmacists.
Q. 11. In a reasonably well stocked retail drug store, state wheth or not the stock includes a number of similar pharmaceutical prep rations, similar in medicinal effects, but the product of differe houses?

Mr. Bradford: Question objected to as immaterial, irrelevant a incompetent to prove any issue herein.

A. Yes, there is a lot of products of all different houses, all alik of different lines, in different stores.
Q. 12. Two or more of the same products, but different makes?

Same objection.

171 A. Yes, in most all stores.
Q. 13. State whether or not you mean that these produc in case of any particular drug are interchangeable?
A. In effect.
Q. 14. Interchangeable with regard to medicinal effects?

Same objection.

A. Yes, that is the object of it.
Q. 15. If a *prescription* writing a particular drug does not specif the name of the particular maker, state whether or not it is prope for the druggist to make his choice of the particular make?

Same objection.

A. Yes.
Q. 16. Assume that the prescription calls for a particular dru and of a particular make, is it proper for the druggist to fill tha prescription by using a drug of a different make than the one spec fied in the prescription?
A. No, except where he gets the consent of his physician. Often times that is done. I have heard it myself, when a druggist call up a doctor over the phone and asks whether he was privileged t do so.

Q. 17. If a druggist puts in a different make, when a particular make is specified, is that honest practice?
A. No, sir.
Q. 18. State whether or not that is your opinion as to the honesty of that druggist?
A. Yes.
Q. 19. State whether or not that is the recognized opinion of the drug business with regard to that practice?
A. It is.
Q. 20. State how far the same thing is true when there is a call over the counter for a preparation of a particular make, and the druggist puts in a similar product of a different make?
172 A. It should not be done.
Q. 21. This should not be done?
A. Yes.
Q. 22. State whether or not, in your opinion, that is honest in the drug business?
A. It is not honest.
Q. 23. State whether or not, according to the ethics of the drug business, that is considered honest?
A. No, sir.
Q. 24. State whether or not, in your opinion, a druggist who did either of these things would be an honest man?
A. He is not.
Q. 25. To what extent have you, as assistant sales manager of the defendant, been charged with the duty of instructing new salesmen whom you have taken on in the western department?
A. Instructed them to be honest, truthful and to sell our own products, and not mention the name of competitors in selling our products. Our "Confidential" also bears that out. I instruct them to study their "Confidential" thoroughly, and by studying it thoroughly it would give them our entire policy, and that if I was not with them, by studying this "Confidential" it would give them our policies.
Q. 26. Do each of them have a copy of the "Confidential?"
A. Yes. They all have a copy of the "Confidential."
Q. 27. As to the sale of how many items would you instruct them? Please state how many items there were being sent out by you to be sold for the house?
A. Well, is that how much of the list price?
Q. 28. The items?
A. I do not instruct them on any particular item. The object is to sell the line as a whole.
Q. 29. How many items were there in the list, approximately?
173 A. Approximately, five thousand or so—in that neighborhood.
Q. 30. State whether or not you instructed them particularly as to the sale of any one or more items among those five thousand?
A. No, sir; because we want the line sold as a whole

Q. 31. Do you know C. J. Thurman, who was once a salesman for the defendant?

A. Yes.

Q. 32. State whether or not you ever gave him instructions specifically as to the sale of Quin-Coco?

A. I never worked with Mr. Thurman.

Q. 33. Was he in the employ of the defendant when you went into their employ?

A. Yes.

Q. 34. What knowledge have you as assistant sales manager of the mental condition of Mr. L. C. Gill, formerly a salesman of the defendant?

A. He was unbalanced. Then he was out of the employ of the company about three years, and we finally re-engaged him in Northern Kansas. I should say re-engaged him for the Pacific Coast, with training in Kansas, and when sent to the Pacific Coast he stopped at Salt Lake City, and was again unbalanced, and then later on I met him in front of his home in Muskogee, Oklahoma, and at that time still felt he was unbalanced.

Q. 35. Did you talk with him at that time?

A. Yes.

Q. 36. When was that?

A. That was about nine weeks ago.

X Q. 37. Did you have knowledge of Gill's character and the quality of his work.

A. We always considered him honest.

Q. —. A good salesman?

A. Yes.

Q. 39. Better than most?

174 A. Yes, better than the ordinary.

Q. 40. Where have you found the market to be for Quin-Coco, Searle & Hereth?

A. I would say practically in all the Southern States. Of course, if you want them specially mentioned, I can mention them.

Q. 41. Among what class of customers?

A. I would say all class of dealers.

Q. 42. Specify the class, please, as near as you can in their importance?

A. As I say, all class of dealers. That would, of course, cover the better stores as well as the poorer stores. I would say some of the big druggists in Southern towns are buyers of Quin-Coco.

Q. 43. To whom is Qin-Coco sold.

A. As I said, it is sold to dealers that are considered the best dealers in town, and sold to dealers that are not considered the best dealers in town. It is sold to all classes.

Q. 44. Dealers in what?

A. Dealers in drugs.

Q. 45. To what extent, if any, is there a market among doctors?

A. Dispensing doctors?

Q. 46. Yes.

A. And prescribing doctors, as well?

Q. 47. On what kind of calls, either prescription or over the counter, is Quin-Coco sold?

Mr. Bradford: Question objected to unless the answer is based upon the witness' own experience.

A. Well, my experience is this that I have seen prescriptions for Quin-Coco; I have seen duplicates of them; I have seen prescriptions for chocolate quinine and I have heard of calls for chocolate quinine when in the drug stores.

Q. 48. On what other calls, if any, can it be properly sold?

175 A. Well, on specified calls, it is left to the dealer's discretion.

Q. 49. On specified calls for what?

A. For chocolate quinine.

Q. 50. Do you know of any other calls on which it can be sold besides chocolate-quinine or Quin-Coco?

A. Well, yes, it is sold by dealers for coughs and colds, and people come in for something for coughs and colds. I have seen Mr. Gieger in Peoria, he sold it that way.

Q. 51. Can you name any other calls on which it can be sold or it has been sold?

A. No.

Q. 52. How do you sell Quin-Coco to retail druggists?

A. I ask them whether they use Quin-Coco, Searle & Hereth Company, a chocolate-quinine containing two grains of quinine sulphate to the teaspoon.

Q. 53. State whether or not in your experience a retail druggist can push the sale of a given pharmaceutical preparation and create a market for it?

Mr. Bradford: Question objected to as irrelevant and immaterial.

A. Yes.

Q. 54. How?

A. As I say that illustration of Mr. Gieger, people coming in for something for coughs and colds and other ailments, he can give a certain product.

Q. 55. Do you know of any lines the sales of which largely depend on the special efforts of a retail druggist?

Same objection.

A. Yes, a good many lines. I would say a good many of the unadvertised items have been pushed by the retail druggist.

Q. 56. Can you state whether or not the sales of such are quite large?

176 A. Yes.

Q. 57. Can you mention any preparation that you have in mind, preparation or lines that you have in mind in this connection?

Same objection.

A. Yes, Myle's goods are pushed. The line depends a good d on the push of the retail druggist; Haywood & Hobson have b pushed a good deal by the retail druggist, and a druggist genen realizes when he buys these goods what he is going to do with th He really does not need any coaching from the ordinary travel man how to dispose of those goods.

Q. 58. State whether or not you were present at a conversat in 1912 or thereabouts between Garfield D. Merner and C. J. Th man, a salesman?

Mr. Bradford: Question objected to as leading.

A. Yes.

Q. 59. What was said there?

A. Yes, in the St. Louis Lunch Room when Mr. Thurman m the remark that the Myle goods were "a good line," and Mr. M ner told him "that is the house he ought to be with."

Q. 60. When was that conversation?

A. It was at noon, dinner time.

Q. 61. What month and what year?

A. That was in December, let me see, December, 1912, I pretty sure.

Q. 62. How soon after that did Thurman's connection with defendant as salesman cease?

A. Well, I thought it was two weeks or so.

Q. 63. Do you know whether or not there are on the market the present time and have been for some time past, chocolate-qu ine preparations made and put out by any house other than Wan & Company?

Mr. Bradford: Question objected to as irrelevant and immateri

177 A. Yes.

Q. 64. Can you name some of them?

Same objection.

A. G. F. Harvey & Company, Saratoga, New York, John Milliken, St. Louis, Meyer Brothers, St. Louis, H. K. Mulford & C Philadelphia. That is all I can recall to mind. There are a gr many others, at least nine or ten of them.

Q. 65. State whether or not you have ever seen the chocola quinine preparations on sale by those houses you have mentioned

Same objection.

A. I have seen their stock bottled.

Q. 66. In drug stores?

A. In drug stores.

Q. 67. In your opinion, one of your salesmen who should su gest to a retail druggist that he should buy your product, Qui Coco, and that he could supply it on prescription or over the count when the Lilly product, Coco-Quinine, was called for, would be a honest salesman?

A. He would not.

Q. 68. State whether or not as assistant sales manager of the defendant, you ever had any information or knowledge, except from the testimony in this case, that any salesman of William R. Warner & Co. had ever suggested to any retail druggist that he could dispense William R. Warner & Company's Quin-Coco on physicians' prescriptions or calls over the counter when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. There are some certain of our travelers that have——

Mr. Rawle: Read the question.

Question repeated.

A. They have suggested our product on calls for chocolate-
178 quinine. That was going to be my original answer.

Mr. Rawle: As that answer is not responsive to my question, I will ask that my question be re-read to him.

Mr. Bradford: I call the attention of the Court to the fact that the witness' answer to the previous question was as follows: "There are some certain of our travelers that have—" Counsel for defendant then had the examiner to re-read the question to the witness when he added to the answer as appears above.

Mr. Rawle: I now ask the question to be again re-read.

Question repeated.

A. Well, I was going to say on that question, absolutely no; that is an absolute fact. What I was going to say——

Q. 69. Confine your answer to the question?

A. The part I was going to bring up, I was going to answer this way: What I intended to answer at that time and somebody interrupted me.

Mr. Bradford: I did not interrupt you at all.

Q. 70. State whether or not you understood the question I put to you and whether the answer that you have given is the answer you desire to make to my question?

A. That is the first answer or the last answer?

Q. 71. I mean the last answer.

A. Yes, I meant that I did not have any knowledge and do not know of where a traveling man had offered our article in place of Coco-Quinine on a prescription or over the counter. That is a truthful answer to it.

Q. 72. If you had any such information that any salesman had done that thing, state whether or not that would have been contrary to his orders and your teachings and in violation of the selling
179 policies of your house?

A. Yes.

Q. 73. When I first asked if you had any information or knowledge that any salesman of Warner & Company ever suggested to a retail druggist to dispense Quin-Coco in place of Coco-Quinine, when specifically called for, will you state now whether you then

made your full answer to that or whether you were cut off by counsel before you had completed your answer?

A. I was cut off by counsel.

Q. 74. When you say you were cut off by counsel, will you say whether you mean by counsel for the plaintiff or counsel for the defendant?

A. Counsel for the defendant.

Q. 75. Under those circumstances will you state whether you have now given an answer to that question do you desire it to stand on the record as your answer to the question?

A. Yes.

Q. 76. State whether you have ever in any way as assistant sales manager of the defendant directly or indirectly directed, authorized or suggested to anyone of your salesmen that he should or might suggest to any retail druggist that he could dispense the product Quin-Coco on physicians' prescriptions or calls over the counter when Ely Lilly & Company Coco-Quinine was specifically called for?

A. I would like to have that read again.

Question repeated.

A. No, sir.

Q. 77. State whether or not you ever, as assistant manager, had any information or knowledge, except by the testimony in this case, of a retail druggist selling or dispensing your product, Quin-Coco, on physicians' prescriptions or on calls over the counter when Lilly & Company's product, Coco-Quinine, was specifically called for.

A. No, sir.

180 Q. 78. State whether or not as assistant sales manager you have ever directly or indirectly authorized any retail druggist to do so, or in any way suggested or represented to any retail druggist that he could do so?

A. No, sir.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 79. When did you last, personally, sell any Quin-Coco to any retail druggist?

A. That would be hard for me to answer until I saw the orders. I could tell you then. I visited with the different salesmen and they wrote up the orders and it really would be hard for me to give you a definite date.

X Q. 80. Can you state approximately?

A. I cannot state just definitely when the last Quin-Coco was sold.

X Q. 81. Did you sell any during the year 1914?

A. Yes.

X Q. 82. In what territory?

A. In different territories, southern territory mostly.

X Q. 83. Be more specific?
A. Well, I would say during that time I sold some in the State of Alabama.
X Q. 84. In company with whom?
A. With Mr. C. J. McCarty.
X Q. 85. What other salesman.
A. Well, that is all I can say positively right now. As I say, if I could get the different orders, I could tell positively just who I sold it with.
X Q. 86. Did you travel with other of your salesmen in the south?
A. Yes. I made a trip with practically all of them during this year.
181 X Q. 87. Also during the year 1914?
A. Yes.
X Q. 88. And those salesmen all handled Quin-Coco?
A. Yes, all of our men have it for sale.
X Q. 89. And also solicit orders from the retail trade?
A. Well, I would not say every one of them, but there were some that solicited orders for Quin-Coco. I want to give truthful answers on this and that is what I am doing.
X Q. 90. Can you tell me the names of any other salesmen than McCarty that you traveled with when Quin-Coco has been sold?
A. I can give the names of other men when it was mentioned, and there is a possibility it was sold, but to give you that specifically I could not.
X Q. 91. I want you to give me the names of those you think you traveled with and who mentioned Quin-Coco to the retail druggist in your presence?
A. Well, Mr. H. Richards.
X Q. 92. In what territory is he?
A. He is in South Texas.
X Q. 93. Anyone else?
A. That is all I can really think of right now.
X Q. 94. You mean to say that you have never heard one of your salesmen represent to a retail druggist that Quin-Coco could be dispensed when Coco-Quinine has been called for?
A. No, sir. I have not, never.
X Q. 95. Did you hear one of your salesmen mention Coco-Quinine to retail druggists?
A. I have not heard them. No, I did not hear them mention that.
X Q. 96. On what demand for your product do you expect your salesmen to sell your product, Quin-Coco?
A. Lots of times there are calls for chocolate-quinine, lots of times no specific calls, and if a druggist had no call on them, I will tell
182 him, that is the way I always put it to them, any time you have got no specific calls or a call for chocolate quinine, that Searle & Hereth Quin-Coco fills that call.
X Q. 97. When did you first hear of a chocolate quinine preparation?
A. The first I heard of it?

X Q. 98. Yes.

A. When I started selling goods.

X Q. 99. When was that?

A. That was February 1st, 1908.

X Q. 100. Is that the first time you ever heard of a liquid chocolate-quinine preparation in the drug trade?

A. Yes.

X Q. 101. Had you never prior to that time heard of Lilly's Coco-Quinine?

A. No, sir.

X Q. 102. What was the first introduction to the drug trade?

A. Lilly's Coco-Quinine?

X Q. 103. No, sir, that date?

A. That date, yes, at the time I started traveling, it was the first introduction to me that there was a chocolate-quinine on the market. I used to work in the hardware business and from the hardware business I came to Warner & Company, and I never got to know of any of these products until I got to selling goods.

X Q. 104. Please give the names of some of the customers in the south that you have called on and solicited orders for Quin-Coco either alone or in company with one of your salesmen?

A. The West End Drug Company of Montgomery, Alabama, is one instance. Then there is a little town in Mississippi, I cannot think of right now. That is all I can really think of right now where I asked them specially for that preparation. Of course, when I visit a man I generally sell the line as a whole. I do not specialize. I sell the line as a whole. When I visit a man I demonstrate to him the line as a whole.

X Q. 105. Do you specialize any product?

183 A. No; I simply take the book and go through it entirely. I do not specialize any particular product. I run right through that book.

X Q. 106. You mean the "Salesman Confidential"?

A. I start through this book, the front of this book, but I cannot stay on any one thing too long. I do not discuss any one particular product, and that is really what the house expects of me, to sell the line as a whole and not specialize on any particular thing.

X Q. 107. When you have a particularly good seller isn't it the policy of your house to push the sale of that item?

A. I will tell you to be frank, we just simply mention it. I say, how is this, and how is that, and he would say, I have got plenty and we go on.

X Q. 108. As I understand your chief experience has been in traveling as an instructor with these salesmen, not as soliciting orders, is that it?

A. My work with these men is to instruct them as to the policies of the company and more so to demonstrate to them that goods can be sold. That is my work to demonstrate to our men that goods can be sold and the house will bear me out that I do that in the amount of sales. That is my duty, to demonstrate to the salesman that he can sell one thousand dollars per week.

X Q. 109. But you have never instructed your men that any of your products could be used as a substitute for well known products of other houses?

A. No, sir, positively no.

X Q. 110. You have never represented to retail druggists that any products of your house could be sold as substitutes for well known products of other houses?

A. No, sir, I have not, and if you will pardon me, any time any of our men who I knew was attempting to do it, I would take him aside and say that is not the policy of our house. We aim to sell our goods on the merits of the product.

184 X Q. 111. From whom do you get your instructions?

A. I get them from Mr. G. D. Merner.

X Q. 112. What did Mr. Merner authorize you to do?

A. He authorized me to hire and fire salesmen and to do just as I said, authorized me to use my discretion, whenever I see fit, when they were not doing what they should do, and I carry out those policies of instruction. When I am with an old man, I simply demonstrate that goods can be sold. I outline the general policy of our house and criticise them when criticisms are due.

X Q. 113. What about Mr. Gill and the conversation you had with him nine weeks ago, what did you say to him at that time?

A. Well, he really did not have much if anything to say. I met him in front of his home and asked him where Mrs. Gill was and he did not invite me to the house.

X Q. 114. What was the purpose of your visit?

A. Just simply to see how he was getting along.

X Q. 115. Did you ask him anything about Quin-Coco?

A. No, or any other products in our line. I do not speak business at all.

X Q. 116. What time in December, 1912, was it that you had this lunch with Mr. Thurman and Mr. Merner?

A. Noon time, noon lunch.

X Q. 117. What part of December?

A. I think it was the fore part of December.

X Q. 118. What did Mr. Thurman say about Nyles' line?

A. He said that "it was a good line," and, as said before, Mr. Merner remarked "that is the line you ought to sell."

X Q. 119. Is there anything inconsistent in the policy of your house when, among yourselves, you mention the line of another house in a complimentary way?

185 A. We very seldom bring it up—not unless—I don't know of any member of the company speaking to me along that line.

X Q. 120. Is it considered sufficient cause for discharge?

A. That happened there. I really don't know what happened after that. I never visited with Mr. Thurman.

X Q. 121. My question is, if one of your men speaks well of the line of another house, is that considered a reason for discharge?

A. No, certainly not.

X Q. 122. You still insist that any salesman who would represent to a retail druggist that he could substitute one product when another product is specified is a dishonest man?

A. Yes, I do.

X Q. 123. Do you instruct your salesmen in reference to any detail work?

A. We do some detail work.

X Q. 124. Do you instruct your salesmen concerning detail work?

A. Yes.

X Q. 125. What are your instructions to the salesmen in this respect?

A. On this particular product?

X Q. 126. On any product?

A. Well, I would say this, that there is no instruction on any particular product. When we detail we detail whole products. Our time is consumed in detailing our whole products.

X Q. 127. Have you personally done detailing work for your house?

A. Yes, I have done a good deal of detail work for them personally myself.

X Q. 128. In company with other men?

A. Yes.

X Q. 129. In what territory?

A. I have done so in Central Illinois and practically every State of any importance, that is part of my work with a new man.

186 X Q. 130. Did you ever detail any physician as to Quin-Coco?

A. Yes, I have. I have mentioned Quin-Coco to them.

X Q. 131. Can you name the physicians?

A. No, I cannot.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 132. When traveling with a new salesman or an old salesman do you watch them sell or do you sell and let them watch you, which do you do, most of?

A. I do most of the selling in all cases with old as well as new men.

R. D. Q. 133. Why?

A. Because, as I stated before, I want to demonstrate to them that these goods can be sold.

R. D. Q. 134. State how far you have been successful in thus aiding in the selling of goods when traveling with your salesmen, new or old?

A. That is in the line of goods sold?

R. D. Q. 135. Yes.

A. I have sold in fourteen weeks seventeen thousand dollars worth of goods.

R. D. Q. 136. Traveling in that way?
A. With the other men, yes.
R. D. Q. 137. Is that, in your opinion, considered good?
A. Yes.
R. D. Q. 138. How good?
A. To the extent if all our men on the sales force would do like that, we would be well satisfied.

Re-direct-examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 139. What territory have you covered during that time?
A. Well, sir, I covered Illinois, I have covered Kentucky,
187 I have covered Tennessee, I covered Nebraska, Minnesota, Kansas, Missouri and Texas. Texas was not one of the States, it was Louisiana instead, with the Louisiana man.
R. X Q. 140. Did you visit all of the territory or only the large cities?
A. I simply went on trips outlined, a large city or a small town, whatever is a weekly trip, that is the way it was.
R. X Q. 141. What proportion of these seventeen thousand dollars worth of goods was Quin-Coco?
A. As I said before, I cannot say. I have no way of telling what I sold unless I look it up. I cannot answer.
R. X Q. 142. A considerable portion?
A. I cannot say that. To be frank with you. I cannot tell you the proportion of any one item.
R. X Q. 143. In selling, how did Quin-Coco compare with the other items?
A. I would say it was a good seller. In the southern territory, it is one of the good sellers. In the northern territory it is not.
R. X Q. 144. In the southern territory it is among the very best sellers, isn't it?
A. I would say it is among the best sellers. I would not say it was the very best.
R. X Q. 145. Among pharmaceuticals, as I understand, Quin-Coco is one of your best sellers?
A. One of the good sellers. I would not say the best.

Re-cross-examination closed.

HENRY J. RITAYIK.

Sworn to before me the 6th day of December, 1915.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of U. S. District Court,
Eastn. Div., Eastn. Jdcl. Dist. of Mo.

188 Not being able to complete the taking of these depositions at this time, the same was adjourned by agreement of counsel

for plaintiff and counsel for defendant until Tuesday, December 7th, 1915, at 9.30 a. m.

Pursuant to adjournment as before stated, on December 7th, 1915, at 9.30 a. m., the further taking of these depositions was had as follows:

JAMES W. WILKINS, a witness of lawful age, produced on behalf of defendant deposes and says:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and present occupation?
A. James W. Wilkins; forty-one the fifth of this month; Denison, Texas; Traveling Salesman for Pfeiffer Chemical Company and allied lines.
Q. 2. Do you travel for William R. Warner & Company?
A. Yes.
Q. 3. State briefly and consecutively your connection with the drug business from the start?
A. Well, I entered the drug business when I was fourteen years old, at Denison, Texas, with Mr. W. H. Robert, Junior. I was with Mr. Robert about a year and a half and I followed the drug busines off and on ever since, with the exception of possibly four or five years, something like that. I have been in the drug business at different intervals during all of the time since I was fourteen years old, retail drug and also traveling salesman selling the drug line.
Q. 4. With what successive retail drug concerns were you connected, giving the years as nearly as you can?
189 A. In the years 1893 and 1894, I operated a drug store for myself at Cale, Indian Territory, now Calera, Oklahoma.
Q. 5. What next?
A. Well, I was in the drug business with R. S. Hedrick, at Kemp, Oklahoma.
Q. 6. Were you a partner?
A. I was a silent partner, interested with him.
Q. 7. Did you attend to the business there?
A. Yes.
Q. 8. What next?
A. Well, I managed the business and later on sold out to my partner, Mr. Hedrick and went to Norman, Oklahoma, and then returned to Denison, Texas, and for a short while began traveling for W. H. Bull & Company, St. Louis, Missouri, medicine business, proprietary medicine business. I traveled for them, that was along 1906, and I traveled for them until the latter part of 1907. I entered the employ of the Pfeiffer Chemical Company the following year, 1908, and I have been with those concerns ever since.
Q. 9. What has been your territory?
A. The first year I was with them I worked East Texas and South-

ern Arkansas. Since then I worked Western Louisiana and East Texas.

Q. 10. What large cities does your territory cover?

A. Well, no real large cities, Shreveport is the largest city in the territory.

Q. 11. Are you a registered pharmacist?

A. Yes.

Q. 12. In what State?

A. Oklahoma.

Q. 13. State whether or not the Searle & Hereth product, Quin-Coco, has been sold by you in your territory during these years, more or less?

A. Yes.

Q. 14. State whether or not the sales have been in fair quantity?

A. Well, they have been fair.

190 Q. 15. How often do you call on your druggists?

A. About every three and a half months. It will vary a little bit but in the neighborhood of that.

Q. 16. How many of them are there in your territory?

A. I never counted them. I cannot say.

Q. 17. Give approximately the number?

A. I do not know, I cannot say just how many.

Q. 18. Would there be as many as one hundred and fifty.

A. I should think so.

Q. 19. Two hundred and fifty?

A. Well, I should think there would be that many.

Q. 20. State whether or not you called on physicians in your territory, particularly dispensing physicians?

A. I do.

Q. 21. How often?

A. Well, I do not call regularly as a rule, I call on them about every other trip, not every trip, sometimes I will skip and maybe the third trip.

Q. 22. About how many dispensing physicians do you call on in this way?

A. Well, I cannot recall from memory.

Q. 23. As many as fifty?

A. I would judge so.

Q. 24. As many as one hundred?

A. It may be one hundred and may not be quite so many.

Q. 25. Have you seen any other chocolate-quinine preparation in your territory except Eli Lilly & Company and Searle & Hereth's?

Mr. Bradford: I object to that as irrelevant and immaterial.

A. Yes.

Q. 26. Name the makers thereof?

Same objection.

191 A. First Texas Chemical Company, Dallas, Texas, John T. Milliken & Company, St. Louis, H. K. Mulford & Company, Philadelphia.

Q. 27. Where have you seen their goods?

Same objection.

A. I have seen their goods in various drug stores that I visited.

Q. 28. State whether or not these are competitive products with your Quin-Coco product?

Same objection.

A. To be sure, yes, they are competitors.

Q. 29. State whether or not you sold the entire Warner line including Searle & Hereth, Pfeiffer Chemical Company, and other companies for whom Warner is distributor?

A. Yes, I do.

Q. 30. About how many items are there on those various lists?

A. I have never counted them.

Q. 31. Do they run up into the thousands?

A. I cannot say.

Q. 32. State whether or not you solicit sales in your territory for the entire line?

A. You mean the different lines?

Q. 33. For the entire line?

A. I do.

Q. 34. State whether or not you put special efforts on a few individual items in your line or on the line as a whole?

A. On the line as a whole.

Q. 35. If a retail druggist having a call over the counter or on prescription for a given preparation made by a specified drug house and he dispenses a like preparation made by a different drug house, state whether or not, in your opinion, that is honest in the drug business, assuming that the customer in the one case, and

192 the physician in the other case is not informed?

A. That would depend in my opinion, on circumstances.

Q. 36. I will put the question a little differently: When a prescription calls for a medicinal preparation and specifies the particular maker in the prescription, and the druggist, without telling the doctor, fills it by using a similar preparation made by a different house, state whether or not, in your opinion, that is honest in a druggist?

A. Well, I don't know.

Q. 37. What is the duty of a druggist as to putting into a doctor's prescription the article called for by the prescription?

A. It is the duty of the druggist to carry out the wording of the prescription.

Q. 38. If, without telling the doctor, he puts in something else, is that honest?

A. If he dispenses something in lieu of what the prescription calls for?

Q. 39. Yes. That is what I asked.

A. I would not consider it honest.

Q. 40. If a customer over the counter calls for a given prepara-

tion and the druggist sells him a different preparation without telling him, is that honest in the druggist?

A. No, sir, I should not think so; unless he specifies the name of the article he wants and he does not call the purchaser's attention to the change, I would consider that a dishonorable act.

Q. 41. State whether or not you would consider a druggist who did that sort of thing a dishonest man in his business?

A. Well, I would say this much: I would not consider that he did right.

Q. 42. If a drug salesman suggested to a druggist that he could do such a thing, would you consider that honest business in a drug salesman?

193 A. State your question again, please.

(Question read.)

A. Well, I couldn't consider it a dishonorable act.

Q. 43. What wouldn't you consider a dishonorable act?

A. What I consider a dishonorable thing: If a man is filling a prescription calling for one thing and a man telling another man to use something else.

Q. 44. Do you know John F. Whitley, a druggist?

A. Yes, sir.

Q. 45. Where is his business?

A. Winfield, Louisiana.

Q. 46. In your territory?

A. Yes, sir.

Q. 47. Do you remember soliciting his business on the Warner line at any time?

A. Well, I called on him regularly when in my territory.

Q. 48. How many times have you called on him since you began with the house?

A. I couldn't say.

Q. 49. For how many years have you been calling on him?

A. At Winfield?

Q. 50. At Winfield or at any other place?

A. It has been something, I think, about five or six years.

Q. 51. How large a place is Winfield?

A. I don't know, sir.

Q. 52. State whether or not you have solicited his trade on the whole Warner line which you carry.

A. Yes, sir, I have.

Q. 53. When you go over the Warner line with Whitley and get to Quin-Coco, what is your practice to say to him on this subject?

A. Well, I sell the entire line. I don't know that I have ever put any stress—any particular stress on Quin-Coco.

194 Q. 54. You remember what your practice is to say to him on the subject of Quin-Coco?

A. I don't remember any particular time that I have specially said anything to him on Quin-Coco. No doubt, I have shown it to him in the line.

Q. 55. What do you tell him when you show it to him in your line?

A. I tell him I have a preparation known as Quin-Coco.

Q. 56. What else?

A. Chocolate-quinine.

Q. 57. Containing what?

A. Two grains of sulphate of quinine to a teaspoonful.

Q. 58. You speak of its qualities?

A. I tell him it is a good preparation.

Q. 59. Anything else?

A. I no doubt tell him that in my opinion it is a smooth piece of goods as the average on the market or similar to it.

Q. 60. John F. Whitley called as a witness for plaintiff, testified as follows:

"Q. What did the salesman say to you in reference to Quin-Coco, as near as you can remember?

A. Well, in going over the items we would be buying, he told us that he wanted us to let him make us prices on Quin-Coco; as we could save considerable money. He saw that we had a considerable trade on Coco-Quinine and he wanted to give us prices on Quin-Coco where we could save money by using it.

Q. What else did he say to you in reference to it?

A. He said it was an identical preparation to Coco-Quinine; that we could sell it on the same prescriptions that we had been selling the Coco-Quinine."

State whether or not you said that to Whitley?

195 A. No, sir, I didn't state that to him.

Q. 61. State whether or not you said to Whitley that he could dispense Quin-Coco the same way on calls for Coco-Quinine?

A. No, sir.

Q. 62. What is your selling talk on this product?

A. I generally show it to a customer in connection with the other preparations in the line, and tell him I have a chocolate-quinine containing two grains of sulphate quinine with a chocolate base, containing chocolate; that it is a smooth preparation.

Q. 63. Have you always had a copy of the "Salesman's Confidential"?

A. Yes, sir.

Q. 64. Would you consider it would be honest in Whitley to dispense Quin-Coco on calls for Coco-Quinine?

A. No, sir.

Q. 65. Would you consider it would be honest for you to tell him he could do that, or persuade him that he could?

A. Repeat the question please, sir.

(Question Q. 65 read.)

A. You ask me if I consider it honest for a man——

Q. 66. For a salesman to tell a druggist that he could sell Quin-Coco when Coco-Quinine was called for?

A. I don't quite comprehend the question. Wasn't that question answered a few minutes ago, or a similar question?

Q. 67. A similar question. Would it be honest in a salesman to tell a druggist that he could dispense Quin-Coco on calls for Coco-Quinine?

A. If he would have a call for Coco-Quinine and the salesman would say to him to use Quin-Coco in lieu of the Coco-Quinine?

Q. 68. That is the question I asked you.

A. Am I allowed to have any of the previous part of my testimony re-read to me?

196 Q. 69. Yes.

A. I wish you would turn and read to me the part of the testimony there that Mr. Rawle asked me about as to how I sell Quin-Coco.

(Testimony from Q. 61 to Q. 67, inclusive, read.)

A. I would like to have the questions re-read to me to make it clear in my mind, so I won't confuse the questions in my mind.

Mr. Bradford: I also want it noted on the record that this discussion over the interpretation of this last question has occupied about six minutes.

The Witness: It may occupy more time than that. I don't have to be in a hurry about answering these questions, do I?

Mr. Bradford: I simply wish the record to show how long it takes for the witness to make up his mind to answer a simple question such as the last one.

Mr. Rawle: I wish to state upon the record that the discussion with the witness which has ensued within the last few minutes was joined in by counsel for plaintiff.

Mr. Bradford: I wish to state that I did not have anything to say in this dialogue or discussion until at least five minutes had elapsed, and the substance of what he has said is already on the record.

(Question Q. 67 read.)

A. I thought that I answered that question in a previous statement?

Q. 70. Please answer it now.

A. The question is: Would I consider it honest for a druggist to dispense Quin-Coco where there was a call for Coco-Quinine?

197 It seems to me that the question has already been asked and answered. It seems to me like the former question was similar to this one. I wish you would turn back and read it to me.

Mr. Bradford: Any further reading of witness' deposition is objected to as entirely unnecessary. The question is plain, and if the witness cannot answer he should so state.

A. The question still is not clear to my mind.

Mr. Bradford: You have asked it yourself? Can't you answer a question you asked yourself.

Mr. Rawle: Please read to the witness the last question.

(Question Q. 67 read, and all that follows to this point, read to the witness.)

Q. 71. What I asked you was whether you would consider it hon for a salesman to tell a druggist that he could dispense Quin-Co when he had a call for Coco-Quinine?

A. I would not consider it honest.

Q. 72. Will you state on what sort of calls over the counter or prescriptions a retail druggist could properly sell Quin-Coco?

A. Well, there are calls for chocolate quinine syrup. I suppose person would be allowed to dispense Quin-Coco for a Chocola Quinine Syrup, and of course, under its own name, Quin-Coco.

Q. 73. Any others.

A. Yes, sir, if a customer should call and call for a syrup co taining quinine, I think a druggist would be justified in dispensi Quin-Coco.

Q. 74. For what complaints is quinine usually administered?

A. For malaria, for colds.

Q. 75. What about calls for colds and malarial medicines?

Mr. Bradford: Objected to as leading and immaterial.

198 A. There is a demand for that kind of product.

Q. 76. State whether or not such a call could be filled b Quin-Coco?

A. I don't see why it should not.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 77. In selling the Warner line I assume that you follow th selling policy of your house?

A. As near as I know how, yes, sir.

X Q. 78. You are familiar with that policy?

A. Reasonably familiar, yes, sir.

X Q. 79. From whom did you obtain your education in that re gard?

A. You mean when I first went with the William R. Warne people or Pfeiffer Chemical Company?

X Q. 80. Then or since?

A. I couldn't say; they have general salesmen with me in th territory.

X Q. 81. Who?

A. Mr. H. H. Richards for one; a Mr. Allen for another; a Mr McNulty for another; a Mr. Ritayik; and also Mr. H. Pfeiffer, th president of William R. Warner & Company.

X Q. 82. All of the gentlemen named have traveled with you a different intervals?

A. At different intervals.

X Q. 83. They were all familiar with the methods employed by you in selling their goods?
A. I can't say.
X Q. 84. In traveling with you did they observe your sales or co-operate with you in making sales?
A. They co-operated with me, yes, sir.
X Q. 85. Visited the druggists with you?
A. Yes, sir.
X Q. 86. Heard you talk to the druggists?
199 A. Well, I don't know every particular thing that I said to the druggist, I don't know that they did.
X Q. 87. When you were selling a bill of goods to a druggist, the gentleman of the list above named who might be with you would take down the order, would he not?
A. Sometimes they would and sometimes they would not.
X Q. 88. Have you ever had instructions at the Home office?
A. On Salesmanship?
X Q. 89. Yes.
A. Not that I remember.
X Q. 90. Have you ever had any information given to you at the Home office respecting the various products you were selling?
A. Yes, sir.
X Q. 91. By whom?
A. By whom?—Mr. Garvin I think it is.
X Q. 92. Any others?
A. You mean pertaining to selling the goods?
X Q. 93. I mean pertaining to the products themselves?
A. Yes, sir, I have had conversations with Mr. Garvin, the chemist
X Q. 94. Did you ever have any conversation with Mr. Garvin respecting Quin-Coco?
A. Not that I can recall to my memory.
X Q. 95. Can you recall any conversation with Mr. Garvin respecting any specialty in your line?
A. Yes, sir.
X Q. 96. What specialty?
A. Guaiatonic.
X Q. 97. Any others?
A. Yes, sir, Tritica, and possibly others.
X Q. 98. But you don't recall *of* any conversation with reference to Quin-Coco?
A. No, sir.
200 X Q. 99. Which product is the largest seller—Guaiatonic or Quin-Coco in your territory?
A. The largest of the two you say? Well, I haven't the record at my command right now, but I think that I sell more of Guaiatonic than I do of Quin-Coco, of the two products.
X Q. 100. You would not be able to state positively as to this?
A. I couldn't say positively, but I think I sell more Guaiatonic.
X Q. 101. Which of the two products, Quin-Coco or Tritica, is the largest seller in your territory?

A. I don't remember, sir.

X Q. 102. Do you have a reasonably large sale of Quin-Coco the trade?

A. I can't say that I do.

X Q. 103. Do you sell a good deal of Tritica?

A. Well, I don't know. Well, it is a fair seller with me. I can say that it is the leading seller by any means of the specialties th I sell.

X Q. 104. To what other druggists in your territory have yo sold Quin-Coco besides Mr. Whitley?

A. Well, I couldn't recall to memory any particular druggist. have sold first one man and then another. I couldn't recall memory any particular name.

X Q. 105. How long have you been traveling this territory?

A. Eight years this coming March. The 23rd of next March will be eight years.

X Q. 106. Do you recall the names of any of the druggists i this territory to whom you have sold Quin-Coco?

A. In East Texas?

X Q. 107. Yes, sir.

A. Well, as I stated a moment ago, I can't recall to memory an particular one. I might name over several customers that I think I have sold.

201 X Q. 108. Are you willing to do so?

A. Well, I would not say that I have sold them, I would not say that I have positively sold them. I couldn't recall to memory every man I have sold Quin-Coco to.

X Q. 109. Have you finished your answer?

A. Yes, sir.

X Q. 110. I asked you if you were willing to name some of them.

A. I would be very willing indeed if I could recall any particular case.

X Q. 111. I understood in a former answer you said you could recall some that you think you have sold. I asked you if you would name these without stating positively that you have sold them?

A. The Harkrider Drug Company, Center, Texas; H. Y. Rogers, of the same City; Mr. J. C. Rogers, for another; Phelps-Hook Drug Company, Texarkana; Ringo Drug Company, Ringo, Louisiana, and others; I couldn't say how many more.

X Q. 112. What is your opinion of Mr. Whitley as a man and as a druggist?

A. For Mr. Whitley I have always entertained a very friendly feeling towards him. I consider him an honest man.

X Q. 113. Pretty good friend of yours?

A. Mr. Whitley has always seemed to be very friendly towards me.

X Q. 114. Is he a man you would trust?

A. Well, I would not care to answer that question. I might under certain conditions trust him. I think the question is a little personal.

X Q. 115. Have you known of Mr. Whitley representing anything to you falsely?

A. You mean telling me a falsehood?

X Q. 116. Yes.

A. I have no recollection of him ever telling me a falsehood.

202 X Q. 117. You usually found that what he has told you has been reliable, have you not?

A. Well, I would not say that I had or had not.

X Q. 118. Why can't you say that you have or have not?

A. Simply because I never had no occasion to give it a thought one way or the other particularly.

X Q. 119. What reason have you to doubt the truthfulness of what Mr. Whitley has testified to in this case?

A. What has he testified to?

X Q. 120. I ask you to answer my question without asking questions. Counsel for your house has already read you his testimony, or part of it.

A. You mean to question anything he has told me at all. You know what room I have to question anything he has ever told you.

X Q. 121. I would like you to answer my question as I propounded it.

A. Read the question.

(Question X Q. 119 read.)

A. I don't know of any particular reason.

X Q. 122. Did you ever represent to your customers that any of the products sold by you could be used by them as substitutes or replacers for the products of other houses?

A. Not knowingly.

X Q. 123. Do you think you ever have unknowingly?

A. It doesn't look to reason that I would.

X Q. 124. Do you show the product Quin-Coco to all of your customers?

A. Well, I don't know that I show it to all of them.

X Q. 125. Your territory is particularly good territory for the sale of this product, is it not?

A. Well, I couldn't say so; it is fair.

X Q. 126. Isn't it as a matter of fact one of the best sellers that you have in your line in your territory?

203 A. I don't consider it my best seller.

X Q. 127. I asked if it was one of the best?

A. Well, I can't say that it is.

X Q. 128. Isn't it one of the best sellers in the pharmaceutical line?

A. Amongst the pharmaceutical line?

X Q 129. Yes.

A. I couldn't say positively it is one of my best sellers.

X Q. 130. How many pharmaceuticals do you sell which you think exceed in sales the sales of Quin-Coco?

A. Well, I consider that I sell a number of them that will exceed the sale of the Quin-Coco. I am confident that I sell more Tono

Sumbol Cordial. I sell, I think, more Guaiatonic, more Tritica, a
I believe more Fernella. I think I sell more Fluid Viburnam Co
pound, and there may be a number of others; I couldn't say.

X Q. 13. Did Mr. Garvin ever give you any information respe
ing Fluid Viburnam preparation you have referred to?

Mr. Rawle: Objected to as not proper cross-examination and
irrelevant and going beyond the proper limit.

A. I don't remember. You mean to ask me if Mr. Garvin ev
gave me my instructions on Fluid Viburnam Compound?

X Q. 132. Yes.

A. I don't remember.

X Q. 133. In your direct testimony I understood you to say th
Mr. Whitley's deposition respecting your representations to him
not true, am I correct?

A. Well, I don't feel like it is true entirely.

X Q. 134. Is it in substance?

A. Well, there is a part there I don't think is true.

X Q. 135. When did you arrive in St. Louis for the purpose
testifying in this case?

204 A. Friday evening—pardon me—Saturday evening it w
when I arrived here.

X Q. 136. Since then how much time have you spent with th
officials of your house in the discussion of the testimony you woul
give in this case?

Mr. Rawle: The discussion with a witness of the matter he is e
pected to testify to, by counsel or client, is a perfectly proper an
recognized practice and I object to this question.

A. Very little, if any.

X Q. 137. With whom have you discussed the case since you hav
been in St. Louis?

A. Well, I have just merely spoke about it in a casual way wit
Mr. G. A. Pfeiffer.

X Q. 138. You mean the Mr. Pfeiffer who is present in the room

A. Yes, sir.

X Q. 139. And has been while you have been testifying?

A. Yes, sir.

X Q. 140. Also with Mr. Merner?

A. I don't think so.

Cross-examination closed at 11.27 A. M.

Deposition closed.

JAMES W. WILKINS.

STATE OF MISSOURI,
City of St. Louis, ss:

Sworn to before me on the 7th day of December, A. D. 1915.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

205 B. F. JONES, a witness called by and on behalf of the defendant, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, residence and occupation?
A. B. F. Jones, New Orleans, Louisiana. I represent William R. Warner & Company as a traveling salesman; have been with them thirteen years. I went with them when it was the Pfeiffer Chemical Company. I began in the drug business in 1880. It is on my watch, the date. That is, the retail business at Winona, Mississippi, as a clerk in the employ of Ward & Vaughn at Winona, Mississippi. I worked there—I don't know exactly how many years I worked there, and in 1880 I went in business for myself with Jones & Watts at Winona as a retail druggist and stayed there two and one-half years in business. Then I went with Lyons Wholesale Drug House in New Orleans and stayed there three years, and then I went with Chamberlain Medicine Company, wholesale druggists in Des Moines, Iowa, and traveled for them in Mississippi, and then I went to Hance Brothers & White, of Philadelphia. I was with them seven years. Then I went to the Pfeiffer Chemical Company and have been there ever since as a traveling salesman. My territory is South Mississippi, South Louisiana and two or three towns in Alabama, also Mobile. I have Mobile and New Orleans; the territory has not changed much.
Q. 2. About how many retail druggists do you solicit in your territory?
A. I think about 500.
Q. 3. How often do you call on them a year about?
A. How often a year? Every three months; that is four times a year.

Q. 4. About what percentage of the doctors do you call on?
206 A. About one-sixth, dispensing doctors—no others.
Q. 5. About one-sixth?
A. Yes.
Q. 6. Do you push the sale of the entire Warner line?
A. I certainly do.
Q. 7. How many items are there, approximately, in it?
A. About three hundred, I guess, or three hundred and fifty.
Q. 8. I mean, how many items are there in the entire line of War-

ner Company and its other companies, including Pfeiffer Company and its other companies?

A. There is about three thousand.

Q. 9. State whether or not it is the object of your work to push the entire line or only a part of it?

A. I push the entire line from one end to the other.

Q. 10. State whether you constantly make any special effort to push any few products in that line?

A. I never specialize on one thing. I work from one end to the other. I have been complimented on that several times from the house.

Q. 11. In selling your goods which line do you start with?

A. Pfeiffer's line.

Q. 12. And then take which?

A. Perfumery line.

Q. 13. And then?

A. Pharmaceutical.

Q. 14. And after that.

A. Patent medicines.

Q. 15. State whether or not in doing this you go through your catalog?

A. From start to finish.

Q. 16. How good a seller is Quin-Coco in your territory?

A. Well, it sells fairly good. I have got a good many better ones.

Q. 17. On what calls over the counter can a druggist sell Quin-Coco?

207 A. He could sell Quin-Coco as we put it up in two-ounce bottles marked "Quin-Coco" over the counter, he could prescribe it, he could sell it for chocolate quinine, he could sell it for tasteless quinine, he could sell it as sweet quinine.

Q. 18. For what human ills is quinine a remedy?

A. Mostly malaria.

Q. 19. Anything else?

A. Fevers.

Q. 20. Anything else.

A. Chills and fevers and malaria and colds about covers it all.

Q. 21. How about sales over the counter to a customer complaining of being sick in various ways.

A. As I suggest to my customer: a lady comes in and says my child is sick, got a fever. The druggist prescribes for a great many of them. They go to work and give them a laxative and then give them Quin-Coco to cut the fever out. There is a great deal of counter prescribing.

Q. 22. State whether or not you have a regular method of procedure when you offer Quin-Coco for sale to a druggist?

A. Yes, sir.

Q. 23. What is it?

A. Well, I state to him,—I first show him the preparation and I tell him we have got the best preparation on the market in the way of chocolate quinine. I say, now, of course, when you get a prescription for Quin-Coco you can fill it or if you get a prescr-

tion for Coco-Quinine you can fill it. I don't suggest to you to substitute at all. There is plenty of cases you can use it without substitution, just in the way of selling it as chocolate quinine, tasteless quinine and sweet quinine and in counter prescribing. Then I tell him the price. It is a better price.

Q. 24. Speak of its qualities?

A. Yes, sir; I tell him how much sulphate quinine it
208 has in it, two grains to teaspoonful, don't nauseate, don't separate, don't ferment, don't sour,—a better proposition than any one I know of on the market. That is what I talk to them.

Q. 25. State how far this is your universal method of work?

A. Since I have been selling it.

Q. 26. If a druggist gets a prescription specifying a preparation of a particular make and fills it with a similar preparation made by a different maker, state whether or not, in your opinion, that is honest work?

A. I don't think that is honest; I know it ain't.

Q. 27. What would be your opinion of the honesty of a druggist who did that?

A. I don't think he would be honest in doing that. I don't preach substitution.

Q. 28. If a drug salesman should suggest to a druggist that he should do that sort of thing, what would be your opinion of the drug salesman?

A. He would not be honest either in that case.

Q. 29. Do you know a druggist named V. B. Richard?

A. Yes, sir; his drug store is at Jennings, Louisiana.

Q. 30. How long have you been soliciting his trade?

A. About twelve years.

Q. 31. V. B. Richard, when called as a witness for plaintiff, testified as follows:

"Q. 6. What representations were made to you by the representative of William R. Warner & Co. when your order was first solicited for this preparation? (Quin-Coco.)

A. He asked me if I handled much Coco-Quinine and said he had a preparation that he thought was better and asked me to get some of it and show it to my doctors and ask them if they would use this instead of Coco-Quinine and that it would be more money
209 in it for me.

Q. 8. Was it understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. Yes."

Please state whether or not you in any interview gave him to understand that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. I did not.

Q. 32. V. B. Richard further testified as follows:

"X Q. 19. What do you mean by saying that it was understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. My attention was called to the preparation Quin-Coco by William R. Warner & Company's salesman and he told me it was very similar to Coco-Quinine which I saw it was. He didn't advise me to substitute it for Coco-Quinine; but said it could be done without detection."

State whether or not you stated to Richard that Quin-Coco could be substituted for Coco-Quinine without detection?

A. I did not, or any other man.

Q. 33. Did you ever deal with Charles Heno?

A. Yes, sir; Napoleonville, Louisiana.

Q. 34. Heno, when called as a witness for plaintiff, testified as follows:

"Q. 19. Have you ever been solicited by Mr. Jones or any one else to buy 'Quin-Coco' since that time?

A. Yes, sir.

Q. 20. Please explain when and what was said on such occasion?

A. Well, I don't remember exactly, but it was two or three months ago when Mr. Jones and a special representative of the laboratories, or one who represented himself as such, came on his regular
210 trip and offered the same products, and said they had been selling it all along as 'Coco-Quinine,' to be used as 'Coco-Quinine.'"

State whether or not this is true?

A. It is not.

Q. 35. Give your reason for saying so.

(Witness is handed Heno's testimony as quoted.)

A. We called on him and offered him the preparations in the usual way, went plumb through the book on the line. Mr. Ritayik was with me from the house when I called on him, but we never told him that we were selling it for Coco-Quinine, positively.

Q. 36. Do you know Wesley S. Ames?

A. Yes, sir; druggist at Laurel, Mississippi.

Q. 37. State whether or not you offered him any of your pharmaceutical lines?

A. I called on Mr. Ames when he first opened and sold him a bill of patents, and he told me himself he wasn't doing any pharmaceutical business. He had no prescription business, he had no doctor, and I then remarked to him I sold more pharmaceuticals than any man that came to Laurel, and when he did have prescription I would like to have the business, and he assured me he would give it to me. I never went over the line, never spoke of any one preparation. I told him I sold more pharmaceuticals than any other pharmaceutical man that came there.

Q. 38. State whether or not Quin-Coco is a pharmaceutical?

A. Yes, sir.

Q. 39. Did you ever at Laurel sell him any Quin-Coco?

A. I never sold him any pharmaceuticals at all. He had no doctor. He has no business now; he sold out.

Q. 40. Was Ames in the drug business at Hattiesburg?

211 A. Himself and brother had a store at Hattiesburg, and then he went to Laurel and opened a branch of this store.

Q. 41. Did you ever call on him at this Hattiesburg store?

A. Yes, sir.

Q. 42. Wesley S. Ames, when called as a witness for plaintiff, testified as follows:

"Q. 11. Have you ever been solicited to buy 'Quin-Coco,' and if so, on what representations?

A. 'Quin-Coco' has been offered to me for sale as a similar preparation to 'Coco-Quinine,' and I have been told that I could dispense it on calls for 'Coco-Quinine,' without detection, and that it was the same goods exactly. That's about the only representations I have had."

State whether or not this is true, and whether you said that?

A. I made no such statements to Mr. Ames or any one else.

Q. 43. Do you know Edwin R. Albright, and where is his place of business?

A. I do; Mobile, Alabama.

Q. 44. Albright, when called as a witness, testified as follows for plaintiff:

"Q. 12. Has it ('Quin-Coco') ever been offered to you for sale, and if so on what representations?

A. It has been offered to me as being the same as 'Coco-Quinine.' That's about all.

Q. 16. How was it expected you would sell 'Quin-Coco' when you receive no calls or prescriptions for it?

A. I don't know how he expected me to sell it other than use it for 'Coco-Quinine.'

Q. 17. Was that your understanding of the proposition?

A. I naturally understood it that way, when he told me 212 it was the same thing as 'Coco-Quinine.'"

State whether or not you ever made any proposition to Albright to buy the Quin-Coco and use it for Coco-Quinine?

A. I did not absolutely. I never offered him any pharmaceuticals whatever, because he had bought his opening bills from Mulford. I knew that and I worked the Pfeiffer line and patent line and perfumery line with him.

Q. 45. Do you know Charles A. Noiret?

A. I do; yes, sir. He is traveling salesman for Eli Lilly Company.

Q. 46. Since when?

A. October, I believe.

Q. 47. Formerly with whom?

A. Mulford,—H. K. Mulford.

Q. 48. When did he leave Mulford?

A. Last January, I believe.

Q. 49. Charles A. Noiret, when called as a witness for plaintiff, testified as follows:

"A. My attention was first called to the 'Quin-Coco' by Mr. Howard Smith, who represented the Pfeiffer Chemical Co. and Wm. R. Warner & Co. Mr. Howard Smith stated to me that 'Quin-Coco' was the same identical thing as 'Coco-Quinine,' as the chemist that formerly made the 'Coco-Quinine' for Lilly was now making it for Pfeiffer Chemical Co.; and in my presence, to the retail drug trade he advised them to buy it, in preference to the original of Lilly & Co., as it was cheaper and would answer the same purpose as the doctors could not detect the difference. Mr. Jones representing the Pfeiffer and Warner Companies in Alabama, told me the same thing."

State whether or not you made such a statement to Mr. Noiret, as I have read to you?

213 A. Never had any conversation with Mr. Noiret on Quin-Coco at all.

Q. 50. Noiret further states:

"Q. 8. Please state any specific instance, naming the time and place, if you remember, when Mr. Jones made such a statement to you as you have given in your last answer?

A. Mr. Jones stated the same to me at Meridian, Miss., in McCorkle's drug store, in the presence of Mr. McCorkle about two years ago. I used to meet him on the road every week or so. We traveled the same territory. I have heard him make the same statement frequently in different drug stores at different times."

What have you to say as to this statement by Noiret?

A. I will state that I never met Mr. Noiret in Mr. Williams' store in Hattiesburg, nor did I meet him in Laurel in Johnson's store. I met Mr. Noiret in McCorkle's store in March on a Sunday morning and we had a cigar together and there was nothing said in regard to pharmaceuticals, Quin-Coco or anything else. I never had much to do with Mr. Noiret.

Q. 51. State whether or not you met Noiret and made any such statements to him in Johnson's drug store in Laurel, or Williams' pharmacy at Hattiesburg, Miss.?

A. I did not.

Q. 52. Noiret further testified:

"Q. 12. What have you heard Mr. Jones say to any druggist as to how he could dispense 'Quin-Coco'?

A. Mr. Jones mentioned to the druggist that when he received a prescription for 'Coco-Quinine' he could use 'Quin-Coco' and it could not be detected and it was cheaper to use 'Quin-Coco' than it was to use 'Coco-Quinine.'

Q. 13. These statements were made by both Mr. Smith

214 and Mr. Jones to the druggists at the stores above mentioned?

A. Yes, sir. In my presence and also the presence of the druggist."

What have you to say to this testimony of Mr. Noiret?

A. I will state that I never sold a bill in the presence of Mr. Noiret to any one of those people, or any other. It is my policy never to butt in on anybody and I never allow anybody to butt in on me when I am selling a bill.

Q. 53. Will you state whether or not in your experience in the drug business as a salesman, you ever have had personal knowledge of a druggist substituting?

A. No, sir.

Q. 54. Have you always as a salesman had a copy in your possession of Warner's "Confidential"?

A. Yes, sir.

Q. 55. State how far you have followed the policy of the house in selling as a traveling salesman for it?

A. I follow it from the word "A" to the word "Z." They always taught me to sell goods without any misrepresentation, and I tried to follow it to the letter. They always told me if I can't get an order in a straight way, never to do it in any other way. I have always been told that since I was with the Pfeiffer Chemical Company and I have followed it to the letter, and to show that I have, I have been in the territory a good while and still doing business.

Q. 56. One of the rules in the "Confidential" relates to not mentioning the name of a competitor in trying to sell goods in a competing line. What is your practice in regard to this rule?

A. I have always too much to do with my own line to mention a competitor, to talk about them. I invariably make it a rule to talk about my stuff.

Q. 57. You have been a retail druggist and drug salesman. State whether or not, in your opinion, a retail druggist can by special efforts push the sale of a given preparation and create a market for it?

215

Mr. Bradford: Objected to as irrelevant, immaterial and incompetent.

A. Yes, sir.

Q. 58. How?

A. By counter prescribing, you know. By seeing his doctor. He can work in conjunction with his doctor. The doctor and him are generally good friends, and he can say to him, here are the things I want to get rid of and want you to prescribe, and they work those things that way.

Q. 59. By counter prescribing what do you mean?

A. Counter prescribing. For instance, a patient comes in and says, I have a cold and my liver is out of order, and he prescribes for him; that is counter prescribing. He can get rid of Quin-Coco that way.

Direct examination closed.

termed them, eroded crystals of quinine sulphate as he found them in samples Nos. 7 and 8, and comment thereon, expressing your opinion as to the value of this evidence?

A. I can not see how any one experienced in microscopic work could interpret the phenomena I have referred to, namely the coating or enveloping of the crystals, particularly at the ends, with the transformation substance, as being due to eroded or bone-shaped crystals. I can see that an unskilled observer might not distinguish between the two elements, namely, the crystals proper and the yellow, oily substance, which gives the peculiar appearance in samples Nos. 7 and 8. It is still more inexplicable how a microscopist could state that in No. 10 all the crystals had gone into solution, when as a matter of fact they had merely gone into this oily transformation product and there is no evidence whatever that a greater amount has gone into solution than already existed before the changes.

Q32. I call your attention to Dr. Beringer's answer to Qs. 40 and 41 respecting Specimen No. 4 and ask you to express your opinion respecting the correctness of his conclusions as there stated, bearing in mind particularly what he has said about his microscopic examination and also what he says in answer to Q41 about the cafe-tannic acid?

A. He states this showed some precipitation on the bottle, still evidenced on the sides of the bottle and bottom, poured like mucilage, having the flavor and characteristics of dextrine. I failed to note any such precipitation myself, the sample being remarkably homogeneous. And I am quite unacquainted with dextrine that precipitates in such a manner. I am at a loss to know how the flavor of such a precipitate could be determined when I have been unable to note even a separation. Furthermore it is hard to understand how such a substance could be identified as dextrine by its taste even if secured in the form of a precipitate from

a preparation so highly flavored with other constituents. Dextrine is practically a tasteless substance and its characteristics even when separated in pure form could be determined only by a skilled chemist. It has practically no flavor. It does have certain polariscopic and other physical as well as chemical characteristics belonging to this carbohydrate. He further states "The slight flavor of coffee which was first perceptible was soon drowned out by the extreme bitterness of the quinine."

I have already testified that this is one of the Bibbins samples which was quite as bitterless as Coco-Quinine. I would not call any of these Bibbins samples extremely bitter. I would however call a sample of suspended quinine sulphate in a chocolate saccharine medium which was submitted to me, such as Complainant's Exhibit Bottle No. 2, extremely bitter. I tasted that sample and for some time afterward suffered excruciating torment, showing that the nerves of my mouth are quite susceptible to such an intense bitter. He refers in the next sentence to the broken down and eroded quinine crystals. This point I have already considered. In this sample I saw no change whatever in the quinine crystals. In only four out of the ten Bibbins samples was the quinine abnormal and showed any change. He states further that "the solution gave a distinct reaction with litmus paper, a distinct acid reaction". As to this point we are all agreed. In reference to the statement "there was likewise in the microscopic fields starch grains partly altered and distributed unevenly throughout the field" I will say that if such starch grains were present they escaped my notice. Dextrine does sometimes contain unaltered starch grains but they were not present in sufficient numbers in this case to attract my attention, and have no bearing on the points in question. He states "coffee contains cafe-tannic acid, which precipitated out part of the quinine, and I have

no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate so that the quinine was subject to reactions in two different directions by this precipitation." In this statement he merelyexpresses a theory but gives no evidence whatever of an experimental nature. Even if the quinine is partly precipitated as tannate, I fail to find any detriment in the change, but on the contrary a distinct advantage as a portion that was in solution would be in an insoluble form. It might here be stated that cocoa as well as coffee is a carrier of tannin, cocoa red, a member of the tannin group, tannin and tannic acid being used synonymously, is present in the cocoa bean to the extent of four to seven per cent., and the precipitation of tannate is quite as probable in the cocoa preparations containing a very considerable amount of cocoa as in this preparation flavored with a small amount of coffee extract.

Q33. Will you please take up Dr. Beringer's answer to Q44 respecting Specimen No. 5 and state your opinion and conclusions on the subjects there discussed?

A. He states "There was decided evidence of precipitation on the sides of the bottle, still showing". I noted no precipitation. He then states "The taste was decidedly bitter and it gave a decided acid reaction with litmus paper and the crystals of quinine sulphate, when examined under the microscope, were distinctly eroded and attacked, and there was likewise separation of quince seed mucilage, showing as I have sketched here the characters of quince mucilage as separated in these specimens (referring to sketch in the witness' hands)". With regard to the alleged bitter taste, No. 5 in my test was quite as bitterless as Coco-Quinine. It was no more acid than Coco-Quinine by the litmus paper test. The crystals of quinine sulphate in my examination were not eroded or attacked, they were normal in appearance.

Q34. Will you please refer to Dr. Beringer's answer to Q59 respecting Bibbins Specimen No. 6. In this answer he stated "under the microscope the crystals of quinine sulphate showed that they were acted upon and eroded and that they separated the Irish moss, jelly and quince seed mucilage in different masses. That this was apparent on the surface of the glass bottle as well as under the microscope. He stated further "In the sketch I have shown (Beringer's sketch) the typical separation of the Irish moss jelly as occurred in this specimen No. 6, and likewise the mucilage of quince-seed, as separated. These separations were unequally distributed throughout the field showing the lack of homogeneous suspension". In connection with this answer as well as his answer respecting Sample No. 5, I ask you to consider his sketch and express your views respecting the same and his conclusions.

A. With reference to the crystals of quinine sulphate I must disagree absolutely with Dr. Beringer. My examination failed to disclose any erosion or any abnormal appearance of the crystals. The preparation is as bitterless as Coco-Quinine. He refers to the separation of the Irish moss jelly and the quince seed mucilage jelly and his illustration of this alleged quince mucilage and Irish moss jelly. The mucilage separated from Irish moss and from quince seed goes into a form of colloidal solution. It is formed by the vegetable cells but on solution in water and straining severs its connection with the organized tissues. If it is precipitated from this colloidal solution, it is a most remarkable phenomena if once again it assumes cellular form. Such a statement is absurd in the highest degree, against all laws of biology or cell formation. The quince seed has an interesting cellular structure corresponding closely to the allied seeds of the apple and pear. There are several distinctive layers which have been carefully studied and to which I have myself

before considering this case or before knowing of this case, studied in detail. There is no structure in the quince seed that corresponds with Dr. Beringer's drawing marked "quince mucilage", and even if there were such a structure I can not comprehend how it would find its way into the quince mucilage in the form of a solution and then be precipitated. The case is somewhat different with Irish moss. This breaks up in the treatment and some of the cells might pass through into the colloidal solution although the cellular matter is removed in making such a solution as completely as possible. If Dr. Beringer found under the microscope any cellular structure such as he marks "quince mucilage" it must have come from the Irish moss although from the picture it might be anything, as it bears the closest resemblance to ciphers arranged in nine rows. His drawing marked "Irish moss jelly" may represent solid particles of the Irish moss which quite posibly found their way in small amount into the preparation. Such being the case it is obviously unfair to make a microscopic picture of the cellular elements, magnified several hundred diameter to illustrate the lack of uniformity of the sample when thousands of such particles equally large or larger can be found under the microscope in Coco-Quinine or Quin-Coco and yet these particles do not interfere in the slightest with the even distribution of the quinine sulphate after reasonable shaking. And in the case of Bibbins sample No. 6 on standing a considerable time, five weeks in fact, without shaking, would also be no detriment and not interfere with the proper dispensing or administering the mixture even without shaking.

Of all the preparations which I have examined, Coco-Quinine and Quin-Coco are the ones that abound in solid particles of cellular matter, whereas in his samples Bibbins employed as thickening or suspending media substances containing little and in some cases no cellular matter. To the naked eye one can see par-

ticles in the cocoa preparations quite as distinctly if not more so than in the Bibbins samples.

Q35. What special experience have you had with or what personal study have you given to the quince seed problem referred to in your answer?

A. In my book on the Microscopy of Food I give a somewhat extensive account of the microscopic structure of the quince seed on page 331 of the second edition.

Q36. In answer to XQ224 Dr. Beringer testifies that in chocolate there is an astringent principle which is classified in tannins. "In my opinion the trace of the tannin like principle present in the commercial cocoas and chocolate is due largely to the admixture of portions of the shells which may be accidentally or otherwise present. In that hull you have a tannic acid principle. It is like a peanut. You take a peanut and in the skin coating there will be tannin, and in the outer shell coating there is some more." What have you to say as to this?

A. Dr. Beringer is correct in his statement that in chocolate there is an astringent principle which is classified with the tannins. In cocoa there is still more than in chocolate, because cocoa is merely chocolate from which a portion of the fat or cocoa butter has been pressed out, thereby increasing the percentage of the other constituents. The statement that in his opinion the trace of the tannin like principle present in the commercial cocoas or chocolates is due largely to the admixture of portions of the shell which may be accidentally or otherwise present is contrary to the well known structure of the cocoa bean, commercial practice and recorded chemical analyses of the products. This statement shows an absolute lack of knowledge of the microscopic structure of the cocoa bean, equal lack of knowledge of the chemical composition of the cocoa bean and cocoa products and a gross injustice to manufacturers of cocoa as well as a possible suggestion of

the grossest neglect on the part of the administrators of the food and drugs act, who would allow cocoa shells to be used in cocoa to such an extent as to give several per cent. of tannin substances. The structure of the cocoa bean is shown on page 445 of the second edition of the Microscopy of Foods, Fig. 348. This figure is a cross section through the shelled cocoa bean or cocoa nib. The cocoa bean is somewhat larger than and about the same size as an ordinary lima bean and is similar to the lima bean (although botanically not at all related), in that it consists in large part of fleshy seed leaves enclosed within a rather thin membraneous skin. Figure 348 referred to is a cross section through one of these seed leaves corresponding to the part of the lima bean which comes up out of the ground in the spring. It shows cells containing starch grains and among these starch three cells of dark color known as the pigment or tannin cells. These three black cells contain tannin or tannic acid, as their chief and characteristic constituent and it is from these cells that the cocoa derives its considerable percentage of tannin. The cocoa shells do not contain tannin in such large amount. They do not find their way into cocoa as the shells are removed in the process of manufacture. So it is obvious that the statement of Dr. Beringer that the tannin of cocoa is due largely to the admixture of portions of the shell is grossly false and misleading. On page 443 of the work cited is the following statement:

> "Over fifty per cent. of the dry embryo consists of fat, the remaining constituents being starch, proteids, theobromine, caffein, a tannin substance known as cooca red, and other substances in small amounts."

Tannin is not an accidental or a minor constituent of the cocoa bean. It is one of the chief constituents and a highly characteristic constituent, both as to its chemical properties, its color and its taste. He states that it

is like a peanut. I can not imagine any common product more unlike a peanut than the cocoa bean in its gross appearance, in its structure, and in many other details. He refers to the tannin in the skin of a peanut and to the tannin in the outer shell coating and in the outer shell, three distinct formations outside of the kernel proper, while I myself after a study covering some weeks never found but two, the red skin and the shell. The statements with regard to the tannin in these three parts of the peanut are not supported by analyses either of his own or of others.

Q37. How extensive has been your study of the cocoa bean and cocoa products?

A. During the years 1902 and 1903 while I was connected with the Connecticut Agricultural Station with the help of two assistants, I made somewhat extensive investigations of the composition of the cocoa bean as secured direct from the importer and ground in the laboratory. This work was the basis for the standards for the composition of cocoa and chocolate promulgated by the United States Department of Agriculture. The methods used or elaborated in this work were for the most part adopted by the Association of Official Agricultural Chemists. In addition somewhat extensive analyses were made of commercial chocolates and cocoas. I submit the report of the station named for 1902 and refer to pages 258 and 259 showing analyses of commercial cocoa. Analyses of the authentic samples to which mention has been made are found on subsequent pages, but in this connection are not of so much interest as those on pages 258 and 259, which are of cocoa such as might be used in the preparation of Coco-Quinine although attention should be called to the fact that in the preparation of this drug product as well as of soda water syrup a cocoa would doubtless be selected containing the minimum amount of fat and correspondingly larger amount of other constituents. In the analyses of cocoa referred to, the range of starch (pure

Indianaoplis, Ind., December 5, 1917, 9 A. M.

Met pursuant to adjournment.

Parties present as before.

Q40. I call your attention to Dr. Beringer's answer to XQs. 212, 213 and 214, and ask you to express your views respecting the subject matter there inquired about and whether or not you agree with Dr. Beringer?

A. The term "peculiar" as used by Dr. Beringer seems to be most unfortunate. Had he said "characteristic" I would agree with him. I find nothing peculiar about cocoa starch, at least more peculiar than of any other starch. The form, size, and other visual characters of the starch grains from different vegetable products differ greatly, so that with the microscope these different starches may be distinguished. In chemical composition the starch in different products agree. We have no evidence that the starch of cocoa is any different from the starch of Indian corn, the potato, the bean, and so on, although different in form. Dr. Beringer states they vary in the character of their coating. I do not understand what he means by "coating," but I will say that I have never heard of a coating of starch grains. It is true that the grains show a concentric structure, as exhibited under the microscope. We note more or less distinct concentric rings, but this structure is not considered to mean a difference in chemical composition other than possibly a variation in the moisture contents. On treatment with reagents starch grains show certain peculiarities, but these are not to my knowledge of the nature of coatings.

He states that it is a mooted question whether the different starches have the same chemical composition, but adds that it is commonly considered that they are chemically of the same composition. While modern research shows that perhaps the true formula for starch is some multiple of the figures given in the common formula $C_6H_{10}O_5$. I know of no evidence whatever that this differs in the starch from different sources.

To sum up, starch is considered to have the same chemical composition regardless of its source; but the granules differ in form in different plants.

Q41. I call your attention to Dr. Beringer's answer to XQ122, respecting suspending mediums and call your attention to what he said about chocolate as a suspending medium, and ask your opinion of this same subject matter?

A. Basing my answer on my own examination of the Bibbins samples, Coco-Quinine and Quin-Coco, I will say that cocoa, which I assume is what Dr. Beringer means by chocolate, is not as good a suspending medium as gelatin, Irish moss, dextrine. It is true that chocolate, or rather cocoa, on boiling with water gelatinizes to a certain extent, and therefore becomes more or less of a colloidal nature, but this is attributable to the starch of the cocoa, and such being the case there is no reason to conclude that cocoa serves the purpose in a way that nothing else so far suggested does. As a matter of fact, cocoa owes its suspending power after boiling with water to starch. This I have shown to be true by a very simple experiment. I mixed a teaspoonful of cocoa with a half of cup of cold water, transferred the mixture to a bottle. I then mixed another teaspoonful of cocoa with half a cup of water and brought the mixture to a boil with constant stirring, boiled for a few minutes, then transferred to a bottle as in the case of the unboiled mixture. The boiling was not continued long enough to decrease the volume through evaporation. Both the boiled and the unboiled prep-

arations were thoroughly shaken and allowed to stand undisturbed. After a time the cocoa in the unboiled preparation settled out, forming a distinct layer, that is, the insoluble portions of the cocoa; small quantities may have gone into solution. From the boiled preparation the cocoa also settled out after a time, but in a much more bulky condition. It occupied several times the bulk, as in the unboiled preparation. The boiling performed one function, namely, the gelatinization of the starch, that is, the conversion of this constituent into the pasty condition with the water. And this change accounts for the change noted.

I know of no other constituent of cocoa than starch which gives this condition—that goes into colloidal solution and thereby imparts to the preparation suspending power. In my opinion starch by itself used in the same quantity present in the cocoa is superior as a suspending agent to cocoa containing that amount of starch. In the cocoa the starch after its gelatinization, in the case of quinine preparations, not only has the task of suspending the quinine crystals, but it must also suspend the solid insoluble portion of the cocoa itself. In other words, while the cocoa contains a suspending gelatinizing material it also contains materials that must themselves be suspended.

Q42. I ask you to refer to Dr. Beringer's answers to XQs. 134, 135 and 136 and 137, and express your opinion on the subjects there inquired about very briefly. You have already covered the subject matter very thoroughly, and I only ask now for brief comments directed to these particular answers?

A. It appears to me that Dr. Beringer uses a great many words to describe a very simple phenomenon, but that he evades the true explanation of the suspending power of cocoa. He states in answer to the question, "How does chocolate suspend quinine," that this is "by virtue of the constituents of chocolate", that "it has the property of making a mixture that will hold

up, distributed throughout it, or in suspending the quinine sulphate". I can not understand why he did not state that this is due to the starch in the cocoa. He evades a simple explanation.

Q43. Dr. Beringer stated in answer to XQ159 respecting Bibbins Sample No. 2, that it was decidedly more bitter than Coco-Quinine. What have you to say as to this?

A. I did not find it so. I found it delicious, quite as bitterless as Coco-Quinine.

Q44. In answer to XQ174, Dr. Beringer stated that he could distinguish the mucilage of quince seed from the mucilage of Irish moss under the microscope. In XQ175 he was asked in what way. He replied: "Irish moss is larger and more gelatinous and gluey in character." What have you to say as to this?

A. I will say that I am unable in a gelatinized form to distinguish these products. I do not believe it can be done, although it is well known that the Irish moss itself has microscopic appearances quite distinct from those of the quince seed. I refer to the cellular elements which do not go into colloidal solution. The quince seed tissues I was unable to find in any of these preparations.

Q45. Do you believe it is possible to distinguish under the microscope quince seed mucilage, tragacanth, Irish moss jelly tolu and gelatin, as found in these Bibbins samples and identify each?

A. I do not believe it is possible. I would not attempt it.

Q46. I ask your attention to the answer of Dr. Beringer to Qs. 86 and 87 and XQ206, respecting the colorings used, with special reference to what he says about coal tar dyes, and ask for your opinion of his testimony and your own opinion respecting the subject matter inquired about?

A. With regard to his statement that the coal tar dyes are susceptible to occasional precipitation and

that he suspects that some of the specimens which show precipitation owe this in a measure to the artificial coloring, I will say that the amount of coloring used was so minute that if precipitated it could not be detected by ordinary means in a colloidal solution, such as exists in the Bibbins samples. Even if precipitated I fail to see any disadvantage, as the whole purpose of the coloring is to please the eye, and the eye shows in all of these samples an even distribution of color.

As regards the therapeutic action of dyes his reference to Allen seems to me grossly unfair and misleading. Allen does state, and every food chemist knows, that napthol yellow is a poisonous dye. Napthol yellow S, however, is recognized as a harmless color and its use is sanctioned by the United States Government, it being one of the eight colors allowed by regulation of the United States Department of Agriculture. To insinuate that napthol yellow S, which was used in at least one of the Bibbins samples, may be harmful because napthol yellow is known to be harmful, is unfair as to insinuate that common salt is injurious to health because muriatic acid and caustic soda, which, together in the proper amount, form common salt, are highly corrosive substances.

I might cite numerous cases where napthol yellow has been shown to be a poison. While I was in charge of the Chicago laboratory in the enforcement of the Foods and Drugs Act, we seized and finally by condemnation of the Court destroyed several carloads of macaroni colored with napthol yellow, yet at that time the Government was sanctioning the use of napthol yellow S as a coloring, under suitable regulations to avoid deception.

If coloring matter is to be allowed in foods and drugs I believe that carefully selected coal tar colors inocuous in themselves and free from poisoning contamination, are more likely to be unobjectionable from a sanitary standpoint than so-called natural colors, such

as cudbear, prepared from sea mosses, and cochineal, a disgusting bug, which come from regions where sanitary precautions are not taken, and where they are handled by natives under filthy conditions.

Q47. In XQ187 Dr. Beringer was asked how he determined the unevenness in the different fields by his microscopic examination. He answered: "Under the same magnification we would have naturally the same number of quinine crystals." He was then asked if he counted the quinine crystals in the respective fields, and he answered that he did in some of them. What have you to say as to this?

A. I will say that the mere counting of quinine crystals in a field is of little or no use, for the reason that the crystals vary greatly in size. Some of them being ten, twenty, and perhaps a hundred times larger than others. If an experienced microscopist expressed his judgment on the matter I would consider the results of some value, although the microscope in the case of a solid material, such as quinine crystals, where the individuals vary greatly, cannot be used in a strictly quantitative way. In such preparations as blood, where the size of the corpuscles is quite uniform, counting is a valuable quantitative test.

Q48. In your experience as a chemist have you ever understood that it was a well known fact that mixtures of oil become rancid much more quickly than pure oils themselves?

A. I have never noted the fact, nor had I ever heard of it until I came into this case.

Q49. I ask you to refer to Dr. Beringer's answer to Q85, the last paragraph of his answer, and note what he says respecting benzaldehyde as a flavoring, and comment thereon and express your opinion of the subject inquired about?

A. Benzaldehyde is a very popular flavor. It is the flavor of the so-called maraschino cherries. It is the chief flavor constituent of bitter almond oil, highly prized for culinary use in this country and especially

in England. I have never heard that it is objectionable because it loses its flavor by reduction to benzoic acid. Dr. Beringer states that it is apt to be oxidized, being reduced to benzoic acid. Oxidization and reduction are diametrically opposite chemical processes. Even if a portion of the benzaldehyde were oxidized to benzoic acid, such benzoic acid would be no detriment in preparations such as we are considering, as it would act as a preservative.

Q50. In answer to XQ191 Dr. Beringer stated that in a number of examinations that he had made he found quinine sulphate equally and thoroughly distributed. In answer to XQ201, wherein he was asked whether after a bottle of Coco-Quinine had been standing a long time would there be any difference in the quinine contents at the top and the bottom, he answered: "I have not made such a determination." What do you understand by his answers to these respective questions?

A. These two answers are not in harmony. It would be impossible to show a uniform distribution of the crystals without a microscopic examination of the top and the bottom of the bottle. Dr. Beringer says in answer to XQ191, that there appears to be a uniform distribution, but in answer to XQ201 he states that he made no determination after standing for a long time. It may be that in answer to XQ191 he had in mind an even distribution immediately after shaking, but judging from his previous testimony it has been my understanding that he insisted that a suspending medium to be satisfactory must hold up the crystals for a long time.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ51. I think you said that the litmus determination of acidity was not quantitative. Is that correct?

A. Using litmus paper as a test of acidity is not quantitative.

XQ52. Is that absolutely true in your opinion, or only to a modified extent?

A. It is true that a very faint degree of acidity with blue litmus paper would not become as red as when a medium or large amount was present, but beyond that small degree of acidity you get no indication from the litmus paper as to the amount present. You could not tell, for example, whether there was 1 per cent. or 30 per cent. of acid present by the degree of color.

XQ53. When saying that the litmus determination of acidity is not quantitative, I take it that you mean that it furnishes no method by which an accurate determination or a scientific determination of the acidity present can be made?

A. It is not even approximate. To explain, vinegar makers have rough, or approximate, methods of determining the acidity of their products, which methods are quantitative, although not accurate to such a high degree as the methods used in the chemical laboratory, but no vinegar maker would think of using litmus paper to determine the strength of his vinegar. With it he could not tell whether his vinegar contained half a per cent., 5 per cent. or 10 per cent. of acid. I refer, of course, to dipping the litmus paper into the product and not to using the litmus paper in conjunction with other reagents. Used in such latter way litmus paper may become a part of a strictly accurate determination.

XQ54. Suppose you took up the ten Bibbins exhibits the first time, ignorant of their contents, and tested them by simply placing litmus paper in each bottle, do you mean to say that you would get absolutely no information from such action as to comparative acidity of the material in the ten bottles?

A. I mean to say that I did test all ten bottles with litmus paper, and the only information I got was that the products were distinctly acid, and I got this

same information when I dipped the litmus paper into the cocoa preparations of the two manufacturers; that no difference in acidity could be detected between the Bibbins samples and the cocoa preparations by this test. I made the tests independent of any knowledge of the constituents.

XQ55. I understand that you made no quantitative test of acidity of the Bibbins samples other than the litmus test so far as that threw any light on the subject?

A. I made no quantitative tests for acidity. I made the litmus test, which is not quantitative.

XQ56. Is there any sense in which you call yourself a pharmacist?

A. No, sir.

XQ57. Has your professional work been more along the line of foods or drugs?

A. More along the line of foods.

XQ58. And very much more?

A. Very much more.

XQ59. This question of human tasting and of detecting by the gustatory organs of the mouth the presence of some particular article by its taste—does not this human sense of taste differ enormously in different people, just as sight or hearing do?

A. It differs somewhat.

XQ60. Would you not use a stronger word than "somewhat"?

A. I am not qualifying as a medical man, but in my understanding the sense of taste does not differ so much as the sense of sight or hearing. I know of people who are stone blind and absolutely deaf, but I do not happen to know of any one who cannot taste.

XQ61. Is tasting at all a matter of training in any given individual. I mean the accurate sense of taste?

A. It is well known that wine fasters and tea tasters develop their faculty of taste in a high degree. So far as I know.

XQ62. Then your answer to my question is yes, and what you actually answered was explanatory. Is that correct?

A. I would hardly like to answer the question yes, for fear that I might not understand your meaning. I explained what my understanding was of cultivated sense of taste. I wish to add that these trained tasters are distinguishing between products of different degrees of excellence, not between products that are absolutely nauseating, bitter, and products which are delicious.

XQ63. Would you say that your professional life and daily work constantly called for the exercise for the sense of taste in a practical way from various chemical or other substances?

A. The chemist is taught early in life to be a taster. The sense of taste and smell are continually used in the chemical laboratory and especially in food examinations. I will state, however, in this case, one does not need to become skilled as a taster any more than one needs to become skilled in detecting the difference between good tasting food and poor tasting food.

XQ64. But you have assumed in this case to pass upon the degree of bitterness in the various compounds you have handled here? That is, in a more or less quantitative way. How far does that not imply an assumption on your part that your palate is a more or less trained palate to detect differences in bitterness, for instance?

A. I did not assume that my palate was especially trained. The patient who would take these preparations as drugs would not have specially trained palates, and I expressed my judgment, putting myself in the position of the patient.

XQ65. That is you became the sick child in place of the expert chemist. Is that correct?

A. I did not put myself in the position of the child,

but of an intelligent person who has a palate who can tell the difference between what is good and what is distasteful.

XQ66. Do you know personally, where is the seat of your strongest sense of taste?

A. I am not a physiologist, and I have never thought of that point. Products taste, for example, bitter or not bitter to me, and I do not attempt to locate the nerves.

XQ67. But is it on the tip of your tongue?

A. That I could not say.

XQ68. If you were now asked to taste one of these Bibbin samples in order to testify as to what you tasted in it, would you take a drop or a spoonful, or what portion?

A. I would take different quantities, and repeat the test several times, taking care that the bitter taste of one sample held over did not mislead my judgment in regard to another sample.

XQ69. Will you not answer my last question a little more closely than you have.

A. I would take several days for the test. I could not do it all at one sitting, because after tasting one bitter sample my sense of taste would be ruined for testing those that were not bitter. I would say that a teaspoonful appears to me to be a large quantity to use. I believe a somewhat smaller amount would answer, because in my experience in tasting the cocoa preparations I found I could form as good a judgment from say a quarter of a teaspoonful as a whole teaspoonful.

XQ70. Have you any knowledge as to what the popular flavoring substances are in drug business and in the candy business?

A. I have the knowledge that several flavors are very popular in the candy business, and I also have some knowledge as to the flavors which are used in drugs.

XQ71. Would you be testifying, professionally I

mean, on the latter subject if I examined you or would you only speak from such general knowledge that a great many people have unprofessionally?

A. I would not be testifying from the standpoint of a physician or a pharmacist or pharmaceutical manufacturer.

XQ72. Referring to your answer to Q36 on the subject of the presence in commercial cocoa of particles of shell and the consequent presence of such particles in the preparations before us or some of them, is it not a fact that Dr. Beringer has testified that the amount if any of such shells in any one of these preparations is extremely minute?

A. I can only refer you to the official record.

XQ73. Would you venture to say as your opinion that commercial cocoas or chocolates contain or usually contain no portions of the shell of the article?

A. They might contain minute portions, but any considerable portion which would, of course, constitute an adulteration is rarely or if ever present at the present time in commercial cocoa.

XQ74. Is every bag of cocoa tested by the Government?

A. No, sir.

XQ75. How could its presence in minute or even small quantities of the shell be likely to be found out except by the user?

A. The user would not be able to find it out, anything like as readily as the trained Government examiner and expert, who has at his command chemical and microscopical methods.

XQ76. But don't you see that you have just said that the Government does not interest itself in every bag of cocoa?

A. Certainly not, but the Government does exercise a rigid inspection of the product, the Government inspectors having access to the factories at all times and Government chemists and microscopists being con-

tinually engaged in the examination of samples taken here and there in the market. Of course, no system of inspection of any kind is an absolute safeguard against fraud, but I fail to see how even if fraud were practiced by the addition of shells to the cocoa furnished to either of the houses in this litigation would alter my general contention that the seat of the tannin in cocoa is the cocoa nib, the part of the cocoa bean legitimately used in the manufacture of cocoa, and not in the shell, which might in minute quantities accidentally be introduced into the product, although the shell might contain a small percentage of tannin.

XQ77. Then you severely criticise Dr. Beringer for holding to the opinion that some commercial cocoa may have in it some particles of shell of the cocoa bean?

A. I criticize him for attributing to a highly improbable form of contamination the presence of a substance, to wit, tannin, which is normally present as one of the important constituents of the pure unadulterated product.

XQ78. You have stated that some of the crystals of quinine sulphate in one or more of the ten Bibbins samples appeared in the microscope to have changed to an oily compound, or to have gone into an oily condition. How did you ascertain that this condition was "oily"?

A. When I said "oily" I meant deported itself like an oil, being in a liquid condition insoluble in the menstrum. I do not wish to say that it has the composition of any kind of an oil.

XQ79. And you made no attempt to identify the substance?

A. That would be a long and difficult undertaking, but I will say that the observations I made were such as might lead an organic chemist into an exceedingly interesting field.

XQ80. Did you observe any such change in the quinine sulphate crystals in Coco-Quinine or Quin-Coco?

A. I did not.

XQ81. Would you consider a product in which such changes had taken place to be a suitable product for commercial use in the drug business? Without further investigation at least?

A. I think that is a pharmaceutical question.

XQ82. But you would at least admit that seeing such changes, that something had gone wrong with the preparation, would you not?

A. That, coupled with the bitter taste.

XQ83. Did you form an estimate in your mind of the number of crystals in the several layers which you found in the Bibbins specimens when examined under the microscope?

A. I formed no quantitative estimate. I did reach the conclusion that the appearance at the top and the bottom of the bottle was not disinguishable, I mean in respect of crystals, except in one instance, where I noted that the crystals were small at the top. I did, however, in the Coco-Quinine and Quin-Coco specimens on standing find a marked distinction in the number or rather quantity of the crystals at the top and at the bottom of the bottle. Mere numbers of crystals does not tell the story. It is merely a judgment based on all the characters involved as to the quantity suspended in the top or in the bottom of the bottle.

Re-direct-examination.

By Mr. Bradford:

RDQ84. In one of your answers to a cross-question you stated that litmus paper might be used as a part of a method to determine accurately quantitative acidity in a preparation. Was such a method employed by Dr. Beringer as explained by him in answer to Q8 of his deposition?

A. It was not.

RDQ85. You have stated that your work has been more largely with foods than with drugs. Do or do not

many of the same constituents enter into the manufacture of foods and drugs?

A. The two subjects overlap. For example, in the products in question, cocoa, sugar, the different flavoring constituents, such as ginger, peppermint, sassafras, wintergreen, orange and benzaldehyde, are well known food constituents.

RDQ86. And your testimony in this case has been with subjects that you are entirely familiar with and in a number of instances have made the subject of a number of experiments and investigations?

A. That is true.

Deposition closed.

ANDREW L. WINTON.

FRANCIS E. BIBBINS, being recalled as a witness for plaintiff, in answer to interrogatories propounded to him by counsel, testifies as follows:

By MR. BRADFORD:

Q1. Dr. Winton in his testimony has referred to certain bottles of syrups which he testified he received from you. Among others, a bottle partially filled with Quin-Coco, marked No. 8. I ask if you recognize this bottle and can identify it, and if so, where you obtained it and what condition it was in when you obtained it and the circumstances under which you gave it to Dr. Winton, if you gave it to him?

A. This sample No. 8 was received by me in an unbroken package through the receiving department of Eli Lilly & Co. It was delivered to me with the parchment wrapping intact, and opened by me, and after a portion of its contents being used by me in my experimental work in this case, the balance of the sample in this bottle was turned over to Dr. Winton.

Q2. I also show you ten three-ounce bottles, said to contain specimens of the Bibbins syrups, Nos. 1 to

10, respectively, and testified by Dr. Winton to have been received by him from you. Will you please state what these bottles contain and the circumstances under which they were delivered to Dr. Winton by you, if such is the fact?

A. These samples were taken from the balance of the experimental lot from which the samples offered in this case as exhibits by me were taken. I refer to Plaintiff's Exhibits, Sample Syrups No. 1 to 10, respectively. The syrups were transferred to the bottles and labelled No. 1 to No. 10, the same as the exhibits respectively referred to, and were handed by me to Dr. Winton.

Q3. Do these bottles contain a portion of the identical batch of material, as contained in the exhibit syrups No. 1 to No. 10, respectively, and have these portions of said batches been in your possession continuously from the time they were made until they were turned over to Dr. Winton?

A. Yes, sir.

Q4. In answer to Q74, Dr. Beringer testified respecting sample No. 10, stated that it appeared to have been colored, but that the coloring matter is not stated. Was any coloring matter used in this sample?

A. No.

Cross-examination.

By Mr. Rawle:

XQ5. Do you state that the integrity of the manufacturer of the Bibbins samples, their preservation after the sample bottles put in evidence had been taken from them and until the Winton bottles were filled, has all been in your own personal professional care and under your personal professional observation?

A. Yes.

Re-direct-examination.

By Mr. Bradford:

RDQ6. I neglected to ask you if the same facts are true, and applied respecting the ten specimens of

these sample syrups numbered 1 to 10, used and introduced into evidence by Dr. Caspari?

A. They are. I personally filled the Caspari sample bottles from the same original batches and personally handed them to Dr. Caspari.

Deposition closed.

FRANCIS E. BIBBONS.

SAMUEL L. HILTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Samuel L. Hilton; age, nearly 52; Washington, D. C.; pharmacist.

Q2. Please state the character and extent of your experience, education and work by which you are qualified to testify as an expert in cases requiring knowledge of chemical and pharmaceutical subjects?

A. I am a graduate of pharmacy, having a degree of doctor of pharmacy, having been engaged actively and continuously in the practice of pharmacy for thirty-four years. I was assistant to the chair of analytical chemistry at the National College of Pharmacy, Washington, D. C., for five years. On many occasions I have delivered many lectures on special pharmaceutical subjects to the classes. For eight years I was a member of the Board of Pharmacy of the District of Columbia, its secretary, and having in charge all examinations on theoretical and practical pharmacy.

Q3. Please state what scientific or other societies you are a member of, and any official or committee connections you have with such societies or have had with such societies?

A. I was a delegate to the United States Pharmacopoeia Convention of 1900 and 1910, was elected treasurer of the U. S. Pharmacopoeia Convention in 1910, and still hold that position. While not a member of the United States Pharmacopoeia Revision Committee, I have been active in revision work, and received special notice for my activities in the lists of those who were active, published in the Pharmacopœia. I am a life member of the American Pharmaceutical Association, twice have been a member of its council, and at present vice-chairman of the council. I have likewise been a member of numerous committees of the American Pharmaceutical Association. I am also a member of the revision committee having charge of the revision of the National Formulary. Member of the American Chemical Society.

Q4. You see before you on the table a number of bottles containing preparations, one being a bottle of plaintiff's preparation, Coco-Quinine, another a bottle of defendant's preparation, Quin-Coco, and ten other bottles containing Bibbins Exhibits Syrups Number 1 to 10, also Plaintiff's Exhibit, Bottle No. 1, shown by the evidence to contain Coco-Quinine with cocoa omitted; another, complainant's exhibit, Bottle No. 2, shown by the evidence to contain Coco-Quinine, with yerba santa omitted. I ask you if you have seen these various exhibit bottles before, and if so, when and where?

MR. RAWLE: Same objections as have been noted of record to all of the preceding witnesses, and upon the same ground of irregularity and admissibility and notice of motion to strike out with costs.

MR. BRADFORD: Same agreement to apply.

A. I have, at Mr. Bradford's office in Indianapolis, Indiana, Sunday evening, December 2, 1917.

Q5. Did you examine the preparations contained

in these several bottles, and if you did, will you please explain the character and extent of your examination?

A. I examined them on that occasion as carefully as could be done under the circumstances, and noting their physical characteristics, their odor and taste.

Q6. Are you familiar with the preparation Coco-Quinine, and if so, when did you first become familiar with it and what is the extent of your knowledge of it as a medicine?

A. I am familiar with Coco-Quinine, and if my memory serves me correctly, became familiar first with it about fourteen or fifteen years ago. I have continuously handled the product in my business, dispensing same on physician's prescriptions and to the laity when called for over the counter. It has been perfectly satisfactory as a medicine, and I can testify that it has been what is known among pharmaceutical preparations as a good repeater, persons once using it will repeatedly call for the same preparation when they need such a preparation.

Q7. Are you familiar with Quin-Coco, and if you are, to what extent?

A. With reference to Quin-Coco I know there is such a preparation on the market. The salesman of the house that makes it offered it to me four or five years ago as a substitute for Coco-Quinine. His offer being rejected on the grounds that it was unfair competition, and when Coco-Quinine was called for it meant a preparation manufactured by Eli Lilly & Co.

MR. RAWLE: The last two questions and the answers are objected to for the additional reasons as irregular at this time and therefore inadmissible, and as irrelevant. The answer to the last question is objected to as volunteered, as stating inferences and not facts. The original objections are repeated.

Q8. Dr. George M. Beringer, when called as a wit-

ness for defendant, testifying in sur-rebuttal at Philadelphia on June 8, 1917, stated that he had examined specimens of these Bibbins samples, being a part of the contents removed from these identical bottles when they were introduced in evidence at the time Mr. Bibbins' deposition was taken, poured therefrom by Mr. Pfeiffer and Mr. Rawle into smaller bottles, and he took up each specimen separately and condemned each and all as pharmaceutically objectionable, unfit and unmarketable and unstable. Assuming that these preparations were made in March, 1916, and have been in the laboratory of Mr. Bibbin from that time until the date of his deposition and in my office in Indianapolis from that day untl Sunday night, when they were brought to this room, I will ask you to express your opinion respecting these qualities of the respective syrups, first will you please take up Sample No. 2, then No. 4, then No. 5 and then No. 6, and state your opinion as a pharmacist of these preparations and whether or not you would consider them stable, satisfactory and marketable?

A. With reference to preparation No. 2, as to stability there is no question in my judgment of its being perfectly stable. As to being a good pharmaceutical preparation I would class it as an elegant pharmaceutical preparation.

As to its marketability I see no reason why it should not be, if the proper endeavors were put back of the preparation to introduce it and bring it to the attention of physicians. It is a far better appearing preparation in every way than many pharmaceutical preparations now on the market enjoying extensive sales. As to the taste I will state that I have tasted this before the examination and am willing to do so again. The taste is perfectly pleasant and showing but a very slight bitter taste, and then only after being in constant contact with the tongue quite a little time.

With reference to Sample No. 4, the same testi-

mony that I have given with reference to Sample No. 2 holds with reference to Sample No. 4. With reference to taste it is very pleasant and showing but a slight bitter taste, and then only after some little while in constant contact with the tongue.

The same testimony that I have given in reference to Sample No. 4 is equally true as to No. 5. While there is a slight sign of separation at the top of the liquid that is entirely immaterial in my judgment and does not affect the marketability of the preparation. With reference to taste, what I have testified with respect to No. 2 and No. 4 is equally true as to Sample No. 5, the bitter taste is but very slight.

Sample No. 6, while this sample shows a little different condition on the upper portion of the bottle, as a pharmaceutical preparation that is immaterial in my judgment and does not affect the marketability of the preparation whatever. Other than that what I have testified to with reference to the previous samples holds true for Sample No. 6. With reference to taste, it is perfectly palatable and shows but very slight bitter taste only after being in contact with the tongue for some little time.

Collecively, I consider all four samples elegant, marketable preparations, that would enjoy a large sale if they were properly exploited.

Q9. In his testimony Dr. Beringer condemned each and all of these preparations without qualification, pointing out many defects in each, and compared them with Coco-Quinine, and stating particularly as to Sample No. 2, that it was decidedly more bitter than Coco-Quinine. I will ask you if what you said about bitterness of these samples is likewise true of Coco-Quinine, and what you have to say about Dr. Beringer's testimony thus referred to?

A. I cannot agree in any way with Mr. Beringer. None of the four samples, in my judgment, develop any more bitterness than Coco-Quinine. In general

appearance the samples, 2, 4, 5 and 6, I believe, show up as better pharmaceutical preparations than Coco-Quinine.

Q10. Will you please consider Samples Nos. 1 and 9 and answer in the same way what you find in reference to these preparations?

A. Sample No. 1 in my judgment is but slightly inferior as a pharmaceutical preparation in appearance when compared with Sample No. 2. As to flavor it is rather pleasant, and it would be no doubt acceptable to a majority of users. As to taste, it is not quite as pleasant as Samples Nos. 2, 4, 5 and 6, in my judgment. You get the slightly bitter taste much quicker than with Samples Nos. 2, 4, 5 or 6.

With reference to Sample No. 9, as to appearance I cannot see the slightest objection as a pharmaceutical preparation of the character of these preparations holding medicaments in suspension. The flavor is decidedly pleasant, and no doubt would be acceptable by many. As to taste, it is more bitter than samples Nos. 2, 4, 5 and 6, you getting the bitter taste in a much shorter period of time.

I would consider both samples No. 1 and No. 9 as marketable preparations, and would no doubt enjoy a large sale if properly exploited, there being many preparations on the market at the present time inferior in character in every way enjoying such sales.

Q11. Without asking you to examine into detail Samples Nos. 3, 7, 8 and 10, which all the witnesses have agreed have developed some degree of bitterness, perhaps exceeding that of the other samples, I will ask you to state as a pharmacist whether you believe that such defect might be overcome by further laboratory experimentation, and whether or not even in their present form or as thus improved they might become marketable preparations?

Mr. Rawle: Specially objected to, because the witness cannot possibly be expected to know or

testify what further experimentation would make these preparations good or what work had been put on them or anything about the formula.

A. I agree that they could probably, with some experimentation, be improved, and I consider that they are all marketable preparations in their present condition, far better than many preparations that are sold by the retail pharmacists to-day.

Q12. What does a "Shake Well" label on a bottle of medicine signify to a druggist?

A. It is a specific direction that the product contains a medicament that is held only in suspension, and for the purpose of securing even distribution the bottle is directed to be well shaken. The pharmacist likewise directs the purchaser of that fact on dispensing a physician's prescription containing substances held in suspension, or when selling direct to the purchaser so that each dose will be practically uniform.

Q13. In Dr. Beringer's testimony he states that a perfect suspending medium for a preparation of this character must have perfect homogeneity and maintain the medicament in even distribution, even after standing for a long period of time. What have you to say as to this?

A. I do not agree with Mr. Beringer. While it is desirable to have a minimum of separation it is practically unobtainable, even on short standing.

Q14. I show you this bottle, Complainant's Exhibit, Bottle No. 1, containing all of the constituents of Coco-Quinine, except cocoa, and ask you if you have tasted the same, and to express your opinion respecting its characteristics, and whether or not it would in itself be a marketable preparation?

A. While the preparation on standing showed some separation, it is on shaking homogeneous and in better condition than very many preparations as to appearance now on the market. As to odor, decidedly pleasant. As to taste, no more bitter than Coco-Quinine or

Samples 2, 4, 5 and 6. As to marketability I can see no reason whatever why it is not as marketable as the other samples about which I have testified.

Q15. Will you also examine and taste Complainant's Exhibit, Bottle No. 2, which contains all of the ingredients of Coco-Quinine, with the exception of the yerba santa, and state what you find as to its taste, etc.?

A. As to appearance, I will say and repeat what I said with reference to No. 1, last referred to. The odor is rather pleasant, but not as pleasant as some of the other specimens. As to taste, the bitterness develops instantly.

Q16. You stated that you were a member of the Committee on Revision of the National Formulary. I believe Dr. Beringer also is a member of that committee, and in his testimony he told us of experiments he had made in an endeavor to make a formula for a chocolate quinine preparation for that book, and expressed the opinion that from an ethical standpoint he was entirely justified in so doing, even with Coco-Quinine as the preparation to work from. What have you to say as to this?

A. Mr. Beringer reported at a session of the National Formulary committee on a preparation of that character that he had been working on a formula for the preparation, that he had failed to make a satisfactory preparation, asking for time to continue his experiments. Several of us, myself included, objected to the inclusion of any such formula, and stated our objections vigorously, that the National Formulary was not to be a receptacle for substitute preparations. As far as I know, no further work was done on the preparation, and the National Formulary IV shows no such formula included.

Q17. What have you to say as to the merits or demerits of benzaldehyde as a flavor for medicinal preparations?

A. I know of no objection based on a sound prin-

ciple against the use of benzaldehyde, and can further say that in the District of Columbia there are several preparations, one of which has been used in rather a large way for many years, both on physician's prescriptions and by direct sale to the public, in which the predominant flavor is benzaldehyde. I further manufacture a preparation myself for physicians' use, and also for a tuberculosis dispensary, where the predominant flavor is benzaldehyde, and have been using it and furnishing same for about six years. Benzaldehyde is also used in certain food products as a flavor, and is a very acceptable flavor.

Q18. What medicinal preparation did you first become acquainted with in which cocoa or chocolate was used as the coloring and flavoring agent?

A. Coco-Quinine.

Q19. How extensively has the use of cocoa gone into use as a coloring and flavoring agent for liquid medicine?

A. I know of none other than the Lilly line that enjoy any sale or reputation in the District of Columbia worth speaking of.

Q20. Is, or is not, the use of coal tar products in medicines objectionable?

A. My opinion is that they are not objectionable, not as much so as many of the animal and vegetable colorings that have been used for some time, for the reason that the accepted colors as specified by the Bureau of Chemistry of the Department of Agriculture are classed as harmless and rightly so in food products, and that they are prepared in laboratories with the greatest amount of care under excellent sanitary conditions, so that you obtain a pure product free from contamination, while with animal and vegetable coloring matters they are prepared in countries foreign to our own by usually the ignorant natives, mostly under the most unsanitary and unfavorable conditions, making it impossible to obtain a pure product that is not contaminated with filthy, nasty foreign material.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ21. When you say that Coco-Quinine is a "good repeater," do you mean that it is well thought of by your customers or your prescribing doctors, and that they are very apt to order it again and again, or call for it again and again over the counter? Is that about what you mean by a "repeater"?

A. Yes.

XQ22. And from the standpoint of the drug salesman who calls on you I suppose a "good repeater" would be a drug or preparation which the salesman had sold to the druggist before and the druggist liked it, and that it was pretty easy for the salesman to sell him some more on the next trip if the drug was out?

A. I don't see that the drug salesman has anything to do with it; it is what the physicians and what the public want.

XQ23. Is the expression, a "good repeater," a familiar one among the druggists, or with you?

A. It is quite a familiar one among the druggists with reference to preparations for which there is a good sale.

XQ24. That is a steady demand?

A. Yes.

XQ25. And may not the expression have gotten into the mouths of the drug salesmen, so that they have been talking or do talk sometimes of a preparation being a "good repeater," meaning that there is a steady demand for it among their customers?

A. Not being a salesman I am unable to state what their view is.

XQ26. In tasting the Bibbins Samples 2, 4, 5 and 6, this morning, you inverted the bottle, leaving some of the contents on the bottom of the cork, removed a little of the contents on your finger and placed it on your tongue, in each case. Is that correct?

A. It is, and I consider I got an average sample for the test.

XQ27. Then, as I timed you, you would wait for about twenty seconds and then begin to answer the question put to you by counsel?

A. That is correct, and the answer was not forthcoming until the moment I began to obtain the slightest bitter taste, which I consider, without timing, to be at least thirty seconds in each case, instead of twenty seconds, possibly longer.

XQ28. And this elapsed period of at least thirty seconds is what you referred to in answer to one of the questions when you said that Sample No. 4 showed "but a slight bitter taste, and then only after some little while in constant contact with the tongue"? Is that correct?

A. That is.

XQ29. And in tasting those first four samples you did nothing in tasting the samples to remove from your organs of taste whatever might have remained thereon from the tasting of the preceding sample. Is that correct?

A. That is not correct, as I rinsed my mouth with water on each occasion in the presence of counsel.

XQ30. Then, to be perfectly fair to you, I understand that you did rinse your mouth after each sample before you tasted the next?

A. That is correct.

XQ31. I understand that your phrase "elegant pharmaceutical preparation," in answer to Q8, is a common phrase to indicate a good appearing preparation, and such a one as you as a leading druggist in Washington are willing to carry on your shelves. Is that correct? I would like you to assume that the preparation has merit of its own, in your belief.

A. I used the term in a different sense, and in this way to distinguish from the ordinary extemporaneous preparation, as, for instance, a physician's prescription, from one that is the result of careful research and experiment, that has not only qualities of merit, but is of itself elegant in every sense of the word.

XQ32. In testifying that this Bibbins article No. 2 was "an elegant pharmaceutical preparation," what qualities in the Bibbins bottle No. 2 before you did you consider as the basis of such an opinion?

A. I think my answer sufficient, and covered the main points of my observation.

XQ33. How can you, sitting there, pick up one of the bottles before you and properly give any opinion as to the "stability" of the preparation in that bottle?

A. I testified at the start that I had examined those preparations Sunday evening, December 2nd, 1917; that it was admitted that these samples were over one year old at the time they were presented to me, and that I think that is sufficient to show that they had not undergone any change when the contents of each package clearly shows that they are free from fermentation, and that they are homogeneous mixtures and that they are practically tasteless.

XQ34. How can you properly testify to the homogeneity of the contents of Bibbins No. 2, except so far as to say that it looks homogeneous at the present moment?

A. The only means at my command at the time of giving the testimony to more minutely define that question was not available, and I was therefore compelled to rely upon the physical appearance, as presented to the eye.

XQ35. Bibbins Samples 3, 7, 8 and 10 were not tasted by you while testifying. Is that correct?

A. The record should show that. I do not remember those numbers at this time. I admit that there were some I did not taste.

XQ36. Have you at this sitting today tasted Coco-Quinine or Quin-Coco?

A. I have not.

XQ37. Then, of course, you have not compared the degree of bitterness of the Bibbins samples you have tasted with any degree of bitterness in Coco-Quinine and Quin-Coco, have you?

A. With Coco-Quinine I have made no comparison to-day, for the reason that I am so familiar with the product, having tasted it possibly several thousand times in which I have handled it, that I did not consider it necessary. With Quin-Coco I believe that that question is immaterial, as I was not requested to make the comparison, and that I am not familiar with the product other than that there is such a product in imitation and offered as a substitute for Coco-Quinine.

XQ38. Is it true that Coco-Quinine is rather largely sold in prescriptions and over the counter for children?

A. It is.

XQ39. Apparently because it is not bitter to the taste?

A. That is probably one of its advantages.

XQ40. In your answer to Q7, in referring to Quin-Coco, you said that "the salesman of the house that makes it offered it to me four or five years ago as a substitute for Coco-Quinine." At what store?

A. At my place of business, 1033 Twenty-second Street, N. W., Washington, D. C.

XQ41. Have you ever stocked the goods of Wm. R. Warner & Co., of Philadelphia?

A. Some of them.

XQ42. Who was that salesman?

A. That I am unable to inform you now. I don't remember his name.

XQ43. Might it have been longer than four or five years ago? Have you any means of approximating the date more closely?

A. From the data that I used to locate the occasion, that is approximately as close as I can state it.

XQ44. What was the data that you used?

A. It was considerably before the death of my partner and brother-in-law, who died three years ago September 9th, that we were looking over these samples together for the purpose of placing an order for

the purchase of certain specialties of Wm. R. Warner & Co., for which we had demand.

XQ45. How fully at that time did you go through that salesman line?

A. Quite extensively, and I believe that I examined practically everything that he had in his sample case. There being a number of pharmaceutical preparations along the general line of pharmaceuticals which I manufacture myself, and at which time I made comparisons of the salesman's sample with my own product.

XQ46. Mention some of those preparations of yours which you compared with his products?

A. Elixir of phosphates of iron, quinine and strychnine, U. S. P. VIII; glycerophosphates compound, no sugar is now official in N. F. IV; several elixirs N. F. III; several tinctures, U. S. P. VIII.

XQ47. Besides his line of samples, did you to any extent go through the rest of his line?

A. Only his particular specialties, for which I had demand on physicians' prescriptions.

XQ48. State what this salesman said to you in trying to sell you his Quin-Coco. Give his exact words and your exact reply in direct statement.

A. As close as I can possibly state Quin-Coco was presented and offered as a tasteless quinine preparation, to use instead of the product of Lilly & Co., and he said it costs you much less. My reply was I use no substitutes, prices does not enter into the consideration; Coco-Quinine is a specialty of the firm of Lilly & Co., placed on the market after proper experiment and investigation on their part, and that they were entitled to reap the reward for their endeavors, and that when I received a prescription or a call for Coco-Quinine the physician and the person making the call had only one product in view, and that product was the product of Eli Lilly & Co.

XQ49. Can you now say positively after this in-

terval of four or five years that you made that long speech to the salesman, and in just the words you have now used?

A. I have purposely eliminated a portion of what I used at the time, because I consider that the language would not look well in testimony. We had quite an argument on that question.

XQ50. Did this salesman say to you that he could sell you a tasteless chocolate quinine preparation, and that it was medicinally similar to Lilly's Coco-Quinine and would sell it at a less price? Is that about what he said?

A. His statement was on presenting the sample. "Here is Coco-Quinine; we have it perfectly." That was the statement that caused a protracted argument, to which I have previously referred in answering another question.

XQ51. Of course, you knew at the time that he was a Warner salesman, and that he was not selling Coco-Quinine, Lilly, did you not?

A. He not only offered that substitute, but as my memory now serves me several other substitutes for other products. So that I almost came to the conclusion that he was offering a line of substitute products for well known pharmaceutical specialties.

XQ52. Question repeated.

A. I think I have answered that I knew he was a Warner salesman, and have stated exactly what he did.

XQ53. Did you or did you not know at the time that the preparation he was offering you was not a preparation manufactured and put on the market by Lilly?

A. That is self evident. He was selling goods for Warner & Co.

XQ54. Then when this salesman said as you have testified (in XQ50): "Here is Coco-Quinine," you understood that he meant that he had an article similar to Coco-Quinine, but not real Coco-Quinine, made by Lilly, did you not?

A. No. I definitely understood that he deliberately offered the preparation of Warner & Co., as a substitute and to be sold for Coco-Quinine.

XQ55. Did you see his labels at that time?

A. The sample from the sample case contained a small label, as I remember it. The sample was offered to me for examination, and I refused even to take the sample and look at it, so that I am unable to state exactly how it was labelled.

XQ56. I show you the pint bottle of Warner's Quin-Coco. Does that remind you of the label the salesman had? (Bottle shown witness was "Complainant's Exhibit, Bottle No. 5.")

A. That was not the package, or anything like it. The sample exhibited was from a salesman's sample case, the bottle being the ordinary homeopathic sample vial, probably holding about two fluid ounces.

XQ57. Had it a label?

A. I testified a moment ago that my recollection is that it had a label of some kind on it, and I further testified that I refused to examine the package and could not state how it was labelled.

XQ58. Was the name Quin-Coco mentioned between you in this talk?

A. It was not, as I remember.

XQ59. How long did that controversy over this article last?

A. If my memory serves me correctly, very near thirty minutes. We had several controversies in discussing various products, and I am of the opinion now that the salesman was in my store for at least two hours.

XQ60. How long did the controversy over Quin-Coco last?

A. The previous answer will show.

XQ61. I venture to ask you to answer it again.

A. I have testified to about thirty minutes.

XQ62. But you said that you did not talk all that time about Quin-Coco, did you not?

A. I did.

XQ63. And therefore, I now ask you how long you talked about Quin-Coco?

A. I again testify that I stated that we discussed that question about thirty minutes, and that the entire interview lasted about two hours.

XQ64. What did the salesman state as to the nature or composition of the preparation he was then offering you? I mean the tasteless quinine preparation.

A. As close as I can remember his statement was to the effect that it had all of the properties of Coco-Quinine, and why pay the price. This started the argument.

XQ65. And I think you have said that at that interview this salesman offered you a number of other Warner articles, which were in competition with articles of similar medicinal value made by other houses, and pressed them on your attention. Is that correct?

A. That is as I remember it.

XQ66. Might there have been a dozen of such other articles?

A. I would not like to state the number of such articles, for the reason that after our argument on this particular preparation he pursued different tactics.

XQ67. Please name some of the other articles that you had a controversy about?

A. A substitute for lapactic pills, S. & D.; a substitute for alophen pills, P. D. & Co., and I think some cascara preparation, but I cannot call that to mind at this time.

XQ68. A substitute for listerine.

A. I think there was.

XQ69. Lactopeptin, or a like article?

A. If my memory serves me correctly there was a preparation as a substitute for elixir of lactopeptin.

MR. BRADFORD: I have refrained from objecting to this line of questions, hoping that it would

soon conclude, but I must interpose an objection that it is entirely improper, not being cross-examination in any sense of the word.

XQ70. Elixir salicylic comp. or any like preparation?

A. They would hardly offer me a substitute for elixir of salicylic Comp., when that is their own preparation.

XQ71. Did he offer you elixir salicylic comp.?

A. It was a perfectly legitimate offer. It was one of their preparations that I purchased at the time. It was one of their specialties, to which they are entitled to a just reward of their labors for introducing the preparation, the same as Eli Lilly & Co. are entitled to the just reward on their preparation Coco-Quinine.

XQ72. At that time had you been handling a preparation similar to the salicylic comp. of any of the other houses?

A. I have never handled anything but Warner's Elixir Calycylic Comp., and would not, because I believe firmly that that is their product, and that they are entitled to all the business on that product and when that product is demanded I know of no other product than Warner & Co.

XQ73. You mean then that when the Warner product is called for you know no other?

A. I know of no other product than the product of the manufacturer who makes a specialty when that product is called for.

XQ74. But you know that Parke, Davis, Lilly, Mumford, Sharp & Dohme, Wyeth and Wampole all market a preparation similar to elixir salicylic comp.?

A. I do not. I know only Warner's preparation, or as far as I can recollect I never heard of the others.

MR. RAWLE: Mr. Rawle moves to strike out so much of the deposition of this witness as is other than of an expert nature, upon the ground that no

notice has been given of the calling of this witness on facts, but only as an expert, and because the evidence on facts that he has given is inadmissible at this time, and repeats the motion to strike out.

Re-direct-examination.

By Mr. Bradford:

RDQ75. In taking medicine, does a person hold it in the mouth more than thirty seconds? I refer, of course, to medicine of the character we have been considering.

A. I should say they hold it very much less than thirty seconds. The inclination is to swallow as quickly as possible, and I am of the opinion that they do so in less than ten seconds.

Deposition closed.

Sam'l L. Hilton.

IN THE
DISTRICT COURT OF THE UNITED STATES,
Eastern District of Pennsylvania.

IN EQUITY.

THE ELI LILLY & COMPANY, a Corporation,
Plaintiff,

vs.

WM. F. WARNER & CO., a Corporation,
Defendant.

District of Columbia, }
City of Washington, } *ss.*

I, Charles E. Riordon, a Notary Public, within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the plaintiff in the above

entitled cause were taken before me, pursuant to notice and agreement of counsel, as follows:

At Washington, D. C., November 7th and 8th, 1917:

Samuel H. Bell,
Ellis Walker Howard,
R. H. Greene,
W. R. Bell,
Edmond Francis O'Connell.

At Indianapolis, Ind., December 3d, 4th and 5th, 1917:

James H. Beal,
Charles E. Caspari,
J. B. Weldon,
F. C. Atkinson,
Andrew L. Winton,
Francis Bibbins,
Samuel L. Hilton,

that each of said witnesses was by me first duly sworn in accordance with the law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and by Mr. Francis Rawle, attorney for defendant, as appears in the record; that the depositions of said witnesses was read over by him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause, and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit. I further certify that the exhibits placed in evidence before me in the course of examination of said witnesses were duly marked by me and in accordance with stipulation of counsel retained by the plaintiff who introduced same.

In testimony whereof I have hereunto set my hand and seal this 5th day of December, 1917.

(Seal)

CHARLES E. RIORDON,
Special Examiner.

160382

Vol. III

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]32

LIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 5, 1924.

CERTIORARI AND RETURN FILED JULY 31, 1924.

(28,613)

(28,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 VOL. 3.

In the District Court of the United States for the Eastern District of Pennsylvania, December Term, 1914.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Answer.

Filed January 29, 1915.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The answer of William R. Warner & Company, a corporation, to the bill of complaint in the above entitled case showeth as follows:

1. The averments of paragraph 1 are admitted, except the averment that "Coco-Quinine" is a compound of high medicinal value. It has the medicinal value of quinine, the chocolate merely acting as a vehicle, used to make the quinine more palatable.

2 2. Defendant has no exact knowledge as to when the plaintiff began the manufacture and sale of "Coco-Quinine." It denies that at the time when the plaintiff became such manufacturer, no similar product was known either to the drug trade or to the medical profession, but avers that at that time there were on the market preparations intended to be used as vehicles for administering quinine and disguising its bitter taste. It has no knowledge as to whether the product was the result of long study and expensive experiment. It denies that the said compound became widely and favorably known as a remedy except in the sense that it was a product which enabled the administration of quinine in a more palatable form.

3. It is denied that the plaintiff, for the purpose of identifying its product, made the compound of a special color commonly called chocolate. The defendant avers that the plaintiff's compound merely has substantially the natural color of chocolate, of which it is in part compounded.

4. The defendant denies that the plaintiff, as a means of identifying the origin of the said product, adopted a certain arbitrary selected flavor, to wit, chocolate. The defendant has no knowledge or in-

formation of any other syrups of other flavors that might be used for the same purpose as is averred in paragraph 4, and therefore denies that any such exist or are known, and avers that chocolate, while-non-essential to the medicinal characteristics of the product, is essential to certain vital characteristics thereof.

5. The defendant admits that such product of the plaintiff has become known as "Coco-Quinine," but denies that has become so known by its color or flavor or by its medicinal effects, or in any other way than as a palatable preparation of quinine. The defendant admits that the name of the plaintiff's product has been recog-
3 nized, but denies that its color and flavor were and are recognized and freely acquiesced in by the trade.

Defendant further avers that compounds of quinine and chocolate, similar to plaintiff's, were manufactured and sold on the market by various drug manufacturers prior to the time when Searle & Hereth Company began to manufacture and sell "Quin-Coco."

6. The defendant admits the averments of paragraph 6, but avers that the sale of compounds of quinine and chocolate to consumers are almost universally made in doses, usually by druggists on physician's prescriptions.

7. The averments of paragraph 7 are admitted, except that it is averred that the plaintiff's product has no other reputation than as quinine in a palatable form and that its remedial action depends solely on the quinine contents.

8. The defendant admits that it is a corporation under the laws of Pennsylvania, and a citizen of said state; that its principal place of business is in Philadelphia, and that it is engaged in the manufacture and sale of medicinal products, and distributes the products of other concerns, including Searle & Hereth Company and Pfeiffer Chemical Company. It is admitted that about the year 1906 the Searle & Hereth Company began the manufacture and sale of a compound of quinine and chocolate. It is denied that it did so with any wrongful or fraudulent intent to divert and appropriate to its own use and own profit a part of the plaintiff's business in the sale of Coco-Quinine or with any other wrongful or fraudulent intent whatever. It is denied that it made its said product in exact imitation of the plaintiff's product. It is denied that it manufactured the same with the purpose and intent of selling it for a substitute for
4 the plaintiff's product and enabling druggists and others to substitute it for the plaintiff's product when Coco-Quinine was called for by customers and indicated on physicians' prescriptions. It is admitted that the defendant's product is of the same color and appearance substantially and of similar flavor as plaintiff's product, but it is averred that the color and appearance of plaintiff's product are due entirely to the chocolate ingredient, but that the flavor of defendant's product is not due to chocolate syrup alone, as is claimed for plaintiff's product, but is due to a combination of chocolate, vannalin and a special extract of yerba santa.

The defendant admits that the name "Quin-Coco" was adopted, but denies that the name and label used by the defendant are a close imitation or any imitation of the plaintiff's name and label, and that they are easily confused therewith. It denies that the defendant's product is a substantially exact imitation of and substitute for plaintiff's product and that it is so recognized in the trade. It avers that the label used on defendant's preparation is easily distinguishable from the plaintiff's label. It denies that Searle & Hereth Company offers the said product to plaintiff's customers, druggists and dealers, informing them that it could and can be used as a substitute for the plaintiff's product. It denies that druggists had any instructions as to any wrongful sale of defendant's product. It denies that defendant's product has been sold to the trade on such representations (at least by the knowledge, authority or permission of the defendant) and that it has been sold by druggists, upon any instructions from defendant to supply demands from customers for plaintiff's product, by authority, or to the knowledge of defendant.

9. It is denied that the defendant has ever made renewed efforts or any efforts to push its product in the drug trade and medical profession as a substitute for the plaintiff's product, except in the way of fair and lawful business competition. It is denied that the Searle & Hereth Company is merged into the business of the Pfeiffer Chemical Company. It is admitted that the same individuals subsequently became interested in all three of the companies mentioned in paragraph 9, and that the defendant is the distributor of "Quin-Coco." It is denied that the defendant has by many and divers ways and schemes or otherwise, in placing its said product on the market represented, through its agents and salesmen to purchasing druggists and physicians that its said product could be furnished in lieu of plaintiff's product when called for by customers or by physicians' prescriptions. There was no connection between defendant and Searle & Hereth Company until late in the year 1908.

It is denied that druggists have, as averred in this paragraph, received any instructions from defendant as to selling "Quin-Coco" for "Coco-Quinine." The defendant is without knowledge or information that druggists ave sold and are now selling "Quin-Coco" for "Coco-Quinine"; but it avers that if any druggist has done so it has been without the instruction, suggestion or knowledge of the defendant.

The defendant has no knowledge or information that customers frequently receive "Quin-Coco" with the druggists' own label, but bearing the name of "Coco-Quinine," but avers that if such has ever been the case, it has been without the knowledge, instruction, representation or suggestion of the defendant, and has been done by such druggists' own unaided volition. The defendation denies that any act on its part has ever unlawfully or wrongfully deprived or is now depriving the plaintiff of sales of its said product, or has resulted in deceiving or defrauding purchasers and users who intend to buy "Coco-Quinine." The defendant denies that it has by any

unlawful or wrongful method whatever pushed the sale and
6 distribution to the trade of "Quin-Coco," and that its product has been retailed as "Coco-Quinine."

10. The defendant denies that its product is inferior in quality and medicinal properties to the plaintiff's product; but it avers that the medicinal action is due to the quinine content, and that the amount of this, according to the labels of both plaintiff and defendant, is the same in each case. It is denied that defendant's sals have ever unlawfully deprived the plaintiff of profits to which it was justly entitled. The defendant denies that it has by any unlawful act injured the reputation of plaintiff's product or in any way unlawfully interfered with the demand therefor, and that any act of defendant has resulted in defrauding the public by giving the public a different product from that demanded. It is denied that the defendants product is of less merit than the plaintiff's.

11. If the averments in paragraph 11 that the long continued use of the name "Coco-Quinine" has constituted it a valid trade mark, the defendant denies the averment. The defendant admits that "Coco-Quinine" has for many years been recognized in the trade as the product of the plaintiff. The defendant denies that the color of the plaintiff's product has caused such color to be recognized in the trade as identifying the product as being that of the plaintiff, and that the chocolate flavor of the plaintiff's product has come to identify said product as being that of the plaintiff. The defendant denies infringement of any exclusive right of the plaintiff to the said name or color or flavor. The defendant is advised, and so avers, that the plaintiff is not entitled to any valid trade mark or exclusive right whatever in the premises, either by reason of the said name "Coco-Quinine" or the color or flavor of his product.

The defendant denies that it is guilty of infringement of any lawful right of the plaintiff in the color of its product or
7 the flavor thereof. The defendant denies that it adopted the name "Quin-Coco" and the color and flavor of its product, and has used the same with the fraudulent and wrongful purpose and intent of unfairly and fraudulently diverting to the defendant part of the plaintiff's trade and to enable its product to be palmed off on the public as and for the product of the plaintiff. The defendant is advised, and so avers, that it has a legal right to manufacture and sell a compound of quinine and chocolate, under the name of "Quin-Coco," and of the natural color and substantially of the flavor of chocolate, and that in doing so it has infringed upon no exclusive right of the plaintiff in the premises.

The defendant denies that it has artfully and fraudulently or in any way whatsoever, through its salesmen, agents, druggists, dealers and confederates, heretofore or ever substituted or is now substituting its product for the plaintiff's product or has injured the plaintiff or deceived the public or done any act or thing in the premises contrary to equity or fair dealing. The defendant avers, on the contrary, that it is and always has been lawfully selling its said product on its own merits, and in so doing has not committed any wrong

against the plaintiff or deceived the public, but has extended its sales by means of a large force of traveling salesmen and by free samples.

12. The defendant denies that the plaintiff has any exclusive right to the use of the color or the flavor of its said product. The defendant denies that it has in any way infringed upon the plaintiff's exclusive rights, and that it has in any way unlawfully caused or is now unlawfully causing the plaintiff any pecuniary loss, and that any act on its part has wrongfully or unlawfully or otherwise affected the plaintiff's reputation as a manufacturer of medicinal products.

8 And the defendant, for a further defense to the bill of complaint, says that it has since —, 1908, and the Searle & Hereth Company from 1906 to 1908, openly sold the product "Quin-Coco" to the trade, and that this has been known to the plaintiff, and that notwithstanding such knowledge, the plaintiff has made no objection to such sales, except one objection made in October, 1909, that defendant's prices were too low.

Wherefore the defendant prays that the plaintiff's bill be dismissed, and prays its reasonable costs in this behalf most wrongfully sustained.

[SEAL.]

WM. R. WARNER & CO.
G. A. PFEIFFER,
Treas.

JOSEPH W. HENDERSON,
FRANCIS RAWLE,
For Defendant.

Deposition on behalf of the defendant taken before George Brodbeck, Esq., Special Examiner, at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Wednesday, November 24, 1915, at 10 o'clock a. m.

Present:

George Brodbeck, Esq., Special Examiner.
E. W. Bradford, Esq., representing the Plaintiff.
Francis Rawle, Esq., representing the Defendant.

GUSTAVUS A. PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

9 A. Gustavus A. Pfeiffer. 43 years old. Treasurer and General Manager of William R. Warner & Company. Residence, Philadelphia, Pa. I first became connected with William R. Warner & Company in July, 1908.

Q. 2. State briefly what had been your connection with the drug business before this?

A. I was connected with the retail drug business ever since I was a boy, first as a clerk, then as the owner of a drug store, and am a registered pharmacist, and was the owner of a drug store for about nine years. In 1901 I assisted in organizing the Pfeiffer Chemical Company, a manufacturing drug concern.

Q. 3. With headquarters in St. Louis?

A. With headquarters in St. Louis.

Q. 4. What are your affiliated companies at present?

A. At present the companies with which we are affiliated are The Searle & Hereth Company, the Dr. Earl S. Sloan, H. E. Bucklen & Company, Pfeiffer Chemical Company, and the E. E. Sutherland Medicine Company, and several others.

Q. 5. When was the product "Quin-Coco" first marketed?

A. In the fall of 1906, by the Pfeiffer Chemical Company.

Q. 6. Why was it introduced?

A. To supply the demand for a chocolate quinine mixture with the taste of the quinine sulphate masked or disguised.

Q. 7. Will you state whether or not that demand existed prior to its first introduction?

A. It did.

Q. 8. Who makes it now, and since 1908, and who sells it and who distributes it?

A. It is manufactured by The Searle & Hereth Company, and it is distributed by William R. Warner & Company.

10 Q. 9. To what trade?

A. To the retail drug trade and to the dispensing doctor and to the jobbing drug trade.

Q. 10. In what size bottles or containers?

A. It is supplied in two ounce bottles, four ounce bottles, pint bottles, five pint bottles and gallon bottles.

Q. 11. Has William R. Warner & Company been its sole distributors ever since August, 1908?

A. Almost exclusively. For a time after August, 1908, the Pfeiffer Chemical Company invoiced goods under the firm name of the Pfeiffer Chemical Company and acted as distributors for "Quin-Coco" in the territory handled by the Pfeiffer Chemical Company. Later, however, the Pfeiffer Chemical Company discontinued using their name in selling goods to the trade and for some time past William R. Warner & Company has handled and is the sole and exclusive distributor.

Q. 12. From your experience in the drug business what would you say the therapeutic effects of this preparation are due to?

A. Due to the quinine sulphate contained.

Q. 13. What would you say were the advantages of the preparation?

A. The advantage of "Quin-Coco" is that it supplies quinine sulphate in minute crystals undissolved, very much sub-divided, and held in suspension by the cocoa. This facilitates administration and absorption, and on account of the pleasant flavor and taste of chocolate, makes the product acceptable to the patient.

Q. 14. To what extent is the bitter taste of the quinine masked in his preparation?

A. Almost completely.

Q. 15. What do you mean by facilitating absorption?

A. The preparation being in liquid form is easier assimilated by the organs, because naturally the product before absorption must be in such form in the digestive organs.

11 Q. 16. You would say it hastens assimilation by the organs?

A. I would.

Q. 17. That it assimilates more quickly than if the same amount of quinine were given in the shape of a pill?

A. It would.

Q. 18. What other, if any, principal ingredients are there in this "Quin-Coco?"

A. Yerba santa, vannilin, saccharin, and cocoa, and a syrup base.

Q. 19. Cocoa in a syrup base?

A. Yes, sir.

Q. 20. Explain that to the Court. What is meant by "syrup" in the drug business?

A. A mixture of sugar and water.

Q. 21. What part does the yerba santa play in this mixture?

A. To disguise the bitter taste of the quinine.

Q. 22. State whether or not the cocoa has the effect of disguising the bitter taste of the quinine?

A. It has.

Q. 23. What about the syrup and vannalin?

A. The syrup is used as a sweetener of the preparation, and is commonly used in medicine for such purposes. The vannalin is added as a flavor and to emphasize the flavor of the cocoa.

Q. 24. But in quite small proportions?

A. Vannalin is used in small proportions.

Q. 25. Have you made any personal experiments in order to demonstrate whether or not cocoa has any effect in masking the bitter taste of the quinine?

A. I have. I have made a sample of a mixture with a syrup base, using the same proportion of quinine as we use in "Quin-Coco" and without any other ingredients. I made another sample, using a syrup of cocoa as a base, and having the same quantity of quinine sulphate, and without any other ingredients *of* flavors. Upon

12 tasting these, I found the one with a cocoa base was markedly less bitter than the one without the cocoa.

Q. 26. You made those experiments yourself?

A. I made these experiments personally. I placed some of the two preparations I made in the bottles, which I produced.

(The bottles produced by the witness are offered in evidence and marked "Pfeiffer Experiment No. 1" and "Pfeiffer Experiment No. 2.")

Q. 27. Can you state what other qualities the cocoa imparts to the combination in "Quin-Coco" in respect of flavor and the fluidity of the mixture and so forth?

A. Besides assisting in masking the bitter taste of quinine sulphate, the cocoa acts as a thickener of the mixture, and has the property of holding the undissolved quinine sulphate in suspension. It also makes the product opaque in this way, hiding the fact that the quinine sulphate is not dissolved. Further, it gives the preparation a chocolate flavor and taste. It also is important in preventing precipitation or settling of the quinine sulphate to the bottom of the bottle, thus enabling the making of a preparation which is pharmaceutically satisfactory.

Q. 28. What is the nature of the preparation in regard to its fluidity and touch, if you choose?

A. It is a thick and rather viscid mixture.

Q. 29. Will you state whether cocoa, that is to say, chocolate, using the broader term, is a popular flavor, and how popular?

A. It is a popular flavor, and is probably the most used flavor of any single flavor.

Q. 30. Will you state whether or not the particles of quinine sulphate are in solution in Quin-Coco.

A. They are almost entirely undissolved.

Q. 31. What would be the relation of the solution of the quinine sulphate in this preparation and its bitterness?

13 A. If the quinine sulphate was all in solution, the preparation would have a bitter taste.

Q. 32. Does undissolved quinine exist in a crystalline form?

A. Usually.

Q. 33. Does it so exist in this preparation?

A. It does, as I have tested it under the microscope.

Q. 34. Explain a little bit more fully what is the advantage of an opaque drug?

A. The advantage of an opaque mixture is limited to those mixtures which have not the ingredients in complete solution. This is to overcome the objection which patients have to taking muddy mixtures or mixtures with precipitates in the bottom, and the opaqueness tends to hide the undissolved ingredients and precipitates, giving the product a more appetizing appearance.

Q. 35. Dr. Francis, one of the plaintiff's witnesses, testified, in his opinion, in substance, that in "Coco-Quinine" the quinine sulphate was in solution. What have you to say about this?

A. Dr. Francis is mistaken.

Q. 36. Give your reason.

A. Almost all the quinine is undissolved and held in suspension.

Q. 37. You have now mentioned certain effects of cocoa in this mixture. Please state your opinion as to how far the cocoa is essential to the preparation, and whether any other ingredient could replace it, in your opinion?

A. I could not make the preparation without it, and I know of no other ingredient which could be used in its stead.

Q. 38. Upon what do you base those statements?

A. On experiments made.

Q. 39. State whether or not you have ever known or seen a

14 liquid mixture which satisfactorily disguised or masked the taste of the quinine without the use of chocolate or cocoa?

A. I have not.

Q. 40. State the difference between chocolate and cocoa.

A. Cocoa is chocolate with most of the cocoa butter pressed out.

Q. 41. Usually and commercially does some of the butter remain in the cocoa?

A. It does.

Q. 42. What becames of the cocoa butter taken out of the chocolate?

A. It is sold as a commercial product.

Q. 43. Under that name?

A. Under the name of cocoa butter.

Q. 44. Why do you prefer to use cocoa instead of chocolate in your "Quin-Coco"?

A. Chocolate contains an excess amount of butter fat which would separate upon standing or in shaking and in shipping goods from maker to user.

Q. 45. What similarity in therapeutic effect, in your opinion, is there between your "Quin-Coco" and Lilly's "Coco-Quinine"?

A. I would say they were similar.

Q. 46. What is the usual unit of a dose of quinine?

A. This varies, but a two grain dose is the more popular.

Q. 47. And in multiples of two?

A. In repeated doses.

Q. 48. In respect of the thickness of the mixture, do you know whether there is any difference between these two preparations.

A. From actual experience, no. I have been told that "Quin-Coco" was the thinner.

Q. 49. When the Pfeiffer Chemical Company first put out its "Quin-Coco" in the fall of 1906, state whether or not it was listed in your catalogue and given to your salesmen to sell over the country?

15 A. It was listed in the catalogue of the Pfeiffer Chemical Company, and the preparation was announced to the travellers, they were advised to accept orders for "Quin-Coco." At that time we employed about thirty-three travellers.

Q. 50. From what sources did the demand prior to 1906 for a liquid preparation of this sort come?

A. It came from the retail drug trade and from dispensing doctors.

Q. 51. What are "dispensing doctors," and how general is the practice?

A. As generally understood, a dispensing doctor is a doctor who carries and dispenses a preparation direct to the patient as against the prescribing doctor writing the prescription and sending the patient to the drug store to obtain the medicine. The practice of dispensing medicines has grown very materially in the last twenty-five years.

Q. 52. Among the doctors?

A. Very materially among the doctors in the last twenty-five years, and at the present time I should estimate that about one-half of the doctors could be classed as dispensing doctors.

Q. 53. Are some of them interested in drug stores?

A. Many doctors are interested in drug stores. Usually when

a doctor becomes interested in a drug store, he ceases to be a dispenser and writes prescriptions for that drug store.

Q. 54. What influence has the increase or diminution of malaria as a disease throughout the county upon the demand for quinine products?

A. Quinine being a popular treatment for malaria, naturally its use would increase and decrease in accordance as malaria increased and decreased.

Q. 55. Can you give any opinion as to whether malaria has increased or decreased in the last ten years?

16 A. I have travelled some in the south. I have noticed improved drainage, and from observations I would say that malaria has decreased. I know in the State of Iowa when I was a boy there was a great deal of malaria and at present there is none whatever.

Q. 56. About what percentage of your sales are direct to retailers and dispensing doctors?

A. Seventy-five per cent.

Q. 57. How does Warner & Company sell their goods?

A. We employ a large force of travelers. At present we have between 75 and 80. These travelers regularly call on the retail drug trade and dispensing doctors. We also distribute literature to our customers and others through the mails and with the products. We also sample our products in response to requests from the trade and as suggested by our travelers and from time to time we sample largely direct from mailing lists which we purchase from circularizing companies.

Q. 58. You mean you distribute samples in containers, bottles or other containers, is that the idea?

A. Yes. The samples are finished in accordance with the nature of the product. If a liquid it is in a bottle, if a tablet it may be either in a bottle or a box, and if a powder in paper; if an ointment, in a tin can.

Q. 59. Do you advertise in the medical drug trade journals?

A. Not at present.

Q. 60. Do you advertise in newspapers?

A. Not the pharmaceutical lines, which covers products of the William R. Warner Company and the Searle & Hereth Company.

Q. 61. How much of the United States do these salesmen cover, how often do they call upon substantially all of the druggists and dispensing doctors in their territory?

17 A. Our aim is to cover the entire United States and our travelers call on the dispensing doctors and druggists from one to six times a year, this in accordance with the territory assigned them.

Q. 62. What was the expense of maintaining this force of salesmen in 1914?

A. Between $250,000 and $255,000.

Q. 63. Of what are your sales of Quin-Coco the result?

A. They are the result of demand for a preparation containing quinine sulphate with the taste disguised, and the result of sampling

we have done with this product and of our efforts in selling the product.

Q. 64. I understand that the retail druggists, the wholesale druggists, sometimes called jobbers, and the dispensing doctors, all buy direct from you?

A. That is correct.

Q. 65. Has the plaintiff a definite method of selling his products which is different from yours, and if so, what is it?

A. As it is generally understood in the trade, Lilly confines the sale of his products through the jobbing drug channel. He employs salesmen to solicit orders from retail druggists and dispensing doctors. The orders from the dispensing doctors are usually filled through the retail drug trade, the orders from the retail druggists being filled through the jobbing drug trade. I don't know whether or not Lilly makes any exception to this general policy, nor what they are. Our policy is to solicit orders from retail druggists, from dispensing doctors and from jobbers, shipping and filling the purchase direct to the purchaser, whether he be a retail druggist, dispensing doctor, or jobber.

Q. 66. Do you know whether the plaintiff solicits or details any dispensing doctors?

A. I understand that he does.

Q. 67. What does "detail" mean in this connection?

A. To demonstrate your preparation, to the physician, either with or without a sample.

18 Q. 68. Are there other drug manufacturing houses who have other methods of sale than those two methods you have just mentioned?

A. Yes, there are some firms who sell only to the retail drug trade; some firms who sell only to dispensing doctors.

Q. 69. Then I understand that your method reaches all classes of purchasers who wish to buy your preparations, whereas the Lilly method and the other methods you have mentioned are limited to a class of purchasers as direct customers?

A. That is correct.

Q. 70. Referring to pint bottle of your product, Quin-Coco, is that and was it when you adopted it a stock bottle in common use?

A. It was.

Q. 71. Both as to color and shape?

A. It was.

Q. 72. What do you know about the word "Lilly" painted in red on Lilly preparations?

A. All the Lilly products that I have seen bear the word "Lilly" in red ink.

Q. 73. In script type?

A. Yes.

Mr. Rawle offers in evidence copy of the trade mark "Lilly" marked "Defendant's Exhibit, Lilly trade-mark."

Q. 74. What is meant in this business by "specialty?"

A. "Specialty" as usually used, means a product introduced by

the firm marketing the same. Oftentimes the word has a broader meaning and includes preparations to which the manufacturer has given a special name or special dress.

Q. 75. May it be a secret or an open formula?

A. It may be either.

Q. 76. Which is it usually?

19 A. When specialties were first introduced they were almost entirely secret. Of recent years, however, quite a number of them have open formulas. I am unable to state which is the larger proportion.

Q. 77. Does your house put out a number of specialties?

A. We do.

Q. 78. Does the Lilly house put out any specialties of the same or similar preparations put out subsequently to your putting out your corresponding specialty?

A. They do.

Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

Q. 79. Can you furnish a list of such?

Same objection.

A. I can furnish a list of preparations of specialties of various firms, including those of William R. Warner & Company and the Searle & Hereth Company, giving the name of the Warner, Searle & Hereth and the manufacturers' preparation and the corresponding preparation marketed by Eli Lilly & Company and first marketed by Eli Lilly & Company subsequent to the marketing of the product by the manufacturer who markets the original specialty. In making out this list I have used the Lilly Company's 1913-14 catalogue. The tabular statement which I produce, contains in the first column the name of the article as originally and first introduced; and in the second column the name of the original introducer, and in the third column the name of the product as subsequently introduced by the Lilly Company, with the page in the Lilly catalogue.

Q. 80. To make the matter clear, is it correct to say, taking an instance, that William R. Warner & Company originally introduced Syrup of Tolu and Heroin, and that at a subsequent date the

20 Lilly Company introduced Syrup of Tolu Comp. and that the two preparations are pharmaceutically similar?

Same objection.

A. That is correct.

Q. 81. What can you say as to whether the various Lilly products on column 3 of this list are pharmaceutically similar to the corresponding production of the original house on the first column of your list?

Same objection.

A. Many of them are.

Q. 82. Name some which you think are?

Same objection.

A. Calomel and bismuth powder, Lilly, is similar both in physical appearance and formula to Calalactose, S. & H. Digestive Comp. powder, Lilly, is similar both in physical appearance and therapeutic action to Compound Digestive Powder, S. & H.; Elixir Salicylic Acid Comp., Lilly, is similar to Elixir Salicylic Comp., Warner. Guaiacol Comp., Lilly, is similar to Guaiatonic, S. & H. Elixir Lactated Pepsin, Lilly, is similar to Lacto-Peptine, New York Pharm. Co. Eucalyptus Thymol Antiseptic, Lilly, is similar to Listerine, Lambert Pharm Co. Tritici, Lilly, is similar to Tritica, S. & H.

Q. 83. State whether or not, in answering above that many of the articles in the third column are similar to those in the first column, you mean that there is no similarity between the others and them?

Same objection.

A. The similarity between the product exists both as regards their therapeutic action and their physical appearance. Some of these products have similar therapeutic action, but vary in physical appearance, while others are similar both therapeutically and physically.

21 Q. 84. State whether or not the items in the third column are such as to be in competition with the corresponding article in the first column.

Same objection.

A. They are.

Q. 85. State whether or not the articles in the third column are such that they could be used with practically the same effect interchangeably with the corresponding article in the first column?

Same objection.

A. Yes.

Mr. Rawle offers in evidence the list produced by the witness, which is marked "Defendant's Exhibit, G. A. Pfeiffer's list of Lilly products."

Mr. Bradford: The offer and exhibit is objected to for the same reasons as stated in the objection to the testimony based thereon.

Q. 86. In the drug business as a whole, and the vast amount of drugs and preparations which we all know of and see in the druggists', can you give an estimate of about how many items are being more or less sold in this country?

A. I would be unable to make any accurate statement, but 125,000 different kinds would be far below the actual number.

Q. 87. Can you classify these in a large sense?

A. They can be divided in chemicals, of which Warner lists practically none; in patent medicines, of which Warner lists practically none; in pharmaceuticals, which embody practically all the Warner

line. Pharmaceuticals may be subdivided into specialties and miscellaneous preparations, of which Warner lists several hundred; into fluid extracts, of which Warner lists over 400; into tablets, of
22 which Warner lists over 1,200; elixirs, of which Warner lists over 200; syrups, of which Warner lists over 50; tinctures, of which Warner lists over 25; capsules, of which Warner lists 6 or 8, besides, several other minor subdivisions.

Mr. Bradford: The last two questions and answers are objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

Q. 88. To what extent are there preparations of the various drug houses which could be used interchangeably without the doctor or the user knowing it?

Same objection.

A. There are quite a few thousand.

Q. 89. To what extent are these interchangeable drugs and preparations put on the market by a number of different drug houses?

Same objection.

A. They are marketed by practically all pharmaceutical and chemical firms, chemical manufacturers.

Q. 90. When you say that they are interchangeable, what have you to say as to whether or not the patient, getting one or the other, would know the difference?

Same objection.

A. He could not know the difference.

Q. 91. Then, if a prescription mentioned one of these interchangeable drugs, it could be filled by the druggist, so far as the patient is concerned, by the use of any of the interchangeable drugs of a number of houses?

Same objection.

A. It could.

Q. 92. If the prescription specified one of these interchangeable drugs, but named the maker, what would be the duty of the druggist?

A. To supply the make or brand specified.

Q. 93. To what extent are drug stores stocked with these
23 interchangeable drugs of the make or brand of several different houses—do they carry the makes of several houses?

Same objection.

A. Very often they do.

Q. 94. In filling or not filling a doctor's prescription, specifying a particular drug, upon whose honesty does the matter depend?

A. Upon the party who fills the prescription.

Q. 95. You were in the retail drug business for a number of years

and in the manufacturing drug business for many years; can you state what is considered to be the ethics on this subject?

A. To fill the prescription exactly as written.

Q. 96. How far, in your experience, is this understood among the druggists and the officials to be the ethics of the drug business?

A. Universally.

Q. 97. What, in this code of ethics, is thought of the druggist who, without informing the prescription writer, fills a prescription with a drug other than the one mentioned therein?

A. He is considered dishonest.

Q. 98. From your experience in the retail drug business and manufacturing drug business, to what extent do you think that this ethical code, which you have mentioned, prevails, and is recognized as followed by the retail druggists?

A. I personally have never known of any one substituting one article when another article was specified on prescription. I further feel that it is generally known and understood that the relation of the retail druggist is confidential, both toward the prescriber and the patient. In filling the prescription the dispenser can infer the ailment of the patient, and he has no right to divulge information which he obtained through this confidential relation. In
24 addition, it is the dispenser's duty to carefully examine the prescription to discover any possible errors of the prescriber. Especially is this true in the case of poisons, to discover and correct any possibility of over-doses. Further, he has no right to use an article in place of the one specified. Doing so brands him as being dishonest, violating a confidence, and committing a reprehensible act. As regards our firm, we have never authorized or suggested any one to use any products we make in place of the product specified. In all our instructions to the travellers, this point is not only discussed, but emphasized. Further, we point out the objections to such a practice. We consider it not only unethical, but a violation of confidence on the part of the dispenser.

Q. 99. What is your opinion, based upon all these years of experience, of the morals of the retail druggist?

A. As a whole, I consider them very high—above the average of the ordinary commercial man.

Q. 100. How far do you consider the drug business properly carried on is fundamentally based upon the personal honesty of the retail druggists in the country?

A. Almost entirely so.

Q. 101. I hand you "Complainant's Exhibit, Document No. 3." Please state what this list contains in respect of Warner's products?

A. Over 90 per cent of the products we make are competitive. Most of these are listed under the same names, while others, although alike therapeutically and in formula, have names different from the competitors' product. This list contains a majority of this second class of items. Some of the products are similar physically, while all of them are similar from the standpoint of the formula and therapeutic effect. This refers to the articles listed opposite each other in the first and second columns. None of the preparations in the second

column are similar in dress and make-up to the articles in the
25 first column, and many of them are very much different in physical appearances, character and so forth. The purpose of that list was for the convenience of our pricing department, of our salesmen, of our druggists and doctors' customers, and to enable them to find preparations similar to each other. In this respect it might be termed a finding list. In a sense, we considered this list as a supplement to our catalogue. We distributed the same to our travellers, to dispensing doctors, and we have heard of travellers of competitors carrying the same.

Q. 102. Are there items in this list which were first put out by any one of your houses and afterwards a similar article was put out by some other house?

Mr. Bradford: I object to that question as immaterial, irrelevant and incompetent.

A. There are.

Q. 103. Are there any preparations made up from the United States Pharmacopœa or the National Formulary on this list?

A. Not any that I know of under the same name, except I notice at least one which is listed in the United States Pharmacopœa, Syrup of Hypophosphates, Comp., which I think is a U. S. P. product. There may be others, but I would be unable to identify them without referring to the U. S. P. and the National Formulary.

Q. 104. Does this list contain, to any extent, or any large extent, your fluid extracts, tinctures, elixirs, syrups, pills and tablets?

A. It does not.

Q. 105. About how many such do you put out similar to the like products of other houses?

A. 2,000 or more.

Q. 106. How far do the other houses in respect of those preparations put out a like or greater number?

A. It varies, but I would say it averages about the same, with all the prominent drug manufacturers.

At one o'clock P. M. a recess was taken until two o'clock P. M.

26 (After Recess.)

Q. 107. What are "line pharmaceuticals"?

A. They are a list of pharmaceuticals which are marketed by different firms under the same name and are subdivided in fluid extracts, elixirs, tablets, tinctures and syrups, wines, pills and several other subdivisions.

Q. 108. They are entirely similar pharmaceutically and are all marketed under the same name substantially?

A. Practically.

Q. 109. They are all similar pharmaceutically, though made by different houses, and are practically marketed under the same name?

A. Yes. But under the manufacturer's individual label.

Q. 110. Before the Lilly Company marketed its Coco-Quinine product, say about 1900, was there a demand in the trade for quinine sulphate with the taste of the quinine masked, and if so, how was that demand met by the drug trade?

A. There has always been a desire to mask the bitter taste of quinine, and this demand was filled by supplying coated pills and tablets, by elixirs, by marketing special syrups of quinine. Some of these, however, did not contain quinine sulphate, but contained the less bitter alkaloids of cinchona bark, which alkaloids have similar therapeutic action. To illustrate, quinine tannate, quinidine alkaloid, cinchonidine alkaloid; also the retail druggist often disguises the bitter taste of quinine by dispensing it at the soda fountain in soda water, such as coffee flavor and chocolate flavor, chocolate soda, and the quinine sulphate was also disguised in powders by being prescribed mixed with powdered chocolate and sugar. In addition there were vehicles on the market for disguising the bitter taste of quinine.

These were intended for extemporaneous preparation—that
27 is, the mixture was made at the time the prescription was written or the product was sold or the dose taken.

Q. 111. State whether or not other drug manufacturing houses have within the last fifteen years put on the market and sold chocolate or cocoa and quinine mixtures similar to Quin-Coco?

A. They have. There are quite a number of such preparations on the market and have been for a great many years.

Mr. Bradford: The question and answer objected to unless the witness antedates the complainant's product.

The Witness: Some of these were on the market before Quin-Coco was marketed.

Q. 112. Please produce samples of such products that have been on the market as you say for some years?

A. I produce the following, giving the name of the product, together with the name of the respective makers:

"Syrup Quinine, with Chocolate;" H. K. Mulford Co., Philadelphia;

"Wampole's Chocolate Quinine," Henry K. Wampole Company, Philadelphia;

"Quin-Choc," First Texas Chemical Manufacturing Company, Dallas, Texas;

"Koquin," John T. Milliken & Co., St. Louis, Mo.

"Chocolate Quinine Syrup," Tilden Company, New Lebanon, New York, and St. Louis, Mo.;

"Quinico," Mayer Bros. Drug Company, St. Louis, Mo.;

"Chocolate Quinine," Burrough Bros., Baltimore, Md.;

"Quin-coco-ine," the Harvey Company, Saratoga Springs, New York;

"Chocolate Syrup of Quinine," the William A. Webster Company, Memphis, Tenn.;

28 "Cocoa & Quinine Comp.," Henry S. Wampole Company, Baltimore, Md.;

"Choquin," William S. Merrell Chemical Company, Cincinnati.

Mr. Bradford: The question and answer and offer of exhibits I object to as irrelevant and not competent to prove any issue in this cause.

Q. 113. Are there others?
A. There are.

Mr. Rawle: I will produce others when received.

Q. 114. What knowledge have you as to the original date at about which any of these products were put on the market?
A. I know that several of these products were on the market prior to the time when Quin-Coco was first marketed. Among these are Syrup of Quinine with Chocolate, H. K. Mulford & Company; Wampole's Chocolate Quinine, Henry K. Wampole & Company, Philadelphia. I am unable to state the exact date of marketing of the others. Some of them were marketed either just before or at about the same time Quin-Coco was first marketed.

Mr. Rawle: I will produce evidence as to dates later on.
Mr. Bradford: The last question and answer are objected to for the reasons previously given.

Q. 115. Can you state from an inspection of the labels of these respective bottles just offered how far the contents are respectively a similar preparation to Coco-Quinine or Quin-Coco?

Same objection.

A. The quinine content of the preparations varies to some extent; but, as a whole, the quinine content is about the same as that of Coco-Quinine, Lilly, and Quin-Coco, S. & H.

29 Q. 116. Do they all contain chocolate or cocoa as an ingredient?

Same objection.

A. They do.
Q. 117. State whether or not these various preparations you have just introduced are in competition and have been for some years on the market with Coco-Quinine, and more or less extensively offered for sale and listed?

Same objection.

A. They have.
Q. 118. What have you to say as to the business standing of the drug houses putting out these products?

Same objection.

A. They all have the reputation in the trade as being reliable houses. Some of them have a national reputation, while a certain few do an international business as well. Among the latter are H. K. Mulford & Company, of Philadelphia, and H. K. Wampole & Company, of Philadelphia, who have an international reputation.
Q. 119. I think you said that the Lilly Company especially de-

tails—that is to say, solicits the business of—prescription doctors, and that you did not; is that correct?

A. That is not quite correct. Prescription doctors have no business to solicit. They are prescribers and not purchasers of medicinal products, as a rule.

Q. 120. I did not mean to ask you whether the Lilly Company solicited the business of the prescribing doctors. I merely meant to ask whether the Lilly Company "details" the prescription doctors?

A. They do.

Q. 121. And your company does not?

A. We do to a limited extent.

Q. 122. And by "detail," do you mean that a salesman
30 visits a prescription doctor and talks about all the merits of a particular drug and hopes to induce him to prescribe it?

A. That is correct.

Q. 123. What effect on the druggists, as to carrying a particular make of goods, does this detailing work among the prescribing doctors have?

A. It creates a demand for that special product.

Q. 124. What do the druggists then do?

A. Supply the demand.

Q. 125. That is, they thereupon keep it in stock?

A. They stock the item and supply the demand.

Q. 126. In this way—that it, by the action of the prescribing doctors of the kind I have mentioned—is that particular product so detailed more fully brought to the attention of the drug stores?

A. Yes.

Q. 127. Please state among what classes of customers your market lies?

A. Among the dispensing doctors, retail druggists and jobbers.

Q. 128. How many doctors are there in the United States, and how many of them are dispensing doctors?

A. They are over 130,000 doctors. I have previously stated that, in my opinion, about 50 per cent. are dispensing doctors. This would mean over 65,000 dispensing doctors. I have before me the classified list of professions and trades in the United States, published by the Howe Addressing Company, of Philadelphia—the issues of September, 1915, which gives the number of the physicians by states, with an aggregate number of 137,760.

Counsel stipulates that the Howe list produced by the witness may go into the record as being a list of physicians in the United States classified by states, and that the list is published by a responsible house in Philadelphia, and bears the inscription on the front page as follows:

31 "Howe mailing lists guaranteed 99 per cent correct." "The Howe Company agrees to furnish a list of all doctors in the United States by states with their respective addresses."

Q. 129. What proportion of your output is sold to dispensing doctors?

A. I am unable to state accurately, but in my opinion it is about one-sixth of our sales of pharmaceutical preparations.

Q. 130. You have said that you had a market with retail druggists throughout the country. Upon what calls, either by prescription or over the counter, could a retail druggist dispense your product other than for the direct call of Quin-Coco?

Mr. Bradford: That is objected to as calling for the witness' opinion, and not for any evidence of value in determining questions at issue.

The Witness: As an ex-retail druggist, this could be dispensed on calls for a cough syrup, especially those with grippy tendencies. It could be dispensed upon calls for a sweet syrup of quinine. It could be dispensed upon calls for a tasteless quinine. It could be dispensed upon calls for a chocolate quinine. It could be recommended by the druggists in cases of coughs, colds and malarial conditions, such as chills and fever. A retail druggist could in many ways dispose of this product other than for calls for either Coco-Quinine, Quin-coco, or even chocolate syrup of quinine.

Q. 131. What about calls for a dose of quinine?

A. The retail druggist could point out the advantage of taking quinine in a preparation that disguises the taste, and especially would this be true if it was difficult for the patient to take pills or tablets, or the patient was nauseated by the bitter taste of quinine.

Q. 132. Have you referred to calls for Quin-Coco as one of the occasions on which a druggist might sell it?

32 A. I have not, but I assumed, of course, that he could sell it on such calls.

Q. 133. Can you state the aggregate sales in dollars of Quin-Coco during the past year or any period?

A. I am unable to give any accurate statement of this because we do not keep a record of such sales in our statistical department; but, judging from the amount made, the sales in 1914 were over $12,000 and less than $13,500.

Q. 134. What have you to say as to druggists recommending Quin-Coco to their doctors and asking them to prescribe it?

A. That is quite a common practice. Druggists very often stock a product which is similar to a nationally advertised or a nationally detailed product, and in a sense act as "detailers" for the manufacturer of the competitive product, interviewing the doctors and requesting them to write prescriptions for the competitive preparation.

Q. 135. Is that considered proper practice on the part of the druggist?

A. It is.

Q. 136. How far, in your opinion, as experienced in a retail drug business, can a druggist, by personal effort, increase the sale of any product or products?

A. A retail druggist can sell almost any product he chooses, and in fact create a demand for such products. This has been and is being done continually. There are some firms in the trade who

market products almost the entire sale of which depends upon the druggist's recommendation and interest in those products. Some of these firms are national in their scope, and have sales in excess of a million dollars each. Oftentimes customers come into the store asking the druggist's opinion as to the product they should use. In many communities, or in some communities, the druggist is looked upon as possessing more or less ability in this direction, and
33 is often called "Doc" or doctor. This is especially true in the Southern states, where it is common practice to call a druggist "Doc."

Q. 137. How about orders from jobbers?

A. We have received orders for Quin-Coco from a great many jobbers, almost all of which were unsolicited.

Q. 138. What proportion of the jobbers in the country would this cover?

A. I am unable to state accurately, but I should judge about one-third of all the jobbers.

Q. 139. What about mail orders?

A. We have received mail orders for Quin-Coco continuously. From an examination of the orders which I have made casually from time to time, I should judge the orders for Quin-Coco average, with those for our other products, everything considered.

Mr. Rawle offers in evidence the Howe Addressing publication referred to above, giving the list of retail druggists in the United States, classified by states, as 53,773.

Q. 140. Does that fairly represent your own estimate of the number of druggists in the United States?

A. That is more retail druggists than I thought there were. I thought it was between 43,000 and 46,000.

Q. 141. What is it that has brought about your sales of Quin-Coco?

A. First, a demand for a chocolate mixture containing quinine sulphate and disguising its bitter taste.

Second, efforts we have made to create a demand, this through samples and through our usual business efforts to increase and extend our business.

Third, through efforts of the retail druggists in inducing doctors to use and inducing consumers to buy Quin-Coco.

Fourth, from the dispensing doctors, from whom we solicit
34 direct, and who use Quin-Coco, in their practice, dispensing it in those cases where they feel such a product is indicated.

Fifth, We have received orders from the jobbers, who in turn supply the retail druggists and dispensing doctors. We also expect our sales organization, which we continue at a large expense, to extend and increase the sale of all our products, including Quin-Coco. These salesmen, in addition to soliciting orders from the retail drug trade and dispensing doctors, also use their spare time in detailing and calling upon the prescribing physicians.

Q. 142. Do they spend their spare time in detailing the prescribing physicians, or is it on the entire line of items carried by you?

A. No, that is impossible. The preparations detailed vary with the salesmen and with the territory.

Q. 143. Will you please state to what extent your salesmen, before they are put to work, are instructed by the officers of the company or others, in the performance of their duties as salesmen?

A. They are given what we consider a good training and a demonstration of our products and policies. Personally I have done a great deal of this work, and did it entirely during the absence of Mr. H. Pfeiffer, who in the last five years has been away traveling perhaps more than half the time. The usual practice is to have the salesman come to the house and have him spend a little time in each of the departments, to acquaint him with the various lines we supply. He is given a set of catalogues to study, and before leaving for the territory, I always made it a point to personally review his visit and go over the matter of selling with him. I deemed this work so important that I had made an outline of the different points I would take up with the salesman. These points cover and review all his work in the department, a review of his contract and territory, a review of our policies regarding our different lines, and a review of our policies regarding other lines, also requirements of a successful traveler. Under this heading I discussed character, industry, knowledge of human nature, knowledge of business, knowledge of goods, knowledge of prices, and particularly dwelt upon character as the best asset which not only a traveler but which any individual could possess. I also pointed out the need of his help, loyalty and co-operation to increase his firm's success. Under the point of policy, regarding our products, I pointed out our relations with our competitors and impressed upon him the disadvantages of making any false statements or soliciting any orders under false promises. I also talked about the question of substitution and pointed out to him that this was dishonest, no matter who did it, bringing out the point that the drug business was rightly ethical, that confidence must exist, that health and life depended thereon. I also reviewed our salesmen's "Confidential and Manual," and our list giving quantity, prices and special offers. This list was not generally distributed to the trade, but was used by our pricing and selling department. It contained nothing secret, and some of these lists were distributed among our competitors. In this salesmen's "Confidential and Manual" we have a section "What a Salesman Should Know." This is in numbered paragraphs. Paragraph 16 reads that "It pays to adhere strictly to the truth at all times."

Paragraph 17 reads that "It don't pay to speak ill or even mention your competitor".

There are other paragraphs. From the last page of this manual I quote the following:

"Our policy in dealing with the trade is briefly stated.

"1. We believe in honesty and fair dealing.

"2. To supply the best quality of products.

"3. To sell goods as low as possible consistent with quality.

"4. To ship orders promptly.

36 "5. To fill orders complete.
"6. To never speak ill of a competitor.
"7. To accord courteous treatment."

Knowing the tendency of the salesman to make promises and statements in his desire to get an order, we would emphasize the need of restraint in this regard, and impress upon him as strongly as we can the need of honesty and fair dealing in his relations with the trade. We impressed upon him also that he is the firm's representative and the house or his firm is judged by him. If he makes a false statement or uses unfair methods, the house is judged in that light.

Q. 144. How far back was this manual in use?

A. The oldest copy which we have on file containing the matter quoted is dated 1911. I don't know whether previous copies contain this matter or not, as we have none on file. Each salesman is supplied with one of these "Confidentials". I would add also that my connection with the selling department is limited to salesmen who work in the territory handled by the Philadelphia office. For convenience our sales organization is divided, part being handled by the Philadelphia office and the other part being handled by the St. Louis office.

Q. 145. Have you any older written matter from which you taught the salesmen?

A. Yes, I have a little vest pocket memorandum which I use in connection with this outline, in fact reference to this booklet is made on the outline, so that I would not overlook reviewing this also. This vest pocket memorandum contains other points to take up with the salesmen, among which are salesmen's expenses, salesmen's sundry points, mailing orders promptly, never talking about competitors. I quote the language of one clause on page 14, reading as follows:

"Never talk about your competitors."

This booklet has other points, such as the disadvantage of
37 talking dull times and discouraging the buyer, and so forth.

I have carried this booklet for over eight years, had it in my possession before coming to Philadelphia, which was in June, 1908.

Q. 146. In thus instructing your salesmen before sending them out on the road, you are instructing them as I understand, to take out a line of many thousands of items. How many thousands are there?

A. Over 5,000.

Q. 147. Have you ever had any information or knowledge except from the plaintiff's testimony in this case of a retail druggist selling or dispensing your product, Quin-Coco, on a physician's prescription or on a call over the counter when Eli Lilly & Company's product, Coco-Quinine was called for or specified?

A. Never.

Q. 148. Have you ever, directly or indirectly, authorized any retail druggist to do so, or in any way whatever suggested to any retail druggist that he could do so?

A. Never.

Q. 149. Have you ever had any information or knowledge except from the testimony in this case that any salesman of William R. Warner & Company had ever suggested to any retail druggist that he could dispense William R. Warner & Company's product, Quin-Coco, on a physician's prescription, or an a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 150. Have you ever in any way, directly or indirectly, directed, authorized or suggested to any one of your salesmen, that he should or might suggest to any retail druggist that he could dispense your product, Quin-Coco, on physician's prescriptions, or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically prescribed or called for?

A. I never have.

38 Q. 151. I think you said that the earliest Quin-Coco was put out in August, 1906, and that the defendant company had nothing to do with that product until August, 1908?

A. That is correct.

Q. 152. What can you say as to whether the plaintiff company had knowledge that that product, Quin-Coco, was on the market?

A. I am unable to state as to what knowledge they had of Quin-Coco being on the market, when first marketed, but sometime in September, 1909, I received a letter from Mr. Lilly, on the subject of Quin-Coco. I produce his letter, dated August 31st, 1909, which is in the following words:

8-31-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

MY DEAR MR. PFEIFFER:

Presuming upon our very pleasant acquaintance, I am going to put a proposition before you in the matter of Coco-Quinine. You are possibly aware that this preparation was entirely original with our house. This fact was fully recognized by our competitors with whom we hold pleasant relations. Mulford and Pfeiffer are the only ones who are making a preparation of the same nature. While it would probably be asking too much to make the request that you discontinue this preparation, we do think it would be reasonable to ask that you observe the same prices. We find that you are selling 5 pint bottles at $2.50 against our $3.30; pints at $7.20 a dozen against our $8.50 to the retail trade. Should you feel inclined to make your lowest price to the retail trade correspond with our prices, which are absolutely fixed, we would certainly appreciate it and be very glad to reciprocate whenever possible. If manufacturers were generally making this preparation, we would not be bold enough to make this suggestion.

Very truly yours,

(Signed) J. K. LILLY.

Mr. Rawle calls on plaintiff's counsel for letter from G. A. Pfeiffer, to J. K. Lilly, dated September 23rd, 1909.

Mr. Bradford: Counsel for complainant states that he has not the letter called for, but that he has requested the officers of the plaintiff corporation to furnish it and search of their files has failed to discover it.

Q. 153. Please produce your copy of your reply to the last mentioned letter?

A. I produce a copy. It is as follows:

Wm. R. Warner & Co.,
Philadelphia, Pa.,
639 N. Broad St.

September 23rd, 1909.

Mr. J. K. Lilly,
c-o Eli Lilly & Co.,
Indianapolis, Ind.

DEAR SIR:

Mr. H. Pfeiffer has returned and we have conferred with him concerning your letter of 8-31-09, referring to Coco-Quinine. In reply would state that we would almost prefer to discontinue supplying Quin-Coco rather than raise the price, not because we could not sell some of the goods at the advanced price, but because we know the tenor of the retail trade, and their objection to manufacturers' raising the price of a specialty, after he has induced them to stock, and frankly, we do not care to court the ill will of the trade.

In reference to discontinuing this preparation, we admit that Coco-Quinine was entirely original with your house, but we also make this claim for preparations Warner and The Searle and Hereth Co. market. To illustrate, we claim originality of Elixir Salicylic Comp., Tinct. Digitalis, Fat Free Tritica, Pils. Cascara Cathartic (Dr. Hinkle), and we beg to inquire whether you and the other members of the Homilia Club would agree to discontinue or raise your price on preparations similar to the above mentioned and other specialties, which we can prove were originally introduced by us. We would not be satisfied to have you agree to do this, but we would expect the other manufacturers to accord us the same treatment as they accord you on Coco-Quinine.

The writer feels the matter is of sufficient importance for a personal interview, for there are many positions which could be taken, among which is the fact that possibly you are deriving as much benefit by our pushing and selling Quin-Coco as you are suffering loss, for does not the fact that several houses are pushing the same preparation, enlarge the market for said product? It is not always true that a monopoly of a certain preparation acts to the benefit of the owner. We are very unbiased in our position, and, of course,

would not think of replacing any new specialty you or any of our other friends place on the market, but really, we do not feel it is fair and just to go back of the returns, unless we shall profit by a condition which causes us a loss, provided we are entitled to said profit.

Respectfully yours, ——— ———.

Q. 154. Can you produce any other letters from the plaintiff or from Mr. J. K. Lilly?

A. Yes, I have another letter dwelling upon the same subject, dated October 6, 1909, signed J. K. Lilly, and a letter dated January 11th, 1910, from J. K. Lilly, which is not signed by him, but identified as his letter by a printed slip bearing the name of J. K. Lilly pinned to the original letter when received. They are as follows:

Mr. G. A. Pfeiffer. 10-6-09.

MY DEAR MR. PFEIFFER:

I must confess to a degree of disappointment in the tenor of your letter under date of September 23, which arrived during my absence in the East.

41 Coco-Quinine was so entirely original with us and such a radical departure in the way of Quinine preparations that we have felt we were entitled to full consideration for it in the same manner that we have always endeavored to consider the rights of others in original, novel preparations. All reputable houses except yours have tendered this consideration and we were in hopes that you, in the light of our desire to work together to our mutual advantage, would at least consider our rights in the premises so far as not to cut under our prices.

It is beyond our power to meet the conditions outlined in your letter, for the reason that we cannot bind other manufacturers but it seems to me that there is an excellent opportunity for our two houses to extend full consideration. After all, it's just a matter between us and of course if this is your last word we will bow to your decision and have to be guided in the future by what we may consider our own best interests, although we much prefer to work together in a way that would serve the interests of both houses. If you can conceive of any way in which we could extend to you a consideration in return for making the same price that we do on Coco-Quinine, we will be very pleased to consider it. If not, then it is of course a closed chapter.

My observation has been that all of the houses profit by the proper consideration of others. If one gets out a specialty and puts money and effort behind it the others do not jump upon it like buccaneers; issue an imitation; cut the price and endeavor to profit by the efforts and expense of others. It seems to me that this is as it should be and if this principle is ignored everybody would be at everybody's throats and a very deplorable condition would result. This doesn't seem to be a sane proposition to me.

With best regards, I am,

Very truly yours,

(Sgd.) J. K. LILLY.

42

1-11-10.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

My Dear Mr. Pfeiffer:

I venture once more to address you on the subject of your Quin-Coco and the price thereof. Your action in pushing this preparation is directly in violation of one of the fundamental principles of the Homilia Club. If this Club means any one thing more than another, it means that members will not attempt to build up a business at the expense of a competitor. Coco-Quinine was absolutely and unquestionably original with our house and has been so recognized by all members of the Homilia Club. Only one manufacturer up to the time of your entering the Club made a preparation of that nature and upon taking the subject up with them, they immediately desisted from pushing it, and their preparation has virtually disappeared from the market.

You have taken our preparation bodily, simply transposing the name and are today energetically and actively offering it as a substitute for Coco-Quinine at $2.50 per five pint bottle against our $3.30. You are not creating any new demand to speak of, and are simply taking at a cut price, business that originated with and was built by Eli Lilly & Company.

There is no parallel to this condition in the Homilia Club and we file with you our earnest protest against your action in this matter. If you cannot see your way clear to withdraw this preparation from the market, we ask that you change the name to one that has not the slightest resemblance to Coco-Quinine and increase your price so that the lowest price to the retail trade will be $3.30 per 5 pt. bottle or $8.50 per dozen pints making no better prices in packages larger than 5 pint bottles.

In making this request we are keeping well within the spirit and the wishes of the Homilia Club such as are being carried out
43 every day by the members thereof.

We trust that you will receive this letter in the spirit in which it is sent and give same your kind and early consideration.

Very truly yours,

——— ———.

Q. 155. I hand you a letter signed J. K. Lilly. Did you receive this at about the time it bears date, and is it from Mr. Lilly?
A. I did, and it is signed J. K. Lilly. It is in the following words:

"Josiah K. Lilly,
Indianapolis.

2-2-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

DEAR MR. PFEIFFER:

Under separate cover there is coming to you a Red Lilly Catalogue for the current year.

Trusting that you will accept it with my compliments and best wishes for a profitable year for your good house, I am,

Very truly yours,
(Signed) J. K. LILLY."

Mr. Bradford: The introduction of this letter is objected to as having no bearing on the subject matter of this suit.

Q. 156. There is a reference in this correspondence to the "Homilia Club." What was that?

A. That was a fraternal organization of some of the prominent drug manufacturers for the purpose of discussing and solving the difficulties, common to all. It was especially helpful when arranging to meet the requirements of the Pure Food and Drugs Act of 1906. This being a new act, the regulations and rules for enforcement were more or less vague and indefinite. It was also
44 used as a register of preparations marketed by the different firms. This registration was under two classes. Class A embraced preparations on which the manufacturer claimed use of name only. Class B embraced preparations on which the manufacturer claimed ownership of both name and formula or product.

A booklet of these names was issued and distributed among the members, a copy of which I produce. This is the second issue of this booklet.

Q. 157. Please look at this booklet and state whether you find any registration of Eli Lilly and Company products in it?

A. I do, on the first page there are products listed under both classes, class A and class B. There is a note at the bottom of the page reading as follows:

"Class A, name only.
"Class B, name and formula."

Q. 158. State if Lilly's Coco-Quinine is registered and classified there and in which class?

A. It is registered in class A.

Mr. Rawle offers the booklet of the Homilia Club produced by the witness in evidence and particularly the registrations therein of Eli Lilly & Company.

The booklet is marked "Defendant's Exhibit Homilia Registrations".

Q. 160. Can you give the members of the Homilia Club?

A. I can remember most of them at the time I was a member. They were as follows:

Ernest Stauffen, of Sharp & Doehme; George S. Merrell, William S. Merrell & Company; F. K. Strearns, of Frederick Stearns & Company; Stuart Wyeth, of John Wyeth & Bro.; Milton Campbell, of H. K. Mulford & Company; W. A. Sailer, John Wyeth & Bro.; E. G. Swift, of Parke, Davis & Company; E. H. Nelson, of Nelson, Baker & Company; J. K. Lilly, of Eli Lilly & Company;

45 G. A. Pfeiffer, of William R. Warner & Company.

Q. 161. Did you have any discussion with Mr. Lilly in regard to referring this subject to a meeting of the Homilia Club?

A. Mr. Lilly and I talked of this subject at one time personally, when we happened to meet at Atlantic City. I am unable to give any definite outline of the conversation. I had forgotten that this interview took place until some time ago. Mr. Lilly refreshed my memory and I remembered the fact that the interview was had, but not what was discussed other than Quin-Coco was discussed during the interview. There was correspondence passed between us regarding referring the matter to a meeting of the members of the Homilia Club.

Q. 162. Then what did you do?

A. Before the next meeting of the Homilia Club I resigned from the Club.

Q. 163. What were your reasons for resigning?

A. There were several reasons. One was the question of salesmen, and the other was the question of Quin-Coco; and after conferring with the other members of the firm we decided that it would be advisable that I resign.

Q. 164. What was the "salesmen" reason?

A. One of the questions which the Homilia Club endeavored to regulate was the hiring of salesmen of the firms represented in the club by other members of the club. The plan was no house should approach a salesman of the other firm and should not hire this salesman until laying the matter before the firm employing the salesman.

Q. 165. You objected to this?

A. We did.

Q. 166. Why?

A. We did not like it and we did not think it was fair to the salesman.

Direct examination closed.

46 Cross-examination:

Mr. Bradford, without waiving objections, cross-examines as follows:

By Mr. Bradford:

X Q. 167. What reply did you make to the letter of January 11th, 1910, from Mr. J. K. Lilly?

A. I have a copy of my reply dated January 14th, 1910, reading as follows:

"Mr. J. K. Lilly,
c-o Eli Lilly & Company,
Indianapolis, Ind.

MY DEAR MR. LILLY:

Your letter of 12-1-10 received, and after being considered by the different members of the firm will be answered.

Respectfully yours."

——— ———.

X Q. 168. What further answer did you make?

A. I have the copy of my reply dated January 25th, 1910:

"Mr. J. K. Lilly.

DEAR MR. LILLY:

After further consideration of your letter of 1-11-10, we have decided that the subject is of too much importance to adjust through correspondence, and will be very glad to go over the matter with you in person some time when you are in the East, and when you can find it convenient to call at the office. Should the writer go West prior to your coming East, he will stop off at Indianapolis. The reason for this plan is our fear that correspondence might lead to unnecessary arguments.

Respectfully yours,

——— ———.

X Q. 169. Did any conference follow this letter of January 25th, 1910, and if so with whom and where?

A. I do not remember any.

47 X Q. 170. When was the conversation with Mr. Lilly at Atlantic City,—before or subsequent to this correspondence?

A. My recollection is that it was before any of it, before all of it.

X Q. 171. Did you have any correspondence with Mr. Lynn on this subject?

A. I don't remember.

X Q. 172. Did you have any conference with Mr. Lynn on this subject?

A. I do not remember any special conference. Mr. Lynn and I might have talked the matter over after the adjournment of the meeting of the Homilia Club of New York City. That is the extent of my recollection, and what was said at that time I could not say.

X Q. 173. I hand you a copy of letter dated February 14th, 1910, and ask you if that recalls any facts to your mind, and to state what the letter is, if you recognize it?

A. This is a letter dated February 14th, 1910, addressed to Mr. C. B. Lynn, reading as follows:

"DEAR MR. LYNN:

Subject: Coco-Quinine.

After further consideration, we feel it preferable that you register the complaint you have against us with all members of the Homilia Club and we will reply thereto. We consider your position raises an issue upon which each of the members of the Homilia Club should pass judgment.

Very respectfully yours."

——— ———.

I would conclude that that is a letter I wrote Mr. Lynn.
X Q. 174. Who is the Mr. Lynn to whom your letter is addressed?
A. Mr. Lynn, General Manager of Eli Lilly & Company.

By Mr. Rawle:

X Q. 175. Here present?
A. Here present.

48 By Mr. Bradford:

X Q. 176. I hand you copy of another letter dated March 7th, 1910, and ask you if you recognize it and if you will read it into the record and state what it is?

A. This letter is dated March 7th, 1910, and it is addressed to Mr. J. K. Lilly, Indianapolis, Ind. Immediately above Mr. Lilly's name are the following names: Ernest Stauffen, George S. Merrell, F. K. Stearns, Stuart Wyeth, Milton Campbell, W. A. Sailer, E. G. Swift, E. H. Nelson. The letter reads as follows:

"DEAR MR. LILLY:

I am today forwarding my resignation to Mr. Nelson, Secretary of the Homilia Club. This action is due to the fact that the firm I represent cannot meet your requirements on Quin-Coco, and for the further reason that when accepting membership, the writer was under the impression that preparations which were on the market prior to the formation of the club were not covered by the resolution adopted on new Specialties. This position we feel is confirmed by the minutes of the Homilia Club, and knowing that the Homilia Club was and continues to be a benefit to the members, rather than cause it any friction, the firm deem it advisable that I resign.

Very cordially yours,

G. A. PFEIFFER."

P. S.—Copy of this letter has been mailed to all the members of the Homilia Club."

X Q. 177. What was the substance of the resolution referred to in this letter relating to new specialties?

A. I have no definite memory as to the verbiage but the thought, as I recollect it, was that the Homilia Club would not discuss the question of priority of rights in a product which had been marketed prior to the formation of the Homilia Club.

X Q. 178. Did not this also cover the matter of registration with the club?

49 A. Perhaps it did. I could not state positively.

X Q. 179. Assuming that it did, would not this be a reason why Coco-Quinine could not be registered with that club in Class B by Eli Lilly & Company at that time?

Mr. Rawle: I object to the question as based upon an assumption and because the minutes of the Homilia Club are the best evidence, and because the witness has stated that he has no definite recollection of the verbiage of the minutes.

The Witness: That would depend upon the wording of the specific clause. It might have such an effect.

X Q. 180. Is it not true that you find in this exhibit list, products registered in Class A by other houses, the exclusive right to which products was and has been freely acknowledged by all manufacturers?

Mr. Rawle: That is objected to because the registrations of other houses are irrelevant and because the registration in the Homilia list by Eli Lilly & Company of Coco-Quinine claims only the right to the name "Coco-Quinine" and to nothing else.

Mr. Bradford: Counsel's last assumption is probably based upon a misunderstanding of the rules of the club as defined in the resolution the witness is testifying concerning.

The Witness: Yes, that is true. I find Adrenolin preparations registered in Class A by Parke Davis & Company. I know, however, that this product is protected by trade-mark and formula patent. No other firm could, if they chose, make or market this preparation.

X 180. Is it not true that except for the resolution to which you have referred, Parke Davis & Company might have registered these products in Class B?

50 Mr. Rawle: That is objected to because the language of the resolution is not testified to and because the act of Parke Davis in registering its product has nothing to do with the registration of Coco-Quinine by Eli Lilly & Company, which speaks for itself, independently of the registration of any other product of any other house.

The Witness: Parke Davis & Company could of course have registered their product under any class they saw fit, it being their own product?

X Q. 181. It was not a new product, at that time, was it?

Same objection.

A. I do not know. I do not know when they first marketed it.

X Q. 182. Do you have in your possession a copy of the Homilia Club resolution which was referred to in your letter of March 7, 1910?

A. I have turned all my papers over to my counsel, and I will look it up and if I find it I will produce it.

Adjourned until Friday morning, Nov. 26th, 1915, at 9.30.

Continuation of Depositions at the Office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Friday, November 26th, 1915, at 9.30 a. m.

Present: Parties as before noted.

G. A. PFEIFFER.

Cross-examination resumed.

By Mr. Bradford:

X Q. 183. Have you found the Homilia Club resolution which was referred to just prior to adjournment Wednesday?

51 Mr. Rawle: That is objected to because it does not sufficiently appear that these are the authentic records of the Homilia Club.

The Witness: I found what purported to be copies of the minutes and am unable to find in these the specific resolution covering a division of products in Class A and Class B. There are references to classification of products in Class A and Class B in these minutes, but I was unable to find the resolution specifically covering this subject.

X Q. 184. Your letter of March 7, 1910, to Mr. Lilly correctly states your understanding of the rules of the club as to this matter, I assume?

Mr. Rawle: That is objected to because the rules of the club must speak for themselves when the authoritative copy of the rule is proved, and because the witness' understanding of the rules is not relevant or admissible, and because the rule is not in itself admissible evidence, but only what the plaintiff did under the rule.

The Witness: The letter expresses an understanding which I then had and which I now have regarding specialties. It does not fully express our reasons for resigning, inasmuch as the question of "salesmen" affected all members of the Homilia Club, while the question of Quin-Coco affected Eli Lilly & Company alone and we did not feel it advisable to start a correspondence regarding the other question with the other members.

X Q. 185. On Wednesday I asked you if you remembered any conference with Mr. Lynn, General Manager of Eli Lilly & Company on this subject, and at that time you were unable to remember any except possibly a reference to it following a meeting of the Homilia Club in New York City. I ask if you have thought the matter over

since, and if so, if you have recalled any other conference with Mr. Lynn on this subject?

52 A. I have not thought the matter over especially, but without refreshing my memory, I cannot state of any other conference. I might answer that that I stopped off at Indianapolis visiting the firm of Eli Lilly & Company once upon my way to St. Louis, but at that time I do not remember of the subject of Quin-Coco or Coco-Quinine being mentioned. Neither do I know the time of this visit.

X Q. 186. From your direct testimony I understood that you are a registered pharmacist. I would like to inquire if you are also a graduate of a school of pharmacy?

A. I took one term in the Illinois College of Pharmacy, Chicago, Illinois, but did not graduate.

X Q. 187. As a pharmacist, do I understand you to say that there are no other syrups except chocolate or cocoa capable of holding the crystals of quinine sulphate in suspension?

A. No, I would not say that, but I would say that there is none that I know of which has the other advantages of chocolate in this preparation.

X Q. 188. These other advantages include, as I understood your direct testimony, a palatable taste?

A. That is one.

X Q. 189. This taste is calculated to make the product popular?

A. It helps.

X Q. 190. What therapeutic advantage has the chocolate or cocoa in this preparation, if any?

A. As regards the actual therapeutic action of quinine it has none, but as regards aiding in making a palatable preparation, it aids in bringing out the full therapeutic action of the quinine, which in some other mixtures might be retarded.

X Q. 191. In what other mixtures for example?

A. In a mixture where the appearance of the product was not appetizing or in a mixture that was not so acceptable to the stomach.

53 X Q. 192. What mixture, for example, would not be so acceptable to the stomach?

A. A mixture which was distasteful to the patient.

X Q. 193. Won't you be a little more specific and suggest some mixture that would be distasteful to the patient?

A. One with a flavor or taste, color or appearance which would be nauseating or objectionable to the patient.

X Q. 194. In the samples of preparations introduced as "Pfeiffer Experiment No. 1 and No. 2," I understand that there is no yerba santa in either?

A. No yerba santa in either of them?

X Q. 195. So far as pertains to quinine as masked in either preparation, the masking is effected then solely by the syrup used, that is in the one case by the "simple" syrup and in the other case by the chocolate syrup?

A. By the chocolate syrup, no other flavors or other ingredients of any kind. One is a mixture of a simple syrup and quinine

The other is a mixture of cocoa and quinine, with the same proportion of cocoa and same proportion of quinine as in Quin-Coco.

X Q. 196. The sample containing cocoa also contains a simple syrup, does it not?

A. Sugar is the base of the syrup of cocoa.

X Q. 197. Are there any other syrups than chocolate or cocoa having the advantages of making a liquid preparation opaque?

A. There might be. I know of none I could mention.

X Q. 198. How about maple or licorice?

A. Licorice, unless I am mistaken, is soluble and will give the preparation a dark color, while cocoa is insoluble and its effect on the preparation is different on account of this difference in character. Maple I have not had any experience with and do not know.

X Q. 199. Is it not common practice in the preparation of liquid medicines, to color them with simple coloring ingredients for
54 the purpose of making them opaque?

A. I never heard of an ingredient added to a liquid preparation for color only which was not soluble in the liquid preparation.

X Q. 200. You spoke of Quin-Coco being brought out by Pfeiffer Chemical Company in response to a demand for a preparation of this character. Will you explain more fully the nature of these demands?

A. They were requests we received from the trade for such a product.

X Q. 201. Did these requests come to you personally and if so from whom were they received?

A. They may have, but on account of the length of time since the product was marketed, I would be unable to state specifically.

X Q. 202. Do you remember of seeing any letters containing such requests?

A. I do not remember.

X Q. 203. Do you remember having any conversation with any of your traveling men on this subject?

A. I do not.

X Q. 204. You do not recall any statements made to you by any of your traveling men in reference to a demand in the trade for a preparation to sell in the place of the Eli Lilly & Company preparation, Coco-Quinine?

A. I do not. I might add that I personally keep a folder in which requests, verbal or written, for additions to our line, are filed. I go over this folder with the other members of the firm, also with our salesmen, and after the decision has been made, all the material is destroyed, so any requests or statements which have been received have long since been destroyed. I always talk over with our travelers when seeing them the question of new preparations. If the question of Quin-Coco was discussed, it was discussed with our travelers just as I discuss the advisability of marketing or adding other new
55 products. Sometimes when in doubt about adding a new preparation we submit the matter to our salesmen for a vote. Whether or not this was done with Quin-Coco I don't remember.

X Q. 205. Please state fully what was done in the fall of 1906 by the Pfeiffer Chemical Company in bringing out the preparation which you call Quin-Coco?

Mr. Rawle: That is objected to as not affecting the rights of this defendant.

The Witness: I would be unable to answer that question for the reason that at that time I was in Chicago in charge of the Searle & Hereth Laboratories.

X Q. 206. Who had charge of the work of bringing out this preparation for the Pfeiffer Chemical Company in the fall of 1906?

Mr. Rawle: The same objection is made.
The Witness: Being away from the laboratory I could not state.

X Q. 207. Was any of the preparation made and sold during the fall of 1906?
A. From personal knowledge I could not state.
X Q. 208. When was this preparation first considered in marketable form and placed upon the market by your concern?
Mr. Rawle: That is objected to unless it refers to the defendant.

The Witness: I think it was in the fall of 1906, but I am unable to state positively. It may have been a little prior to the fall or it may have been towards the latter part of the year.

X Q. 209. Was any considerable quantity of this preparation made either during 1906 or 1907 and sold by your concern?
A. I can only answer that by comparison, by stating that there was less sold then than we sell now.
56 X Q. 210. What concern first introduced to the trade a liquid preparation of quinine sulphate colored and flavored with cocoa?
A. My understanding is that the firm that first introduced it and detailed it in a large way was Eli Lilly and Company.
X Q. 211. The preparation which they marketed under the name of Coco-Quinine?
A. Yes.
X Q. 212. Was or was not the Eli Lilly & Company preparation one that was popular in the trade in 1906?
A. I would say that Coco-Quinine was known by the trade, but I could not say as to the extent of its popularity.
X Q. 213. Do I understand from your direct testimony that Quin-Coco is not manufactured in the Philadelphia laboratories of William R. Warner & Company?
A. Yes. That would require the explanation that the Searle & Hereth Company share with the William R. Warner & Company the building occupied by William R. Warner & Company.
X Q. 214. What is the relationship between the Searle & Hereth Company and the William R. Warner & Company?
A. William R. Warner & Company, is distributor for the products of the Searle & Hereth Company.

X Q. 215. What is the distinction as to the ownership between the two corporations?

A. The Searle & Hereth Company is a corporation of the State of Illinois. William R. Warner & Company is a corporation of the State of Pennsylvania.

X Q. 216. Are not both corporations owned by the identical persons?

A. They are not.

X Q. 217. In what respect do the ownerships differ?

A. William R. Warner, Jr., owns an interest, a substantial
57 interest, in William R. Warner & Company, and has no interest whatever in the firm of the Searle & Hereth Company.

X Q. 218. What is the relationship between the Pfeiffer Chemical Company and the Searle & Hereth Company on the one hand and William R. Warner & Company on the other?

A. The Pfeiffer Chemical Company is a corporation incorporated in the State of Missouri, the stockholders of which are different than either those of the Searle & Hereth Company or those of William R. Warner & Company.

X Q. 219. Is it not true that the controlling interest in each corporation is owned by the same individuals?

A. It is.

X Q. 220. Is it not true that Searle & Hereth Company except in name has no active existence, but the preparations sold under its labels are manufactured in the chemical laboratories of the Pfeiffer Chemical Company in St. Louis and the laboratories of William R. Warner & Company in Philadelphia?

A. No. The Searle & Hereth Company has a legal existence, makes its reports to the State, reports the income tax covering its profits to the national government and fanufactures its own products.

X Q. 221. But has no independent laboratories?

A. It has independent laboratories, just as much as William R. Warner & Company and the Pfeiffer Chemical Company.

X Q. 222. Where are the laboratories of the Searle & Hereth Company located?

A. St Louis, Missouri, and Philadelphia, Pa.

X Q. 223. What is the difference in the identity of the Searle & Hereth Company laboratories in Philadelphia and the laboratories of the William R. Warner & Company in Philadelphia?

A. They are in the same building?

X Q. 224. Are they not identical?

A. They are together.

58 X Q. 225. Is there any difference watever?

A. Yes. Each firm's products are made from each firm's formula, each preparation is made as an individual entity.

X Q. 226. Do not the same chemists and employees conduct the operations of the different concerns, the same laboratories?

A. Yes.

X Q. 227. Is not the same thing true of the laboratories in St. Louis?

A. Yes.

X Q. 228. Do you regard Quin-Coco as a Searle & Hereth formula?

A. Yes. It is so filed in our formula binders.

X Q. 229. When did you acquire the Searle & Hereth Company?

A. June, 1906.

X Q. 230. Did you find Quin-Coco formula among the Searle & Hereth formulas?

A. No, and there are other formulas now put out under the Searle & Hereth which were not in the Searle & Hereth formulas at that time, new products which we have added since 1906.

X Q. 231. May I inquire why the Searle & Hereth label is used for the Quin-Coco product instead of the label or the Preiffer Chemical Company, which I understand originally brought it out?

A. The reason was that when the Searle & Hereth Company affiliated with the Pfeiffer Chemical Company, the Pfeiffer Chemical Company had marketed a line of pharmaceuticals. As they also manufactured a line of patent medicines, it was difficult to introduce the goods and the line was not at all popular. After the affiliation, the Searle & Hereth line of pharmaceuticals being established, the Pfeiffer Chemical Company line of pharmaceuticals was discontinued, and the leading items in the Pfeiffer Chemical Company line were remarketed under the Searle & Hereth label. That was the reason Quin-Coco was transferred.

59 X Q. 232. You regarded your ownership of the Searle & Hereth Company as giving you the right and privilege of adopting the Searle & Hereth label for any product you saw fit; is that not so?

A. Yes.

X Q. 233. You considered this practice your privilege in order to utilize the good-will of the Searle & Hereth Company you had purchased to your best advantage?

A. Yes.

X Q. 234. Were Searle & Hereth originators of a combination of calomel and bismuth?

A. I could not say that they were the first firm to ever mix calomel and bismuth, but they marketed and made popular a special combination of these two ingredients under the name Calolactose.

X Q. 235. Is it not true that so-called specialties of many concerns in many instances are substantially well known formulas, marketed under special names and made popular by special effort?

A. That is probably true to a certain degree. How common that practice is I would be unable to state.

X Q. 236. Referring to the blue list, "Plaintiff's Exhibit Document No. 3," are not many of the items on this list common prescription items?

A. Many of the preparations are prescribed and many sold in original packages and some both.

X Q. 237. I note on this list that you give the original product, the original manufacturer and the original manufacturer's price

the prominent location on the circular. Was there any purpose in this?

A. That was necessity, because this information required more room inasmuch as it was unnecessary to state the manufacturer's name on our product.

X Q. 238. Why was it necessary to state the manufacturer's name and manufacturer's price as to the original product?

A. As a matter of information.

X Q. 239. You mentioned that your travelers use their
60 spare time, or some of it, in detailing special products to the physicians. Can you give any estimate as to the proportion of your travelers' time that can be so classified?

A. I would saw a small proportion of their time.

X Q. 240. What specialties do they detail?

A. That depends upon the traveler. Some travelers take a liking to one product and push that product. Others take a liking to a different product.

X Q. 241. The traveler is allowed to use his own judgment then?

A. Very largely. It is only done in his spare time and we feel he is the best judge of his territory, and the work so done is entirely voluntary on his part. It is not a requirement from the firm.

X Q. 242. What have you to say of your product Quinimel as a medium for masking the taste of quinine sulphate?

A. It is a good product. It is weak in that it does not hold the quinine in suspension. The quinine precipitates on standing.

X Q. 243. That is used more for extemporaneous combining, I presume; I mean for immediate administration?

A. Yes. The Quinimel is intended as a medium for extemporaneous preparation and for masking the taste of other bitter substances other than quinine also. Quinimel is a vehicle only, containing no quinine or other drug with definite therapeutic action.

X Q. 244. Your statement as to the value of your sales of Quin-Coco for the year 1914 I assume was made after inspection of your sales records and is as accurate as you can make it?

A. We do not keep a statistical record of Quin-Coco sales. This is based upon the laboratory records as to the amount made.

X Q. 245. What do your laboratory records as to the amount made show in gallons?

A. I could not state.

61 X Q. 246. Your laboratory records would show this, I presume?

A. Yes, with the explanation that we marketed this same product under another name, in proprietary formula, under the firm name of Preiffer Chemical Company, under the name of Dr. Hobson's Sweet Chocolate Quinine, and it would be impossible to state how much was marketed under the name of Quin-Coco, and how much under the name of Dr. Hobson's Sweet Chocolate Quinine.

X Q. 247. Do your figures refer to the product of St. Louis laboratories alone or the St. Louis laboratories combined with the Philadelphia laboratories?

A. Combined.

X Q. 248. How long has the preparation been on the market under the Dr. Hobson's label?

A. Several years. I could not state exactly how many.

X Q. 249. Do you keep a record sales of the Dr. Hobson's product?

A. We do not.

X Q. 250. In your testimony Wednesday, relative to your instructions to salesmen, you referred to a typewritten memorandum for the purpose of refreshing your memory. When was this typewritten memorandum prepared?

A. That memorandum was an evolution of points I had been taking up with the salesmen, this being the last list, and as near as I can remember, this was first adopted in the early part of 1914.

X Q. 251. Do physicians as a rule specify the make when prescribing items which are commonly referred to as "general line" items; I think you have used the term "general lines"; is not that correct?

A. I am really not any longer competent to testify as to present practice, but I feel the practice varies. Some do and some do not. Some consider, if it is a line item, any maker's product would be satisfactory. Others have a preference for a certain maker's
62 line, and specify. The various houses aim to encourage specification for their particular products.

X Q. 252. You have mentioned I think that propably one-third of the jobbers in the United States had sent you orders for this item, Quin-Coco. Can you state approximately the proportion of your sales of this one item that goes through the jobber's hands?

A. I could not say, but I would say a small proportion.

X Q. 253. One per cent?

A. I would say more than that as an opinion.

X Q. 254. You mentioned the fact that your house does not advertise in the medical journals. Is there any reason for this?

A. Our house formerly quite largely advertised in the medical journals. We discontinued doing so because we thought it did not pay.

X Q. 255. By "our house" do you mean William R. Warner & Company or Pfeiffer Chemical Company, or both?

A. William R. Warner & Company.

X Q. 256. Does the Pfeiffer Chemical Company advertise in the medical journals?

A. Never, to my knowledge.

X Q. 257. Have you ever advertised Quin-Coco in the medical journals?

A. Never, to my knowledge.

Redirect examination.

Mr. Rawle: I re-examine without waiving any objections.

By Mr. Rawle:

R. D. Q. 258. Referring to the typewritten pages you used yesterday to refresh your memory, about teaching your salesmen, you say

it is an evolution. How far back does it go in substance, that is how far back did you teach your salesmen along the lines indicated on these typewritten sheets?

63 A. This vest pocket memorandum which I have had over eight years was the beginning of making notes for conferring with the travelers.

R. D. Q. 259. And that has been gradually enlarged into the typewritten sheets?

A. It has.

R. D. Q. 260. How far has the teaching been the same, independently of whether you used that vest pocket book or the typewritten sheets?

A. The general policy has been the same.

R. D. Q. 261. As a matter of fact, is not the business of these affiliated corporations carried on entirely by yourself, your brother, Mr. H. Pfeiffer, both living in Philadelphia, and Mr. G. D. Merner, living in St. Louis?

A. We three have personal charge and control of the business of the several concerns.

R. D. Q. 262. What does "detailing" mean in respect of selling drugs to physicians, and is the term applied to dispensing doctors?

A. Detailing as commonly understood means demonstrating either by literature, samples, or personal visit to the physician. Detailing is done both to the prescribing and dispensing physician. It may also be done in a limited way to the druggist.

R. D. Q. 263. State whether or not it is usual and proper that salesmen selling competing goods should be informed as to competitor's prices for his goods?

A. This to a greater or less degree is almost necessary in order to meet the arguments of the buyer.

R. D. Q. 264. In this case chocolate and cocoa have often been used more or less interchangeably. State whether or not in current talk among laymen and even among those in the drug business, they are often used interchangeably, though not accurately?

A. They are.

R. D. Q. 265. When you became connected with William R. Warner & Company in 1908, was that corporation represented in the Homilia Club and by whom?

A. It was, by Mr. Frank M. Ramsay. Shortly after my

64 connection with William R. Warner & Company, Mr. Ramsay's services were discontinued, and I understand his membership in the Homilia Club was dropped or lapsed.

R. D. Q. 266. Soon afterward you were elected?

A. Later I was elected as a member.

R. D. Q. 267. While the membership of the club consisted of individuals and not of the corporation, they were employed by, and were in the club as representatives for their respective houses?

A. That was my understanding.

R. D. Q. 268. Do you happen to know whether Mr. Joshua K. Lilly was the Registrar of the club?

A. Yes, he was, at least for a time. I am informed that the Homi-

lia list, second issue, in evidence, was published at the offices and under the supervision of Mr. J. K. Lilly.

By Mr. Bradford:

R. D. Q. 26-. As Registrar of the club?
A. As Registrar of the Homilia Club.

By Mr. Rawle:

R. D. Q. 270. In the drug manufacturing business, state whether or not there is any more or less common practice of calling the attention of a competitor to trade derelictions on the part of one or more of that competitor's salesmen.

Mr. Bradford: Objected to as not re-direct examination, immaterial and irrelevant.

The Witness: It is done. How common the practice is I am unable to state.

R. D. Q. 271. Will you state whether or not anyone representing the Lilly Company ever complained to the defendant in respect to the matters here in controversy, as to an unfair method of selling Quin-Coco?

A. I have no recollection of ever receiving a letter or a complaint from Eli Lilly & Company regarding the acts or methods of
65 any one of our salesmen. I do remember of our St. Louis office at one time complaining to Eli Lilly & Company regarding the acts of one of their travelers, and my recollection is that the matter was amiably adjusted.

R. D. Q. 272. State whether or not in your opinion Quin-Coco S. & H. is inferior to the Lilly product of Coco-Quinine in stability or other qualities?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: We consider it equal in therapeutic action and a superior product from a pharmaceutical standpoint.

R. D. Q. 273. You have been asked whether you advertise your products and you replied that you did not. Can you state whether or not, for this reason, and for any other reason, the cost of selling goods for your house is lower than that of competitors?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: Not knowing the cost of selling of other firms, I do not know whether our cost of selling is less or more, but not spending any money in advertising in the medical journals, it is not necessary to add this to our selling cost. The selling cost as I use the term here includes both advertising and salesmen's expenses and other expenses for exploiting products.

R. D. Q. 273. Has it been your practice to employ head salesmen or salesmen having some supervision over the travelers?

A. Yes.

R. D. Q. 274. To what extent have such head salesmen had to do with the teaching travelers the proper method of selling goods?

A. To the extent of following our instructions as regards our policies and as regards posting the men on the various products.

66 R. D. Q. 275. And as to trade morals and as to morals of selling the goods?

A. Yes, that is part of our instructions.

R. D. Q. 276. State how far your instructions to your head salesmen were along the same lines as those to your travelers that you have testified to?

A. I often reviewed this list with the head travelers.

Recross-examination.

By Mr. Bradford, without waiving objections, as follows:

R. X Q. 278. As I understand it now, in addition to yourself, a "head salesman" taught your traveling men how to sell goods. Will you please explain a little more fully the methods employed by these head salesmen in teaching the travelers, I mean were their instructions wholly in the office or were these head salesmen put upon the road with the travelers and by example as well as by instruction authorized to teach your travelers?

A. The head salesmen worked with the regular salesmen both in the office and on the road. They sold goods with the regular traveler, often doing the selling themselves, leaving the regular salesmen watch their work, and then this would be reversed and the head salesmen would watch the regular salesmen work.

R. X Q. 279. Besides yourself, who else gave instructions to the head salesmen and also to the regular travelers?

A. Mr. Henry Pfeiffer, Philadelphia, Mr. G. D. Merner, St. Louis.

R. X Q. 280. Did these gentlemen also accompany salesmen on their trips?

A. Mr. Henry Pfeiffer years ago did this work. I don't remember of Mr. Merner ever working with the regular salesmen himself.

R. X Q. 281. Is it not a fact that Quin-Coco is as close a duplicate to Coco-Quinine as it is possible for your laboratories to make it?

67 A. We add nothing to Quin-Coco to make it like Coco-Quinine. Quin-Coco is the result of the ingredients all of which are necessary to the making of the product.

R. X Q. 282. By "the product" I assume you mean a product both in appearance and therapeutic action like Quin-Coco?

A. By "product" I mean Quin-Coco itself.

R. X Q. 283. Is not "detailing" usually considered important in the introduction of the new specialties?

A. Formerly it was considered the only method, but at present far less detailing is done. It is an efficient method of introducing a new product. However, the expense of personal detailing is so high as to, in many cases, make it unprofitable. I would say the practice of personal detailing with samples has diminished a great deal in recent years.

Mr. Rawle: Having just been able to procure copies of the third and fourth "Issues" of the registration list of the Homilia Club, following in sequence the second issue of the same club list offered in evidence yesterday, I now offer these two issues in evidence in respect of the registration therein of Coco-Quinine by Eli Lilly & Company in Class A and of "The Lilly Print" on the back of the cover, as indicating the printer of these two issues.

Mr. Bradford: The introduction of these lists is objected to except as a whole and for all the information they contain. If offered as exhibits as a whole for the information of the court no objection to their introduction is made, and it is admitted that they were published by the Registrar of the Homilia Club, Mr. J. K. Lilly, the President of the complainant corporation, and at complainant's publishing department.

The issues referred to are marked by the stenographer,
68 Defendant's Exhibit, Homilia Registration, numbers 2 and 3 respectively. GUSTAVUS A. PFEIFFER.

Deposition closed.

HENRY PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. Please state your name, age, residence and occupation?

A. Henry Pfeiffer; age, 58 years old; residence, 6809 York Road, Philadelphia; occupation, manufacturing pharmaceuticals and patent medicines.

Q. 2. Have you ever been in the retail drug business; and if so, where, and how long?

A. I was in the retail drug business in Cedar Falls, Iowa, and for ten years about.

Q. 3. And after that?

A. After that went into the drug manufacturing business in St. Louis, in the firm of Allan Pfeiffer Chemical Company, nine years; then with the Pfeiffer Chemical Company and Searle & Hereth and William R. Warner. I am the President of William R. Warner & Company.

Q. 4. I understand that the business is controlled and managed by you and your brother, G. A. Pfeiffer and G. D. Merner entirely?

A. Yes.

Q. 5. What is your general department of the work, broadly speak*nig*?

A. I devote the most of my energy and time to the selling end, engaging salesmen, and training them, also in the financial and business ends.

Q. 6. Do you have considerable to do with training the travelers when they are first taken on?

69 A. Yes.

Q. 7. Also you have been absent in the last five or six years going around the world and traveling more or less, have you not?

A. I have been away from the business about the last five years, from one-half to two-thirds of my time.

Q. 8. What is your method of preparing the travelers to go out on the road and what line of instruction do you give them?

A. We give them samples and catalogues, "Salesmen's Confidential" and verbal instructions.

Q. 9. Have you any written rules which you impress upon them and have done so for some years; if so produce them?

A. I have a vest pocket memorandum which I have had for 13 or 14 years, this same book (producing memorandum book).

Q. 10. Have you taught the new travelers from that?

A. I have taken this up with them after they had been with us some time, after they had started out. I did not take this up with them at the time they started so much as I did after they were with us.

Q. 11. What rules or directions do you find in that vest pocket book, bearing on the question of how to deal with competitors' like products?

Mr. Bradford: Objected to unless the book is to be introduced as a whole.

Q. 12. Using this vest pocket book merely to refresh your memory, state what, if any, teaching you gave the travelers as to how to deal with competitors, as to talking about competitors' products?

A. Always taught them to let the other fellow alone, that we had all we could do to handle our own business.

Q. 13. Who do you mean by "the other fellow?"

A. The other competitors.

Q. 14. What do you mean by "letting alone?"

A. I mean not to waste their time talking about competi-
70 tors, but to put their entire efforts and energies on our samples, on our line that we manufacture and sell them.

Q. 15. How do you teach them with regard to a careful observance of trade morals and honesty in traveling for your house?

A. We always felt that our line gave us great possibilities, and if we got what we were entitled to we would be satisfied. It was not necessary to lie or misrepresent to get that business.

Q. 16. Did you take up with them the rules in the "Salesmen's Confidential" and discuss those?

A. Yes.

Q. 17. I hand you a copy of "Salesmen's Confidential and Manual," 1913–14, and call your attention to the 86th and 87th pages thereof. On page 86, notice rules 16 and 17, and on page 87 the seven rules indicating "Our Policy in Dealing with the Trade." Please look at those rules and state how far you took up those subjects in teaching your salesmen?

A. We constantly made an effort to keep our salesmen from talking too much about our competitors. We felt it was in our own line, that every knock was a boost, for the other fellow. That has been our policy, to keep from mentioning or recognizing the other people in our selling talk.

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Cross-examination, without waiving objections:

Mr. Bradford, without waiving objections, cross-examines as follows:

By Mr. Bradford:

X Q. 60. The several gentlemen to whom counsel has referred to in his direct examination as witnesses on behalf of the plaintiff in this case, are all well-known to you, are they?

A. I know them very well.

X Q. 61. Are they men of good reputation?

A. That I don't know, except Mr. Richard. He is all right, I know that; also Mr. Ames. I don't know about the others, I would not say.

X Q. 62. You would have confidence in anything that Mr. Richard or Mr. Ames told you, would you?

A. Yes, sir.

X Q. 63. As to Mr. Noiret you would not be willing to make the same statement?

216 A. Well, I don't know him as well as I do the others.

X Q. 64. How long have you known Mr. Noiret?

A. I met him, but I haven't known him to amount to anything. I only met him on the road. I didn't run with Mr. Noiret. He and I were a different strain. We didn't run together, you know.

X Q. 65. Is it a fact you frequently met on your trips?

A. We didn't frequently meet; no, sir. We met once in a while, but we didn't meet frequently.

X Q. 66. How long did you travel together in the same territory for your respective houses?

A. I don't think he was in my territory over a year. He was on the road, but not in my territory.

X Q. 67. You spoke of various calls for which the druggist might rightfully dispense Quin-Coco. Among them you mentioned sweet quinine?

A. Yes, sir.

X Q. 68. What is the technical name of the preparation commonly known in the drug trade as sweet quinine?

A. I don't know.

X Q. 69. Did you ever hear of Febriline?

A. Yes, sir.

X Q. 70. Isn't Febriline frequently called sweet quinine by druggists?

A. The people call it sweet quinine. They don't know the difference between them. They call it sweet quinine.

X Q. 71. What is the difference between Febriline and sweet quinine?

A. One is made with sulphate and the other is made of cinchona alkaloid.

X Q. 72. Has Febriline any chocolate in it?

A. No, sir; not that I know of.

X Q. 73. When did you first hear of a liquid quinine preparation colored and flavored with chocolate?

217 A. Well, I can't state the exact date I first heard of it.

X Q. 74. About when?

A. The first preparation of it I saw I think it was chocolate quinine tablets.

X Q. 75. When was that?

A. That was quite a while ago. I don't know the exact date.

X Q. 76. When did you first hear of it?

A. I can't tell you the exact date when I did first hear of it.

X Q. 77. Did you ever hear of Eli Lilly & Company's Coco-Quinine?

A. Certainly.

X Q. 78. Did you ever hear of any liquid quinine colored and flavored with chocolate before you heard of Coco-Quinine, Lilly?

A. No, sir; I saw preparations of it made by retail druggists.

X Q. 79. Where?

A. In New Orleans.

X Q. 80. When?

A. That was in 1893.

X Q. 81. What did you see?

A. I saw chocolate lozenges, tasteless, made by J. T. Baltar, of New Orleans.

X Q. 82. Are chocolate lozenges liquid?

A. No, lozenges.

X Q. 83. My question asked you as to liquid preparations?

A. Liquid—no, sir.

X Q. 84. You speak of dispensing preparations in two-ounce bottles under what name?

A. Quin-Coco. They sell it that way. They sell it over the counter as Quin-Coco.

X Q. 85. Where?

A. In retail drug stores we sell it to.

X Q. 86. Put up in original packages as Quin-Coco?

218 A. Yes, sir.

X Q. 87. How long have you been doing this?

A. Since we have been handling it.

X Q. 88. And the druggists are handling these original packages of Quin-Coco in two-ounce bottles?

A. There is quite a number of them in my territory.

X Q. 89. Name some of them?

A. The Owl Drug Company, Vinegar Bend, Ala, The People's Drug Store in Leeksville, Mississippi, The Wallace Drug Store, Laurel; E. E. Perkins, Sandersville, Mississippi; Lafayette Drug Store of Lafayette, Louisiana; Davis Pharmacy, of Bunker, Louisiana; and quite a number of others.

X Q. 90. And these several stores have been handling it?

A. In the original package, sell it right over the counter.

X Q. 91. Ever since it was put on the market?

A. Yes, sir.

X Q. 92. You have referred to counter prescriptions?

A. Counter prescribing.

X Q. 93. This is by the druggist himself, I assume?

A. Yes, sir.

X Q. 94. You say that as a salesman for your present employers you have never represented to a retail druggist that he could use any of your products to replace the products of competitors when the competitors' product was asked for?

A. I have never told a man that he could substitute, never. That is not my policy. I talk my preparations to the druggist. I show him their quality, and everything of that sort, but I never told a man to substitute; if you get a prescription for this and that and the other specified, give it to them.

X Q. 95. Did you ever compare your product Quin-Coco with the Lilly product, Coco-Quinine?

A. Never did.

219 X Q. 96. Never mentioned Coco-Quinine?

A. I don't know that I never mentioned it, but I never compared it.

X Q. 97. What do you say in reference to Coco-Quinine when making your sales of Quin-Coco?

A. I never call it Quin-Coco. I call it Chocolate Quinine.

X Q. 98. What would you say as to the character of these numerous witnesses who have testified that you mentioned Coco-Quinine to them and told them that Quin-Coco was the same thing?

A. I didn't tell them that.

X Q. 99. What have you to say as to the character of the men who would make such statement?

Mr. Rawle: Objected to as irrelevant and futile.

A. Well, I have nothing to say as to their character.

X Q. 100. I suppose if every druggist in your territory would testify to the contrary, you would still insist that your statement last made is true?

A. Yes, sir; I simply would; absolutely.

X Q. 101. Is Quin-Coco one of your leading sellers in your territory?

A. No, sir.

X Q. 102. You don't regard it as of much importance in your line, do you?

A. No, sir; not so very much.

X Q. 103. You sell a good deal of it, however, don't you?

A. I don't sell an extra amount of it. I sell it once in a while. I sell more Guaiatonic, Tritica and specialties and things like that. We are always working for the profitable side of it, and we always work those first.

X Q. 104. You mean there is more profit in these others than there is in Quin-Coco?

A. Many of them there are.

X Q. 105. From whom did you get this information?

220 A. From my own self, my own experience. I don't reckon there is a man traveling that don't know the profitable ones in his line.

X Q. 106. You mean the profit to yourself or to your house?

A. To my house.

X Q. 107. You personally have knowledge of what these various products profit your house?

A. I have an approximate idea of these things, you know.

X Q. 108. You must have obtained that idea from some one who knows?

A. I have been in the drug business all my life and I know about what things are, you know. I never had any specific information from the house as to those things.

X Q. 109. You know the cost of Quin-Coco by the gallon?

A. No, sir.

X Q. 110. You know the cost of Guaiatonic by the gallon?

A. No, sir.

X Q. 111. You know the cost of Tritica per gallon?

A. No, sir.

X Q. 112. In what special localities did you have the largest demand for Quin-Coco?

A. No special locality, I don't think. I work all together in the South, you know, and it is more or less used in the South, and I have no big sale on it.

X Q. 113. How did you introduce Quin-Coco to your customers when it first came on the market?

A. I took the preparation and showed it to them and explained it to them and told them it was a preparation without grease, it would not separate, it would not ferment, it would not nauseate the stomach. I told them there was a growing complaint of chocolate-quinine on the market, they would get lumpy; ours was always the same consistency. I got out in that way and got what I did get in that way.

221 X Q. 114. How many chocolate quinines were there on the market when you introduced Quin-Coco?

A. There were three or four in my territory; I think there were three or four.

X Q. 115. Name them?

A. I know there was Mulford's and Harvey's. I don't know the others. There was three or four in that territory; and Lilly's.

X Q. 116. When did you begin the sale of Quin-Coco to your trade?

A. I don't know the exact date.

X Q. 117. About when?

Q. When we brought it out on the market; I don't know the exact date of that.

X Q. 118. Approximately how many years?

A. Ten, I reckon; eight or ten.

X Q. 119. Would you say it was as much as eight?

A. No, I would not swear to that.

X Q. 120. Would you say it was more than seven?

A. I guess it was seven or eight; I couldn't say the exact date, you know.

X Q. 121. Who first instructed you in reference to this product of Quin-Coco?

A. I had no regular instructions about it at all. I got it like any preparation that is sent to us, with literature, you know. There was no special instructions about Quin-Coco.

X Q. 122. The product was merely added to your line and you were expected to sell it?

A. That is the way we did with all the line.

X Q. 123. Did you ever have any instructions at the home office in reference to the preparation?

A. No, sir; only in a circular way. They sent out a circular about Quin-Coco, literature or something of that sort.

X Q. 124. Did you ever talk to any one in the laboratory about it?

A. Yes, sir—not about Quin-Coco though. I talked with the chemist in the laboratory.

222 X Q. 125. About other things?

A. Well, I have been up there to see him. Every time I come in the house I go to speak to him.

X Q. 126. Isn't it your custom to talk to him about the preparations?

A. The preparations I want to talk to him about, yes, sir, but I had no preparations to talk to him about Quin-Coco, though.

X Q. 127. Did you ever talk to him about its similarity to Coco-Quinine?

A. No, sir; never did.

X Q. 128. He never said anything to you about its similarity to Coco-Quinine?

A. No, I don't think Coco-Quinine was mentioned in my presence.

X Q. 129. Did you ever hear Quin-Coco mentioned among the Pfeiffer sales force that Coco-Quinine was not mentioned in connection with it?

A. How is that?

X Q. 130. Did you ever hear Quin-Coco discussed among the Pfeiffer salesmen or any one connected with the Pfeiffer or Warner houses at any time?

A. Yes, I heard that mentioned a number of times, but I didn't hear a word about Coco-Quinine at all.

X Q. 131. What other druggists did Mr. Ritayik call on in your company on the same trip that you called on Mr. Heno?

A. While we were in Napoleonville we called on Mr. Heno and called on the Ruby Drug Store, and we called on Roth Drug Company—that day, you mean?

X Q. 132. Where?

A. At Thibedeau, Louisiana. We called on Roth Drug Store, same place and Meyer Drug Store.

X Q. 133. Does this cover the entire trip or merely that day?

A. That day.

X Q. 134. How many days was Mr. Ritayik with you?
A. Two days.
223 X Q. 135. Where were you the other day?
A. Working on the Bayou la Fourchee.
X Q. 136. What drug stores did you call on that day?
A. We called at a general store selling patent medicines.
X Q. 137. Perfumes?
A. No, patent medicines. We didn't sell any perfumes.
X Q. 138. Did you say you never sold Mr. Ames any pharmaceuticals at any or either of his stores?
A. No, I said I didn't sell Mr. Ames at Laurel.
X Q. 139. Have you sold him any at Hattiesburg?
A. We sold him since he made that testimony there. I sold him two pharmaceuticals before this. I sold him Calalactose and Pancreopepsine, and then we sold him a nice bill since then about three or four weeks ago.
X Q. 140. Prior to the time when Mr. Ames testified had you not solicited his trade for pharmaceuticals?
A. Yes, sir.
X Q. 141. In selling your entire line, as you have referred to it, I suppose you mean you go over each of these three thousand items with your customer, do you?
A. We have a big book that has everything in it. I start on the first page and go over each thing.
X Q. 142. Calling his attention to the leaders?
A. Everything in there.
X Q. 143. How long do you spend in each retail drug store?
A. Sometimes two hours, sometimes thirty, forty minutes. Sometimes I go fast with it, and that is our policy, to go through it.
X Q. 144. You mean you can talk three thousand items to a man in an hour, thirty minutes or forty minutes?
A. Your label is there and your cartons are labeled of what you are selling or the label of the pharmaceutical is in there. You go right through it. If there is something that strikes his eye or we have a specialty, we call his attention to it. We go right
224 along. With some I do and some I don't. We go through the whole line. That is our policy with every man we call on.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 145. You referred to chocolate lozenges made by J. T. Baltar of New Orleans in 1893. Did you state whether or not you handled that as a retail druggist?
A. No, sir; he handled it.

Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

R. D. Q. 146. State whether or not you were familiar with that product of Baltar's?

Mr. Bradford: Same objection.

A. Yes, sir, I was. I. L. Lyons & Company, of New Orleans, sold it for them in a wholesale way. Baltar made it.

R. D. Q. 147. What had you to do with it, please?

Mr. Bradford: Same objection.

A. Nothing whatever.

R. D. Q. 148. What knowledge had you of it?

Mr. Bradford: Same objection.

A. Well, I was there in contact with it and saw it.

R. D. Q. 149. In what connection were you in contact with these lozenges?

Mr. Bradford: Same objection.

A. I was working for I. L. Lyons & Company.

R. D. Q. 150. And I. L. Lyons & Company sold it?

Mr. Bradford: Same objection.

A. Yes, sir.

R. D. Q. 151. Did you sell it?

Mr. Bradford: Same objection.

225 A. No, I didn't sell it. I was working in the house. I filled the orders for it.

R. D. Q. 152. What was the name of the preparation?

Mr. Bradford: Same objection.

A. Chocolate lozenges.

R. D. Q. 153. State whether or not it contained quinine?

Mr. Bradford: Same objection.

A. He said quinine and chocolate.

R. D. Q. 160. What did the package say about it?

Mr. Bradford: Same objection.

A. I don't remember.

Re-direct-examination closed.

Deposition closed. B. F. JONES.

Sworn to before me the 7th day of December, 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court, Eastern Division of the Eastern Judicial District of Missouri.

Adjourned to meet at Planters' Hotel, St. Louis, Missouri, at 2.30 p. m. this day.

Pursuant to recess as before stated at 2.30 p. m. of the same day, the further taking of these depositions was resumed as follows:

HOWARD HENRY RICHARDS, a witness of lawful age, being produced on behalf of defendant, deposes and says:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and present occupation?

A. Howard Henry Richards; thirty-eight; I make my
226 headquarters at Houston, Texas; traveling salesman.

Q. 2. With William R. Warner & Company?

A. Yes.

Q. 3. State consecutively what you have done since you became connected with the retail drug business?

A. I was clerk in a retail drug store in Kansas City, that is twenty-four years ago, and following that I worked for Parke-Davis & Company for a period of four years; that is in the house, the Kansas City branch; and following that I went to work for the Searle & Hereth Company, that followed the four years I was connected with Parke-Davis & Company. I have been with Searle & Hereth and this concern practically sixteen years. I was with Searle & Hereth practically eight years and five years with the Pfeiffer Chemical Company, and with William R. Warner & Company the rest of the time.

Q. 4. Are you a registered pharmacist?

A. Yes.

Q. 5. How many years' experience?

A. Well, I served four years in the retail drug business as a clerk. I served three years, and then I took my course in the Kansas City College of Pharmacy, and afterwards registered.

Q. 6. Have you ever served as assistant sales manager for William R. Warner & Company?

A. Yes.

Q. 7. What years?

A. That was about three years I served in that capacity.

Q. 8. As traveling salesman what has been your territory?

A. My first territory was Kansas City, in the pharmaceutical department only, and later in northern Kansas, and after that I was
227 placed in the position of assistant sales manager. This covered a period of three years. At the expiration of that time, I was sent in their interests to southern California, headquarters at Los Angeles. I served the company there two years, and from the Los Angeles territory was transferred to southern Texas territory, headquarters at Houston, the territory I now cover, south Texas, includes San Antonio, Austin, Houston, Beaumont, Galveston and Brownesville.

Q. 9. How many drug stores, approximately, are there in your territory?

A. I would say in the neighborhood of fourteen or fifteen hundred drug stores.

Q. 10. How often do you visit them during the year?

A. Well, some of them I call on every sixty to ninety days, some twice a year.

Q. 11. What do they average all around?

A. I do not quite understand.

Q. 12. What is the average number of times you call on your entire trade during the year?

A. Well, I would say in the largest centers I make it on an average of five to six times a year, and smaller points I would say from four down as low as twice a year.

Q. 13. What proportion of the dispensing doctors do you call on?

A. I have but very few dispensing doctors in my territory. There are some, but they are mostly situated out in the isolated districts.

Q. 14. In selling, do you endeavor to sell the entire line?

A. Yes, always.

Q. 15. Do you specialize any particular item in your line?

A. No, sir.

Q. 16. In selling Quin-Coco, what is your practice in talking to the druggists?

A. Well, I sell Quin-Coco the same as any other product on our list.

228 Q. 17. Describe your method of taking up the subject, what is your sales talk?

A. My sales talk in demonstrating Quin-Coco in connection with the sale of any other product in our line, demonstrating Quin-Coco I merely call attention to the product as being the very best product of this character on the market, barring none, in smoothness, and the fact of it being free from any lumps, and the absence of any nauseating properties which is a serious drawback to some, and from the fact that it is palatable and it is sold at a reasonable price.

Q. 18. In selling a preparation against a competing preparation, what is your practice as to referring to your competitors?

A. Well, as a rule, I make no reference whatever to a competitor in selling an article. I sell Quin-Coco on its merits. The druggist is acquainted with the objectionable features, and with various pharmaceutical products, their experience is sufficient really to cover that which they buy.

Q. 19. Among what customers is there a market for Quin-Coco, and on what calls?

A. Well, you take the South, it is a large quinine consuming country, more so than any other section of the United States, and for the preparations of quinine, it is a matter of how to put it up in a form that is acceptable and palatable; take children, for instance. It is difficult for a child to swallow a quinine capsule, or even swallow a pill, and to put it in palatable form, syrup form, the drug trade generally are acquainted with the fact that a quinine preparation in tasteless form, of syrup consistency, makes a ready seller.

Q. 20. On what calls do druggists dispense it?

A. To reduce fever, and as a malarial tonic, and oftentimes, where you take it in the South, poor people cannot afford the serv-

ices of a physician, they are filled up with malaria and if they have twenty-five cents to spend, they go in and buy something
229 along that line, perhaps they cannot pay fifty cents for a chill tonic, they ask for something for malaria, and the first thought of a druggist is some palatable preparation, and for the unspecified call the druggist is at liberty to sell him Quin-Coco. I urge him to recommend along that line and sell him Quin-Coco, even in two ounce bottles, four ounce bottles, labeled with reading matter on it, so they can read what it is good for.

Q. 21. State whether or not these two and four ounce bottles of Quin-Coco are put up by all the houses?

A. Put up by our company as well as our packages sold over the counter.

Q. 22. In the original package?

A. In the original package.

Q. 23. Can you name any other calls upon which Quin-Coco could be supplied?

A. Well, it could be sold wherever quinine is i-dicated. Quinine in the South is just like fresh air in the North; it is a vitalizer.

Q. 24. Do you know any other calls that come into a drug store, that is in the nature for a call for sweet quinine or syrup of quinine?

A. There are various preparations of that kind on the market.

Q. 25. What I want to ask is, whether there are calls for anything like a sweet syrup of quinine?

Mr. Bradford: I object to the question as leading.

A. There are calls for tasteless syrups of quinine, bitterless quinine syrups, brown syrup of quinine, chocolate-quinine, and two-bit chill tonics.

Q. 26. In your experience as a retail druggist and salesman, is it within the power of the retail druggist, if he chooses, by special effort, to push the sale of a given preparation?

Mr. Bradford: I object to the question as immaterial, incompetent and irrelevant.

230 A. In the matter of selling goods, where there is no specific specification and a call is for a tasteless syrup of quinine or something to be suggested by the druggist for malaria or chills, it is optional with the druggist what he sells. It depends altogether on the percentage of profit that it yields him, which permits him to make the sale.

Q. 27. How far, if he chooses, can he create a market for a given product by a special effort?

Same objection.

A. Well, it depends altogether on the existing demand.

Q. 28. Along that line, with what chocolate-quinine preparation are you in competition in your territory?

A. In competition with several. Coco-Quinine for one; Ko-Quin, made by John T. Milliken Company, St. Louis. Those are two of

the principal ones. There is another product that is called Quin-Coco-ine that I see occasionally, manufactured by the Harvey Company and other various syrups of quinine, for instance, an alkaloidal preparation made by the Paris Medicine Company, called Febriline, and other syrups of tasteless quinine.

Q. 29. I wish you would again mention them all?

A. I would also say sweet preparations, preparations called syrups, Cinchona, alkaloids.

Q. 30. Which preparations mentioned contain quinine, I mean contain cocoa or chocolate?

A. The preparations that contain chocolate are those with the label of "Ko-Quin," made by John T. Milliken Company, and the preparation called "Quin-Coco-ine, made by the Harvey Company, and the preparation made by Eli Lilly & Company, known as Coco-Quinine.

Q. 31. If a retail druggist has a call for a specific make of a given preparation, and dispenses the make of another maker, state whether or not you consider that honest in a druggist?

231 A. I would not consider it so. If he would deliberately and knowingly dispense an article when another is called for specifically; I would not think he would dare.

Q. 32. Have you ever had personal and actual knowledge of such an act on the part of a druggist?

A. I have never seen it done.

Q. 33. If a salesman suggests to a retail druggist that a retail druggist can buy his preparation and dispense it when a similar preparation of another maker was called for, state whether or not you would consider that honest on the part of the salesman?

A. I would not consider it so.

Q. 34. Have you ever had personal knowledge of a druggist dispensing Quin-Coco, Searle & Hereth, when Coco-Quinine was called for on a prescription or over the counter?

A. I have never seen it done.

Q. 35. State whether or not you have ever made a suggestion to that effect to any retail druggist?

A. Never since I have been selling drugs.

Q. 36. State wh-ther or not you ever traveled with J. W. Wilkins, a Warner & Company salesman, when you were assistant sales manager for the company?

A. Yes.

Q. 37. State whether or not this was in the course of your duties as to instructing him as to the proper manner of selling drugs for the defendant?

A. I started him out in the interests of the company; traveled with him the first week he traveled for the company.

Q. 38. Did he have a "Salesman Confidential?"

A. Yes. He was equipped with a full set of catalogues, a sample case, complete outfit.

Q. 39. Including the "Confidential?"

A. Including the "Confidential," the price current complete.

Q. 40. When you were teaching him, state whether or not
232 you took up with him the policies of the house as to the proper method of selling its products?

A. I outlined in detail the general selling policy of the company and their wishes.

Q. 41. State whether or not you called his attention to any rules bearing upon honesty in the "Confidential?"

A. I outlined the general policy which is an open proposition with every salesman connected with the selling force of the William R. Warner Company and the Pfeiffer Chemical Company.

Q. 42. Tell what policy you taught him in that respect?

A. A complete demonstration of our entire line, not to speak ill of any competitor, put in six full days each week, and to not pass through a town where there is a drug store without soliciting orders from either the druggist or dispensing doctor and hospitals as well.

Q. 43. State whether or not you gave him any instructions as to what you considered honestly in his work?

A. To not misrepresent anything that we made.

Q. 44. State whether or not you gave him any instructions as to selling goods which are in competition with like goods of other makers?

A. I demonstrated the entire line with Mr. Wilkins just in a general way. Mr. Wilkins is a druggist and was thoroughly posted on a great many items, having sold them in a retail store.

Q. 45. Is there any rule in the "Confidential" particularly applying to sales talks when selling an article in competition with a like article of another house?

Mr. Bradford: I object to the question as incompetent, irrelevant and immaterial. The "Confidential" itself is the best evidence.

A. No, sir, nothing.

Q. 46. I call your attention to Rule 17 on page 86 of the
233 "Confidential," does that refer to the instructions on the subject of selling a competing line?

Same objection.

A. That is absolutely the policy of the company.

Q. 47. Read the rule?

A. That it pays to adhere strictly to the truth at all times; that it don't pay to speak ill of or even mention your competitor.

Q. 48. State whether or not you showed him those rules?

A. I most certainly did.

Q. 49. State if you know Julius R. Prochnow, and if so, where his business is?

A. Yes, I am perfectly acquainted with Mr. Prochnow, San Antonio, Texas. I sold him a bill of goods three weeks ago.

Q. 50. How long have you been calling on him since you first knew him in this business?

A. I have been calling on him since just three years ago.

Q. 51. State whether or not you ever sold Mr. Prochnow any Quin-Coco?

A. Since I have been calling on Mr. Prochnow I have never sold him a drop of it.

Q. 52. State whether or not you have verified that statement recently from the record?

A. I believe so.

Q. 53. State whether or not that is your recollection outside of the record?

A. I absolutely know I never sold Mr. Prochnow any Quin-Coco personally.

Q. 54. Have you looked up your records on that subject?

A. I have looked up the records.

Q. 55. With what result?

A. With the result I have copies of all of the orders I sold Mr. Prochnow, original orders shipped out by William R. Warner
234 & Company and the Pfeiffer Chemical Company, and on those orders no Quin-Coco appears.

Q. 56. On these orders no Quin-Coco appears?

A. Not on my personal orders.

Q. 57. State whether or not you remember to have discussed with Prochnow the subject of Quin-Coco?

A. I have discussed the subject of Quin-Coco with Mr. Prochnow as I would bring it up in my general sales talk covering every drug in our line in a general way, not specializing particularly on any product.

Q. 58. Julius R. Prochnow, a witness called on behalf of plaintiff in this case, testified as follows:

"Q. 12. Have you ever been solicited to buy Quin-Coco, and if so, by whom, and what inducements were held out as a reason for such a purchase?

A. Yes, William R. Warner & Co.'s salesman solicited my order, and the inducement was the price.

Q. 13. What else was said by William R. Warner's salesman?

A. He told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper.

Q. 14. Did he say anything about what use you could make of it?

A. He intended me to use it instead of Coco-Quinine.

Q. 15. What do you mean by 'instead of Coco-Quinine?'

A. When I got a call for Coco-Quinine or a prescription that it could be used instead."

State whether or not this is true?

A. I solicited Mr. Prochnow's general order for our products, but I did not sell Mr. Prochnow any Quin-Coco. I sold him essence of pepsin elixir, iron, quinine, and strychnine, in competition with other products, aggregating over fifty dollars' worth of our
235 assorted products, but I did not, and have never sold Mr. Prochnow personally any Quin-Coco. I might have said in my demonstrating Quin-Coco, when I came to it, that it was the best

preparation on the market of this kind, barring none, and for unspecified calls for chocolate quinine or syrup of quinine, he was justified in using Quin-Coco or putting it in competition with any over-priced chocolate-quinine preparation on the market, whose ever it may be, but I did not sell Mr. Prochnow any Quin-Coco and never have personally since I called on him, but I have never advised any druggist that he could use Quin-Coco on specific specified calls for Coco-Quinine or any other chocolate preparation where it is specifically called for.

Q. 59. Prochnow testified in the answers just read to you, that you told him he could use Quin-Coco instead of Coco-Quinine, "when I get a call for Coco-Quinine or a prescription, that it could be used instead". State whether or not it is true?

A. It is absolutely false. I do remember telling Mr. Prochnow that he is foolish for paying the difference in price on those items he bought from me, as our system of shipping and billing is direct; billing and eliminating the middleman's profit.

Q. 60. Do you know A. J. Garner, a druggist, and where his place of business is?

A. Yes; Mr. Garner is with the Weyman-Garner Drug Company at Yoakum, Texas.

Q. 61. State whether or not you ever sold him any Quin-Coco, and if so, how much?

A. I have never sold Mr. Garner Quin-Coco since I have been selling goods for the company. I sold him several years, will give the dates of the orders.

Q. 62. State whether or not you verified this from the records?

A. Yes.

Q. 63. Do your records show whether you ever sold Garner any Quin-Coco?

236 A. Personally I have never sold Mr. Garner any Quin-Coco.

Q. 64. State whether or not you ever said to A. J. Garner or in any way gave him to understand that Quin-Coco could be dispensed or used by him for Coco-Quinine?

A. No, sir. I have sold Mr. Garner several years, goods of our line embracing pharmaceuticals in gallon quantities, various elixirs, one particular preparation called "Quinatone", that is a pharmaceutical product the same as any other elixir especially made by William R. Warner & Company.

Q. 65. Is this drug suitable for malaria?

A. Yes, an anti-malaria tonic.

Q. 6. Containing any chocolate?

A. Absolutely none.

Q. 67. State whether or not you have ever in your career as a salesman said to a retail druggist that he could dispense Quin-Coco on a prescription that called for Coco-Quinine?

A. Absolutely none. On a specific specified prescription I would be presuming too far, or a call over the counter, or even a specified call.

Direct-examination closed.

Mr. Bradford, without waiving objections, cross-examines as follows:

X Q. 68. Who did sell Mr. A. J. Garner Quin-Coco?

A. Who did sell him?

X Q. 69. Yes.

A. I never sold him Quin-Coco.

X Q. 70. That does not answer my question.

A. I am not in a position to know. I am the representative in that territory, whether a predecessor did, I do not know. I am not in a position to know.

X Q. 71. Are you in position to swear no one has sold Mr. Garner Quin-Coco while you have been on that territory?

237 A. There was a gallon of Quin-Coco sold the Weyman-Garner Drug Company in 1910.

X Q. 72. By whom?

A. I don't know who represented us.

X Q. 73. Was he a traveling salesman?

A. He was a traveling salesman.

X Q. 74. How long have you been calling on Mr. Garner?

A. Three years on Mr. Garner.

X Q. 75. Is the one gallon sale to which you have referred, the only sale of Quin-Coco ever made to the Weymouth Drug Company, or to the Weyman-Garner Drug Company?

A. I absolutely sold Mr. Garner no Quin-Coco in the three years I have been traveling for the company.

X Q. 76. That does not answer my question.

A. As far as the records of the house indicate, yes.

X Q. 77. What is the preparation "Quinatone", which you have sold?

A. Quinatone is a combination of tincture of cinchona, red, yellow, cinchona, Fowler solution and port wine, tincture pale cinchona, Fowler solution, port wine as the basis for anti-malaria tonic.

X Q. 78. Do you remember what you did say to Mr. Garner when you had your conversation with him, in which Quin-Coco was discussed?

A. No, sir; I never sold Mr. Garner any Quin-Coco, personally.

X Q. 79. What do you mean by personally?

A. When I went there personally to call on Mr. Farner and solicit his orders for our products.

X Q. 80. You have stated that you suggested to Mr. Garner that it was foolish to pay higher prices for several other drugs, but did not make the same suggestion to him with reference to Quin-Coco, are you sure of that?

238 A. Mr. Garner, you see, I made the suggestion——

(Question repeated.)

A. I did not think that Mr. Garner ever handled any Quin-Coco, and did not know it at that time. I demonstrated the general line. I did not specialize on any one particular product.

X Q. 81. You say that you never solicited Mr. Garner's order for Quin-Coco?

A. I solicited his orders in general. I always mention Quin-Coco when I go through the line. "How much Quin-Coco can you use?"

X Q. 82. Did you ever mention Coco-Quinine to Mr. Garner?

A. To my recollection, no, sir.

X Q. 83. Or to any other retail druggist?

A. It is possible that Coco-Quinine has been brought up, that they use it, Ko-Quin, yes, that is brought up every day.

X Q. 84. Is not that frequently and in the way of introducing the subject to retail druggists?

A. Not necessarily.

X Q. 85. But it is sometimes introduced in that way, is it not?

A. Well, in a general way a man selling our products, he covers the line in detail, right through, mentioning all products. We have not the time to anchor ourselves on one product for any period of time.

X Q. 86. What other products similar to Quin-Coco sell for higher prices than Quin-Coco?

A. What other products?

X Q. 87. Similar to Quin-Coco sell for higher prices than Quin-Coco; than your price for Quin-Coco?

Mr. Rawle: There are two questions there, which one do you want him to answer?

A. Well, one in particular; Coco-Quinine is sold in excess of the price of Quin-Coco.

X Q. 88. Any other?

A. Well, I am not in a position to say.

239 X Q. 89. You have stated that you told no retail druggist that he could use Quin-Coco when Coco-Quinine is specified, either on a prescription or on a call over the counter; is that correct?

A. Yes.

X Q. 90. Is that true of all the other products in respect to your line?

A. Yes, absolutely.

X Q. 91. What do you call a specifically specified call?

A. "Coco-Quinine, Lilly," is a specific specified call.

X Q. 92. Suppose a customer asks for Coco-Quinine?

A. It is understood as a Lilly product.

X Q. 92*a*. You have named a number of calls which are common in the drug stores for the quinine preparations in syrup form, in that list you did not mention Coco-Quinine.

A. I presume there are calls for Coco-Quinine.

X Q. 93. Which preparation of syrup of quinine containing chocolate was the first to come to your attention in the drug trade?

A. Well, I do not know that any had been called to my attention until I commenced to associate myself in the pharmaceutical field.

X Q. 94. That was when?

A. That was practically sixteen years ago.

X Q. 95. After you became associated in the drug trade, did you have such preparation called to your attention?

A. Well, in selling, I did not pay particular attention at the time.

X Q. 96. What liquid preparation of quinine containing chocolate or cocoa was the first such preparation that you remember?

A. Well, the one I was thoroughly familiar with and had an opportunity to examine and demonstrate personally, was Quin-Coco.

240 X Q. 97. Why do you qualify your answer?

A. I appreciate that there was a product on the market, but at the time when I was getting the line of our products to sell, I never came in competition with any other article on the market.

X Q. 98. I asked you what other liquid quinine preparation containing chocolate first came to your knowledge in the drug trade and you have answered by a string of qualifications?

A. Quin-Coco is the first one I have been fairly familiar with.

X Q. 99. Did you ever hear of a chocolate quinine preparation containing chocolate before you heard of Quin-Coco?

A. Not to my knowledge.

X Q. 100. Never heard of Coco-Quinine?

A. No. I do not recollect Coco-Quinine when I was associated in the retail drug business.

X Q. 101. When was that?

A. That was pretty near twenty years ago. My memory does not serve back that far.

X Q. 102. How long have you known of Quin-Coco?

A. Since I have been associated with the Pfeiffer Chemical Company and William R. Warner & Company.

X Q. 103. Fourteen years ago?

A. Eight years ago.

X Q. 104. Do you remember Quin-Coco as long as fourteen years ago?

A. Eight years.

X Q. 104. And you have been selling it for fourteen years?

A. No, sir. I was with Searle & Hereth for seven years and we hadn't any preparation of chocolate-quinine. When I was with the Searle & Hereth Company, naturally I went with the Pfeiffer Chemical Company and this product, Quin-Coco, I suppose, was added on about that time. That is when I commenced to

241 become thoroughly familiar with Quin-Coco, its possibilities, its formula, and its method of sales.

X Q. 106. While you were with the S. & H. Company you were familiar with it?

A. I do not know that I ever paid much attention to it, possibly so, possibly I have seen it but I have no recollection.

X Q. 107. I am speaking of while you were with the Searle & Hereth Company?

A. Yes, I suppose I have.

X Q. 108. What were your duties while you were with the Searle & Hereth Company?

A. Call on druggists, physicians, hospitals.

X Q. 109. You were an active salesman for that house?

A. Yes.

X Q. 110. Selling a line of pharmaceuticals?

A. Pharmaceuticals.

X Q. 111. To the retail trade?

A. Yes.

X Q. 112. In what territory?

A. Northern Kansas.

X Q. 113. Were you familiar with the products of your competitors?

A. Quite so, competing articles, yes.

X Q. 114. And you still insist that you did not know of Coco-Quinine, Lilly, at that time?

A. I suppose, as I said before, I knew of it, but I had no occasion to come in competition with it.

X Q. 115. Because you had no opportunity to compete with it, because you had no competing article in your line?

A. No. I had an article called Quinomel for masking the bitterness of quinine. It was an adjuvant in masking and rendering quinine palatable.

X Q. 116. Did it also contain any quinine?

A. It absolutely did not contain any quinine. It was just an adjuvant for combining quinine sulphate.

242 X Q. 117. It would render it sufficiently palatable to be acceptable to the patient?

A. Yes.

X Q. 118. How long have you known Mr. Prochnow?

A. Just the past three years.

X Q. 119. Do you consider him a reliable man?

A. In every way I found him to be, yes.

X Q. 120. Worthy of confidence and belief?

A. I believe that.

X Q. 121. How about Mr. Garner?

A. I have known him for the same period of time, only in a business way, the same as I know Mr. Prochnow. I did not know either gentleman personally, only in a business way.

X Q. 122. What did you mean by "depends on existing demands" in reference to the ability of the druggist to push a certain product?

A. Owing to the existing demand?

X Q. 123. Yes.

A. That applies to medicine in general. The existing demand. You take the South, the climatic condition applies on certain remedies that require a certain demand, existing demands in certain parts of the year. You take this past year, if it was not for chill tonic and quinine preparations in the South, there would be the biggest epidemic of malaria in the history of Texas that we would have had in years.

X Q. 124. What do you refer to as chill tonics?

A. Chill tonic is a tonic for breaking up chills, reducing fevers, quinine is a remedial agent.

X Q. 125. These so-called chill tonics, as a rule generally contain either chocolate or quinine sulphate, do they?

A. Just depends on whose composition it is. Our Quin-Coco we recommend for chills and put it up in a package as a treatment for chills. We put up a "Doctor Hobson" chocolate syrup of quinine for chills in twenty-five cent packages and fifty-cent packages, and it is sold all over my territory.

243 X Q 126. Do you class Quin-Coco as Coco-Quinine among the chill tonics?

A. Well, they can be used and are used, I presume, no doubt.

X Q. 127. I am only trying to get your idea of such tonics, as to the classification in which these various remedies belong.

A. Where you use the term "chill tonics," in a broad sense, you include everything indicated for chills or the preparations containing quinine in mild form. In chills, quinine is the first thought of any druggist, quinine is a sheet anchor for chills.

X Q. 128. Where did you travel with Mr. J. W. Wilkins?

A. I traveled with Mr. Wilkins out of Dallas, east Texas territory.

X Q. 129. Do you remember whether any Quin-Coco was sold while you were with Mr. Wilkins?

A. I do not remember.

X Q. 130. Do you remember whether ny druggist was solicited for an order for this preparation?

A. No doubt; the item appears in our catalogue and our catalogue is covered in entirety. No doubt it was.

X Q. 131. How long have you had a "Salesman Confidential"?

A. "Salesman Confidential," ever since this catalogue has been issued. Since I have been in the employ of the company. Since I have been using the "Confidential," Searle & Hereth, William R. Warner has issued a "Confidential" to their catalogue and now since the amalgamation of the two companies, it is in a combination form, book form.

Mr. Bradford: I wish you would wait until I finish my question before answering.

X Q. 132. Has the salesman creed on page 87 been in all the copies of the "Confidential" which you have had in your possession?

244 A. I do not remember.

X Q. 133. Has the matter on page 86, headed "What a salesman should know," been in all the copies of the "Confidential" which you have had?

A. That I do not know.

X Q. 134. You were authorized to teach Mr. Wilkins the policy of the house, were you?

A. Yes.

X Q. 135. By whom?

A. By the president of the company. He outlined his wishes and the way the line was to be demonstrated to the trade in general.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 136. State whether or not you were employed by the Searle & Hereth Company before that company formed a connection with the Pfeiffer Chemical Company?

A. Yes.

R. D. Q. 137. When the Searle & Hereth Company and the Pfeiffer Chemical Company formed a business connection, did you pass into the employ of the Pfeiffer Chemical Company?

A. Yes.

R. D. Q. 138. Do you remember about when this was?

A. That was possibly seven years ago, when the Pfeiffer Chemical Company took over the Searle & Hereth Company.

R. D. Q. 139. Can you state to your knowledge when those two companies came together?

A. I would say about in 1908; I do not know for sure.

R. D. Q. 140. Do you know what year Mr. G. A. Pfeiffer removed to Philadelphia?

A. In 1908.

R. D. Q. 141. While you were in the employ of the Searle & Hereth Company, and before it became connected with the Pfeiffer Chemical Company, you sold Quin-Coco as a part of the line?

A. I never sold Quin-Coco during the period of the time under the Searle & Hereth management.

R. D. Q. 142. How soon after you became connected with the Pfeiffer Chemical Company did you take up the sale of Quin-Coco in this line?

A. After the change and moving the Chicago laboratory to St. Louis and taking up sales of the combined lines.

R. D. Q. 143. You have previously stated on cross-examination that you knew of Quin-Coco fourteen years ago, what have you to say now?

A. In view of the dates which Mr. Bradford has permitted you to suggest to me, I will have to withdraw the fourteen years. It is since the amalgamation of the Searle & Hereth Company and the Pfeiffer Chemical Company.

R. D. Q. 144. Then, instead of fourteen years, then, what would you say now?

A. I say, since I have been connected with the Pfeiffer Chemical Company.

R. D. Q. 145. Did you as assistant sales manager ever teach any other new salesmen and travel with them?

Mr. Bradford: Mr. Bradford objects to the question as not redirect-examination.

A. Yes.

R. D. Q. 146. How many?

Same objection.

A. I traveled with all the salesmen out of St. Louis with the exception of two and also William R. Warner's salesmen out of Philadelphia, designated by Mr. G. A. Pfeiffer, and also salesmen on the Pacific Coast, beginning from Denver west.

R. D. Q. 147. I think you stated that you received your instructions as to the sales policy from the president of the com-
246 pany, state whether or not you instructed salesmen along those same lines as to the policy of the house?

A. I carried out the wishes of the president of the company the way he wanted the goods demonstrated to the retail trade, in an honorable way.

R. D. Q. 148. State whether or not in doing this you took up the policy as outlined in the "Confidential" and took it from that?

A. At the time when I went out in the general sales capacity, the president outlined his wishes in detail, how the goods were to be demonstrated and to call on each and every druggist in the territory and post the salesmen thoroughly covering our products.

R. D. Q. 149. State whether or not you gave them any instructions as to honesty in selling.

A. I certainly did. I instructed each and every salesman who took an order from the druggist to leave a copy of that individual order with the druggist for the order he solicited and not to misrepresent any articles sold.

R. D. Q. 150. State whether or not as assistant sales manager you had the right to take on and discharge salesmen?

Mr. Bradford: Objected to as not re-direct-examination.

A. That authority was not vested in me.

R. D. Q. 151. In case of a dereliction on the part of the salesman, what was it your duty to do?

Same objection.

A. My visit to the salesman was to assist him in increasing his business and to make a detailed report on my visit with the salesman.

R. D. Q. 152. In case it was called to your attention the salesman had been guilty of impropriety in his work for the company, state what it was your duty to do in such case?

Same objection.

247 A. To go over any matter of that character, and if it was objectionable, if his sales work was objectionable or any of his habits were objectionable, to touch on these points and endeavor to overcome them.

R. D. Q. 153. If you could not overcome his habits of that kind, what was it your duty to do?

A. I would give a report in detail to the house and action was taken from that end.

R. D. Q. 154. State whether or not while you were assistant sales manager you ever had any information or knowledge that any Warner salesman had either suggested to any retail druggist that he could dispense Quin-Coco for Coco-Quinine on a call on a prescription or call over the counter specified.

Mr. Bradford: Objected to as not re-direct examination and grossly improper.

A. No, sir.

R. D. Q. 155. State whether or not if you had any such information that a salesman had done so, would it have been contrary to your teaching and in violation of the selling policy of the house?

Mr. Bradford: Same objection.

A. Yes.

R. D. Q. 156. State whether or not you ever, as assistant sales manager, in any way, directly or indirectly, authorized or suggested to any of your salesmen that he should suggest to any retail druggist that he could dispense Quin-Coco on a physician's prescription or call over the counter, when Coco-Quinine was specifically called for?

Same objection.

A. No sir.

R. D. Q. 157. State whether or not you ever as assistant sales manager did directly or indirectly authorize any retail druggist to dispense Quin-Coco on prescription or on call over the counter when Coco-Quinine was specifically called for.

Same objection.

A. No sir.

R. D. Q. 158. Have you ever had personal knowledge of a retail druggist doing that thing?

Same objection.

A. No sir.

Mr. Bradford recross-examines without waiving any objection.

R. C. Q. 159. Is it not possible that the product you had in mind when you testified that you had been familiar with Quin-Coco for the past fourteen years, so far as that period is concerned prior to the amalgamation of the Searle & Hereth Company with the Pfeiffer Chemical Company, was Coco-Quinine?

Mr. Rawle: I follow Mr. Bradford's practice in objecting as not proper recross-examination.

Mr. Bradford: Mr. Bradford calls attention to Mr. Rawle's question on re-direct examination on this particular subject.

A. My personal acquaintance with Quin-Coco.

The Witness: Read the question again.

R. C. Q. 160. Is it not possible that the product you had in mind as the one with which you were familiar for fourteen years, so far as the period prior to the amalgamation of the Searle & Hereth Company with the Pfeiffer Company is concerned was Coco-Quinine instead of Quin-Coco?

A. Yes, I have been familiar with Coco-Quinine, as I say, but I have not come in direct competition with Coco-Quinine until the past seven years.

R. C. Q. 161. Who was president of the company to whom you have referred?

A. Mr. H. Pfeiffer for the past seven years.

249 R. C. Q. 162. When did he give you a Salesman Confidential?

A. Well, he gave me a Salesman Confidential when I went to work for him in connection with the other catalogues and samples.

R. C. Q. 163. In 1906?

A. At the time of the amalgamation of the companies.

R. C. Q. 164. And that Confidential you used in giving your instructions to salesmen?

A. Well, the instructions in my capacity of course covered every product in our line, general selling policy, and my instructions were to assist the salesmen in increasing the selling of our products in the manner to conform with the policy of the company.

R. C. Q. 165. In Mr. Henry Pfeiffer's original instructions to you did he mention Quin-Coco?

A. No sir, not that I remember, to sell our entire line. I sold the line with him.

R. C. Q. 166. Did he mention to you any other products which might be recommended to the druggist as replacers for the original products of other houses?

A. He demonstrated the general line of the products. I am a druggist personally and a great many of the products I was fairly familiar with, in the pharmaceutical line.

R. C. Q. 167. Mr. Henry Pfeiffer is not a pharmaceutical man, is he?

A. As far as I know he is. He seems very familiar with the line sufficiently so to post all the salesmen he travels with. Mr. H. Pfeiffer covered the line entirely for products we sell.

R. C. Q. 168. Would a salesman necessarily have to misrepresent if he stated to a druggist that Quin-Coco is an exact duplicate of Coco-Quinine, he would not be misrepresenting it, would he?

A. Not if he said it was a better preparation than Coco-Quinine.

R. C. Q. 169. Suppose he told a druggist it was an exact duplicate and no one could tell the difference, would that be misrepresenting?

250 A. That would be through the work of demonstrating the product.

R. C. Q. 170. Would that be misrepresentation?

A. It would, because Quin-Coco is a better preparation than Coco-Quinine.

R. C. Q. 171. How do you know it is a better preparation?
A. I know it from a pharmaceutical standpoint, the physical appearance, and from the comments of the trade, a good many of om I have sold Quin-Coco to and demonstrated.
R. C. Q. 172. Do you know an eminent pharmaceutical professor ned La Wall, of Philadelphia?
. No sir.
. C. Q. 173. Did you ever hear of him?
. No sir.
. C. Q. 174. He was called as an expert by your company in this and testifies that his analysis of these two products does not ose any difference whatever and they are identical, in other ds, identical so far as he could discover?
. That is only one man's opinion.
. C. Q. 175. Do you put your opinion against the analysis of essor La Wall?
I am entitled to my opinion.
C. Q. 176. Is that the kind of opinion that you expressed to trade?
That it is a better preparation, yes.
C. Q. 177. Better preparation than what?
Than any preparation of a similar character on the market, ng none.
C. Q. 178. Did you ever represent that it is a better preparation Coco-Quinine?
I have when occasion demands it, yes, and I considered it so.
C. Q. 179. Who told you that Quin-Coco was a better preparation than Cocoa-Quinine?

Rawle: That is objected to as not proper for recross-nation.

A. I regard it as a superior article from the standpoint of a druggist.
C. Q. 180. Will you explain in what particular it is a better ation?
t is a smoother preparation, it is not inclined to lump. We fresh from our laboratory, gets in the hands of the retailers uick dispatch, the product is not held on the hands of a s shelf for an indefinite period. The article comes in direct satisfactory condition, can be poured out in narrow neck presents a fine appearance pharmaceutically.
. Q. 181. This is the line of argument you put up to your hen the occasion demands it?
es.
Q. 182. Also that it is cheaper in price?
is better than any other priced article on the market.
. Q. 183. As a matter of fact you think that the ordinary or physician can tell the difference in the physical appearthe two products?

Rawle: Mr. Rawle objects to this line as not proper cross-ation.

A. In selling Quin-Coco, it is not my position to demonstrat other products being sold on the market. I demonstrate chiefly th article I am selling.

R. C. Q. 184. Is it not a fact that the demand for Coco-Quinin is the demand that has made the sale for you of Quin-Coco?

Same objection.

A. I cannot say.

Recross-examination closed.

Re-redirect-examination.

By Mr. Rawle:

Mr. Rawle examines without waving any objections.

R. R. D. Q. 185. When you went into your territory, state whether or not you found a demand for quinine as a drug for the cure o chills and fevers and so forth?

252 Mr. Bradford: Objected to as irrelevant and immaterial and too obvious to require an answer.

A. Yes.

R. R. D. Q. 186. State whether or not you found a demand for a sweet or tasteless quinine preparation in which the bitter taste of the quinine was masked?

A. Yes.

R. R. D. Q. 187. State whether or not at that time you found such demand existing without regard to the various preparations on the market for filling the demand?

A. Yes.

HOWARD HENRY RICHARDS.

Sworn to before me the 7th day of December, 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court,
Eastn. Div.-Eastn. Jdcl. Dist. of Mo.

HENRY JOSEPH GONZALES, a witness, called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

A. Henry Joseph Gonzales; age, 32; residence, New Orleans traveling salesman for William R. Warner & Company.

Q. 2. Give a brief statement of what you have done in various capacities since you became connected with the drug business?

A. Well, I worked as drug clerk for a while for Coree & Sauvinet, in New Orleans. I worked for them approximately twelve years. While I was with them I was a prescription clerk. I left 253 them, I think, in 1905, and went to work for Parke, Davis & Company as a traveling salesman selling pharmaceuticals. I worked for them until about fo-r years,—I guess four or five years ago, and then I worked for William R. Warner & Company, where I have been ever since.

Q. 3. What is and has been your territory for William R. Warner & Company?

A. South Louisiana, Central Mississippi and Southern Alabama.

Q. 4. How long have you had that territory?

A. Just about three months now.

Q. 5. Previous to three months ago what was your territory?

A. South Louisiana, Central Mississippi and Southern Arkansas.

Q. 6. What large cities have you in those two territories?

A. Practically no large cities in Mississippi, the largest is Natchez, Vicksburg, Jackson, that is about all of the large cities. In Louisiana, Monroe, La. No large cities in Southern Arkansas. The town of Camden, a town of five thousand population is the largest one I make.

Q. 7. In your present territory approximately how many druggists are there?

A. Approximately three hundred.

Q. 8. In your former territory how many druggists were there?

A. About the same.

Q. 9. How often each year do you visit each of your druggists in the average?

A. Average four times a year.

Q. 10. To what extent do you visit doctors?

A. Well, about the same thing, those that I do visit.

Q. 11. About what proportion of the doctors in your territory do you visit?

A. About one-sixth.

54 Q. 12. Are you a registered pharmacist?

A. I am.

Q. 13. How long have you been a registered pharmacist?

A. Since 1904; that is eleven years.

Q. 14. When you were first taken on as a Warner sales who instructed you as to your duties as a salesman?

A. Mr. Henry Ritavik.

Q. 15. State what instructions he gave you as to the honesty part of your duties?

A. We have a booklet and our "Confidential" that lays particular stress on that as to the honesty, and in handing that to me he told me to be sure and read that very carefully, and gave me to understand what the policy of the house is. It was honesty first, last and all the time.

Q. 16. State how far you have endeavored to carry out those instructions?

A. Right to the letter.

Q. 17. Have you always had a copy of the "Confidential"?
A. Always.
Q. 18. State whether or not you are familiar with the teachings the two last pages of the "Confidential"?
A. I would not say particularly. I have read it and understa it pretty well, yes.
Q. 19. In soliciting sales from a druggist, state whether or n you take up your entire line with him?
A. I do.
Q. 20. State whether or not you put special stress on any one o few items therein?
A. No, sir, I do not.
Q. 21. Have you any usual order in which you take up t different classes of products that you sell?
A. I have, yes, sir.
Q. 22. Give the order.
A. Well, we have a large catalog, which is illustrate
255 and we take it up as they come. For instance, "Non-secret and then perfumes and then pharmaceuticals and then pate medicines; they come in rotation.
Q. 23. From your experience as a retail druggist and a drug sal man, state whether or not it is in the power of a retail druggi if he chose, to push the sale of a given preparation actively a create a market for it?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Repeat that question.

(Question read.)

A. He could.
Q. 24. In what ways?
A. By having confidence in the preparation, knowing just exact what he is giving and he can recommend what he is giving, and as rule a man behind the counter can sell anything he wants. That better illustrated by the many "Non-secret" houses that are in exi ence today.
Q. 25. What houses; what are the names of the "Non-secret houses?

Mr. Bradford: Objected to as incompetent, irrelevant and i material.

A. Hobson's and Meyer, Heyworth, Rexall, Santox, and so o These lines are practically made up by the druggist.
Q. 26. In the lines of these "Non-secret" houses you have me tioned, state whether or not those houses depend upon the druggi to push their lines and create their market for them?

Mr. Bradford: Same objection.

A. Almost absolutely.

Q. 27. Will you state whether the lines of these "Non-secret" houses are very largely sold by retail druggists in the country?

Mr. Bradford: Same objection.

256 A. They are.

Q. 28. How largely?

Mr. Bradford: Same objection.

A. To a very great extent, how much I would not be able to say. They do an enormous business.

Q. 29. State whether or not you find a market in your territory for Quin-Coco?

A. There is.

Q. 30. How well does it sell?

A. Only fair.

Q. 31. State whether or not you have opportunity to become familiar with the stock of a retail druggist whom you solicit?

A. I do.

Q. 32. State whether or not a well-stocked drug store carries preparations which are the product of several houses, but which are similar and medicinally interchangeable?

Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

A. They do.

Q. 33. To what extent do they carry such lines of different makes which are interchangeable?

Mr. Bradford: Same objection.

A. They certainly carry a good many of them, I guess, or most of them in fact.

Q. 34. Are these drugs or preparations having the same pharmaceutical effect and which the druggist could use indifferently or interchangeably if the particular maker's name were not specified?

Mr. Bradford: Same objection.

A. If he so minded, yes.

257 Q. 35. Can you give me any approximate figures as to how many different drugs or preparations there would be in a well-stocked drug store as to its stock of such preparations but of several different makers?

Mr. Bradford: Same objection.

A. No, sir, I don't think so; I don't think I can tell you.

Q. 36. If a retail druggist having a call for a preparation of a specified make should dispense the call with a preparation of a different make than the one specified, state whether or not you would consider that honest business?

A. No, sir, I would not; that would be dishonest.

Q. 37. In such a case state whether or not you would consider that druggist an honest man?

A. No, sir, I would not.

Q. 38. If a drug salesman should suggest to a druggist, a retail druggist, that he could supply the preparation of that salesman when the preparation of another house was called for, state whether or not you would consider such act on the part of the salesman honest?

A. That would be a dishonest act.

Q. 39. State whether or not in such case you would consider the salesman an honest man?

A. I would not consider him as such.

Q. 40. State whether or not you as a salesman have ever made such a suggestion to a retail druggist?

A. I have not.

Q. 41. State whether or not you ever suggested to a retail druggist that he could buy Quin-Coco, S. & H., and sell it on prescription or over the counter when Coco-Quinine, Lilly, was specifically written or called for over the counter?

A. I did not.

Q. 42. If a retail druggist wants to sell a preparation of a certain house when the preparation of another house is specifically called for, state whether or not he has opportunity to do so?

A. He has.

258 Q. 43. More or less frequently?

A. More or less.

Q. 44. State whether or not if he did that he would be doing it knowingly?

A. He would.

Q. 45. State whether or not the line that you carry includes Quin-Coco in two-ounce and four-ounce bottles?

A. It does in two-ounce bottles. Four-ounce bottles, I don't know that we have it. I never have sold it, I don't know.

Q. 46. State whether or not you have sold any Quin-Coco to your trade in two-ounce bottles?

A. Quite a bit of it, yes, sir.

Q. 47. When a druggist buys it in two-ounce bottles how does he sell it, in the original package or otherwise?

A. In the original package.

Q. 48. What label is on the two-ounce bottle of Quin-Coco?

A. "Quin-Coco, S & H," and then the directions.

Q. 49. State whether or not the druggist sells it with that same label on it?

A. Yes, sir.

Q. 50. Do you know a druggist named Edmund F. Barnes; if so, where does he do business?

A. I do; at Macomb City, Mississippi.

Q. 51. Is he in your territory?

A. Yes, sir.

Q. 52. Have you ever solicited his business?

A. Yes, sir.

Q. 53. How big a place is Macomb City?
A. I judge about four or five thousand.
Q. 54. When did you first visit Barnes?
A. Why, when I first went with the house, some time the first month, I worked up the Illinois Central; that was in January, 1914, I presume.

Q. 55. In selling Quin-Coco what is your selling talk?
259 A. Why, I first demonstrate it to a customer and tell him the market there is for it, the amount that he can sell over the counter by recommending it to his trade, and giving them the merits of the preparation; also, if there is a doctor connected with the druggist, I leave a sample with him or sell him a sample, tell him just exactly what the product will do, what it has done.
Q. 56. What do you tell him it will do?
A. For a case of chills, fevers, malaria, it is so nice to give to children, palatable and sweet, and when they come in and ask for chocolate quinine to use this Quin-Coco.
Q. 57. For what other calls over the counter could you sell it?
A. He could sell it, as I said, by recommending it as a palatable preparation of quinine for fever and cold, malaria.
Q. 58. Under what names are these palatable preparations called?
A. Down in Louisiana they call it sweet quinine or chocolate quinine.
Q. 59. Any other names?
A. They call it Quin-Coco, that is some of them do and some of them call it Coco-Quinine.
Q. 60. Any others?
A. No, sir, that is about the only names I know of.
Q. 61. Edwin F. Barnes, called on behalf of the plaintiff in this case, testified as follows:

"Q. 10. Have you ever been solicited to buy Quin-Coco, and if so, by whom and what were the reasons advanced why you should purchase it by the party offering it?
"A. Quin-Coco has been offered us by Mr. Gonzales the salesman and representative of Warner & Co. He offered it to be used as a substitute for Coco-Quinine and said it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quine without any one being the wiser."

260 State whether or not you ever said this to Edmund F. Barnes?
A. I absolutely deny that.
Q. 62. State whether or not this is contrary to your selling methods?
A. Absolutely.
Q. 63. State whether or not you would consider it honest to say those things to a druggist?
A. It would not.
Q. 64. Barnes further testified as follows:

"X Q. 15. Please give the exact words of Gonzales when he offered you Quin-Coco as you have testified?

"A. He said 'How is your stock of Coco-Quinine, why don't you buy our Quin-Coco. It is the same formula and the only chocolate quinine on the market that can be *disposed* for Coco-Quinine without any one being the wiser. Besides it is cheaper.'"

State whether or not you said that to Barnes?

A. No, sir, I did not, absolutely not.

Q. 65. State whether or not that kind of sales talk is according to your sales methods?

A. It is not, sir.

Q. 66. Barnes testified as follows:

"X Q. 21. Did Gonzales suggest that sort of practice to you on Quin-Coco?

"A. He offered Quin-Coco to be used as Coco-Quinine.

"X Q. 22. Meaning that you should dishonestly use Quin-Coco for Coco-Quinine, and pass it off on your customers without telling them?

"A. He suggested that I buy Quin-Coco and dispense it for Coco-Quinine, but there was nothing said of dishonesty.

"X Q. 23. Then you didn't think that he was suggesting any dishonest course to you?

261 "A. He suggested I use it as Coco-Quinine but there was nothing said of dishonesty.

"X Q. 24. Did you understand him as suggesting to you that you should dishonestly dispense it as Coco-Quinine?

"A. I did."

State whether or not you said those things to Barnes?

A. I did not, no, sir.

Q. 67. State whether or not such statements to Barnes would have been in accordance with your sales policy?

A. Repeat that.

(Question read.)

A. It would not.

Q. 68. And practice?

A. No, sir.

Q. 69. State whether or not, in your opinion, such statements to Barnes would have been honest on your part?

A. They would not.

Q. 70. Barnes testified as follows:

"X Q. 36. Give the exact words in which he (Gonzales) offered Quin-Coco to be dispensed on prescriptions?

"A. He asked 'How is your stock of Coco-Quinine,' and asked 'Why don't you buy Quin-Coco, it is the only chocolate quinine on the market that can be dispensed for Coco-Quinine without any one being the wiser."

State whether or not you said that to Barnes?

A. I positively deny that, absolutely so.

Q. 71. Barnes testified as follows:

"X Q. 40. What did he (Gonzales) say?

"A. He said it was the only preparation of chocolate quin-
262 ine on the market that could be dispensed for Coco-Quinine."

State whether or not you said this to Barnes?

A. I did not; positively not.

Q. 72. What did you say to Barnes?

A. Why, there was really at no time any conversation in regard to quinine, particularly Quin-Coco or chocolate quinine or any preparation of that kind which came up as I was selling my regular line of goods and Quin-Coco I was asked in regard to it and I told him he could make a pretty good sale of that product and I went on to explain to him the methods by which it could be sold over the counter particularly.

Q. 73. What did you say in explaining the methods?

A. I told him the demand was very great for this class of preparations, that he could do very good with it; in fact, I would put it up in two-ounce bottles for selling it over the counter. He knew it was good for children. I never had sold him any, didn't sell him any at that time. In fact, I only remember selling Mr. Barnes one bill. He appeared to be very busy and didn't give me much time.

Q. 74. Did that bill include Quin-Coco?

A. No, sir.

Q. 75. State whether or not you remember this particular interview with Barnes?

A. I do not.

Q. 76. Do you remember that you called on him?

A. I do.

Q. 77. And went over your line?

A. Yes, sir.

Q. 78. You remember what you said in going over your line about Quin-Coco?

A. There was no particular stress laid on Quin-Coco.

Q. 79. Do you know Sol C. Ray?

A. I do.

Q. 80. What is his business, and where is it?

263 A. He is a druggist for the Price Drug Company, Brookhaven, Mississippi.

Q. 81. How big a place?

A. About five thousand, I guess.

Q. 82. Sol. C. Ray, when called as a witness on behalf of plaintiff, testified as follows:

"Q. 8. Who offered Quin-Coco to you, and on behalf of what manufacturing house?

"A. Mr. Howard Smith was the first and then Mr. Gonzales.

"Q. 10. Can you remember what was said to you by either of these gentlemen relative to Quin-Coco and Coco-Quinine? If so, will you please state, specifying which salesman made the statements you refer to?

"A. We were offered the Quin-Coco as an article that we could dispense or sell at a bigger profit than we could the Coco-Quinine by both Mr. Smith and Mr. Gonzales.

"Q. 11. Was it your understanding of their representations that you could use Quin-Coco to supply the demand for Coco-Quinine?

"A. Yes, sir; that was the understanding."

State whether or not you ever gave such understanding to Ray?

A. I did not, sir.

Q. 83. State whether or not, if you had done so, it would have been contrary to your regular selling methods?

A. It would.

Q. 84. State whether or not you would have considered it would have been dishonest in you to have done so?

A. It would. If you will, allow me to say there, that that store has been handling that preparation long before I came there. I didn't introduce it. In fact, I don't have to introduce it at all
264 in my territory, and there was no question at no time between Mr. Ray and myself in regard to it.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 85. How many times did Mr. Ritayik visit your territory and make trips with you?

A. Oh, I judge probably three times a year, probably twice a year. I will say, I think twice last year and probably three times this year.

X Q. 86. When was this last trip with you?

A. This was the trip in August.

X Q. 87. What territory did you cover *in* that trip?

A. We only worked one day together, that was when he came to see me in regard to this change of territory, Arkansas to Alabama.

X Q. 88. Where did you work that one day?

A. We worked in Vicksburg and we made a few towns adjoining Vicksburg on the Y. & M. V.,—Yazoo and Mississippi Valley.

X Q. 89. How long was he with you on this first visit?

A. Three days.

X Q. 90. That is when you first went to work for him?

A. Yes, when I first went to work,—about three days.

X Q. 91. What territory did you make during that visit?

A. On the first visit we worked in Brookhaven, on the Illinois Central road.

X Q. 92. What towns?

A. All of them from Ozyka to Jackson.

X Q. 93. Calling on retail druggists?

A. Yes, sir.

X Q. 94. What class of physicians do you visit?

A. Dispensing doctors.

X Q. 95. In selling your goods do you mean that you have no specialties that you prefer or push over others?

265 A. I have such a large line that we haven't time to waste on any particular item.

X Q. 96. What territory did you cover while you were with Parke, Davis & Company?

A. Southern Louisiana.

X Q. 97. What years did you work there as a salesman?

A. I worked that for a year first and left them in 1908 or '09, I think. I am not positive about that. Then I was away from that for about eight months and went back and stayed with them three years. I would not be absolutely positive about that time. It is approximately that time.

X Q. 98. In speaking to Mr. Barnes in reference to the large market for such a preparation, what preparation did you have in mind?

A. A large market for any particular preparation.

X Q. 99. Yes. I think you told him there was a large demand for such a product as Quin-Coco, and you thought he could sell lots of it?

A. No, there wasn't any great demand. He could build up a good business on Quin-Coco, I told him by putting it up in two-ounce bottles or buying it in original two-ounce bottles, and I recommended it, but there is not such a big demand. I told him he could create a big demand.

X Q. 100. Was or was there not a large demand for Coco-Quinine in that territory?

A. I cannot say.

X Q. 101. What preparation was Mr. Barnes using in his drug store at that time?

A. I never have sold him any, I don't know. I haven't sold him any Quin-Coco.

X Q. 102. I mean, what quinine preparation in liquid form, containing chocolate?

A. I don't know, sir.

X Q. 103. Didn't you go behind his prescription counter?

266 A. I did.

X Q. 104. And inspect his stock?

A. Not closely.

X Q. 105. Didn't you see a bottle of Coco-Quinine?

A. I would not say that I did.

X Q. 106. Would you be willing to say that you did not?

A. No, I don't know.

X Q. 107. Did you ask him as to the demand for Coco-Quinine in his store?

A. No, sir.

X Q. 108. Did you ask him as to what he was selling of that product?

A. No, sir.

X Q. 109. Didn't you ask him why he need pay the Lilly price when you could sell him Quin-Coco at a much lower price?

A. I did not.

X Q. 110. You deny in toto everything that Mr. Barnes testified to on this subject?

A. Absolutely so, yes, sir.

X Q. 111. You charge Mr. Barnes with lying in this testimony that he has given?

A. Yes, sir.

X Q. 112. What object do you suppose Mr. Barnes might have had in so doing?

A. I don't know of any object that he had. I couldn't possibly tell. There was never any conversation of that kind between him and I, positively not. I can remember every occasion I was in his store. There was never any question of that kind. I solicited him on Quin-Coco as I would on Salysilic or Sloan's Liniment, or anything of that kind. As I say, I never sold him at that time and never sold him since.

X Q. 113. Have you continued to call on him?

A. Yes, sir.

X Q. 114. You have known him how long?

A. Just since I have been in the territory; about two years approximately.

267 X Q. 115. He was in your territory when you were traveling for Parke-Davis?

A. No, sir.

X Q. 116. Do you know Mr. Barnes' reputation for honesty and veracity in his community?

A. I do not.

X Q. 117. Did you ever hear anything said derogatory to his character?

A. I have not.

X Q. 118. Did you ever say to any druggist in your territory that Quin-Coco could be dispensed when Coco-Quinine was called for?

A. I did not.

X Q. 119. Did you ever represent to any druggist in your territory that any other product in your line could be dispensed for a product of a competing house when that product was called for?

A. I did not.

X Q. 120. Did you ever meet Coco-Quinine in your travels as a salesman for Parke-Davis & Company?

A. A few times.

X Q. 121. Pretty generally in the stores in that territory, was it not, at that time?

A. Why, I never made any particular stress or watched Coco-Quinine particularly.

X Q. 122. Did you ever hear of a preparation of quinine sulphate in liquid form containing chocolate before you heard of Coco-Quinine?

A. I can't say that I have.

X Q. 123. Isn't it a fact that Coco-Quinine had a large market and there was a large demand for this product in your territory?

A. I don't know, sir.

X Q. 124. In what form do you sell the larger part of your Quin-Coco, I mean, in what sized packages?

A. In bulk, in gallons.

X Q. 125. How do you find the trade in Quin-Coco in your territory?

268 A. Why, there is not a very great demand for it there. I sell some of it. There is quite a few products I sell more of than I do Quin-Coco.

Cross-examination closed.

Deposition closed.

HENRY J. GONZALES.

Sworn to before me the 7th day of December, A. D. 1915.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the United States, District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

By agreement of counsel the further taking of testimony is adjourned to Wednesday, December 8th, 1915, at 9.30 o'clock a. m.

Wednesday, December 8th, 1915—9.30 a. m.

Met pursuant to adjournment.

CLINTON GORDON MCCARTHY, a witness called by and on behalf of the defendant, having been first duly sworn, deposes and says, in answer to interrogatories propounded to him by counsel:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

A. Clinton Gordon McCarthy; age, 32; residence, Mobile, Alabama; no occupation at present.

269 Q. 2. What has been your connecton with the drug business from the beginning; state it consecutively?

A. I began with Sutton Brothers in Mobile in 1907 as a clerk; they were retail druggists, and I worked there until 1911. It was a medium sized drug store. I was prescription clerk and buyer. I then went in the employ of William R. Warner & Company as traveling salesman. I remained in their employ until November the 11th, 1915. I then partly resigned and figuring on going into the drug business at this time.

Q. 3. What was your territory when you were in the employ of the defendant?

A. East Tennessee, including Nashville and Knoxville.

Q. 4. What was your previous territory?

A. South Alabama, including Montgomery and Selma.

Q. 5. During what years did you cover the South Alabama ter tory?

A. From 1911 until August, 1915.

Q. 6. Did you sell the entire Warner line always?

A. Yes, sir.

Q. 7. About how many items?

A. Something over five or six thousand items.

Q. 8. How many druggists in your first territory, approximately

A. I couldn't state.

Q. 9. How often did you visit them?

A. About every ninety days.

Q. 10. How often did you visit doctors?

A. Well, some I visited ninety days, some six months.

Q. 11. What proportion of the doctors did you solicit in your te ritory?

A. About 75 per cent., that is dispensing doctors.

Q. 12. What are dispensing doctors?

A. A doctor who dispenses his own medicine.

Q. 13. When you first came into the employ of Warner &
270 Company did you have any instructions as to the policy o the house on sales methods, and from whom?

A. From Mr. Ritavik, and my instructions were that we were to sell all goods on an honest basis, straightforward and honest basis, and no transactions were to be made that in our estimation the house would not like.

Q. 14. Did he give you a copy of the "Salesman's Confidential?"

A. He did; yes, sir.

Q. 15. How far did he instruct you on the selling rules contained therein, and particularly pages 86 and 87, which I hand you?

A. He instructed me in all of these, and especially as to the honest dealings with the customers.

Q. 16. What stress was laid upon the rule in that "Confidential" as to competitors' goods?

A. That we were to avoid mentioning all competitors' goods, and that we were out to sell William R. Warner's or Pfeiffer's Chemical Company's goods, or their line.

Q. 17. State whether or not in your work for the house as sales- man you obeyed those instructions?

A. I did.

Q. 18. In going the rounds of the retail druggists have you access to their stock of goods behind the counter usually?

A. Yes, sir.

Q. 19. Are you able to familiarize yourself with the stock which they carry?

A. Yes, sir.

Q. 20. Will you state whether or not a fairly well stocked drug store carries preparations of a similar medicinal kind, but made by different drug houses?

Mr. Bradford: Objected to as immaterial, irrelevant and incom- petent.

A. Yes, sir; they do.

Q. 21. Can you say whether or not these different preparations made by different houses are pharmaceutically interchangeable and one could be used for the other with the same medicinal effect?

271

Mr. Bradford: Same objection.

A. Some are.

Q. 22. If a prescription contains one of these interchangeable preparations, but does not specify the name of the particular maker, state what the druggist can do in filling such prescription?

Mr. Bradford: Same objection.

A. I don't hardly understand that question.

Q. 23. If the druggist carries on his shelves that specified preparation made by several different makers, which makers can he use?

Mr. Bradford: Same objection.

A. The one specified.

Q. 24. My question was as to a prescription which specified the preparation, but did not specify the maker, in that case what can a druggist do?

Mr. Bradford: Same objection.

A. I think he can use his discretion as to what to dispense.

Q. 25. If the prescription specifies the preparation and specifies the name of the maker, what is the druggist's duty?

Mr. Bradford: Same objection.

A. To dispense the one called for.

Q. 26. If, without telling the doctor, the druggist on a prescription specifying the name of the maker should dispense another make of that drug, would that be honest in the drug business?

A. No, sir.

Q. 27. Would you consider it honest?

A. No, sir.

Q. 28. If there is a call over the counter for a given drug and the druggist passes off on a customer some other drug, state whether or not that is considered honest in the drug business?

272

A. No, sir.

Q. 29. Do you consider it honest?

A. No.

Q. 30. If a drug salesman should suggest to a druggist that he could dispense Quin-Coco when the physician's prescription or a call over the counter specifically called for Coco-Quinine, state whether or not that would be honest in the salesman?

A. No, sir.

Q. 31. If a drug salesman should suggest to a druggist that he could dispense Quin-Coco when a physician's prescription or a call

over the counter specifically called for Coco-Quinine, state whether or not that would be honest in the salesman?

A. No, sir.

Q. 32. Do you know Oscar J. McMillan, and if so, where is his drug store?

A. Yes, sir, I know him; his drug store is Pritchard, a suburb of Mobile.

Q. 33. For how long have you called on McMillan at his drug store?

A. Well, I saw McMillan in his present location one time.

Q. 34. What about some other location?

A. At one time he was at Whistler, Alabama, with Dr. Gay.

Q. 35. State how often you called on him for business at either of those places, approximately?

A. About six months, every six months.

Q. 36. How many calls including both places?

A. I believe three times.

Q. 37. How considerable were these two drug stores in amount of business and stock?

A. I considered they carried about two to three thousand dollars stock.

273 Q. 38. You said that you had solicited McMillan's trade three times?

A. About three times.

Q. 39. When were these three times?

A. I don't remember the date; the last time, I think, was in June or July, 1915; I don't remember the exact date.

Q. 40. Do you remember a call at the end of February, 1915, after McMillan went into business for himself?

A. No, sir; I don't remember.

Q. 41. Oscar J. McMillan, when called as a witness for plaintiff, testified as follows:

"Q. 4. Did you ever hear of a preparation called Quin-Coco, and if so, when and under what circumstances?

A. I heard of it through the William R. Warner & Company's salesman, Mr. McCarthy.

Q. 5. What did Mr. McCarthy say to you on this subject?

A. He asked me if I didn't want some of their preparation, Quin-Coco. I told him, 'No, we couldn't substitute.' He told me it was all right, that it was the same thing as Coco-Quinine, that you couldn't tell the difference. And that it was the original preparation, brought out by a doctor who didn't have the money to back it up with advertising. And that in the meantime Lilly had put Coco-Quinine on the market, and that then Warner brought out this Quin-Coco and put it on the market. He told me it would not be substituting at all, that you couldn't tell the difference between it and Coco-Quinine. That is about all.

Q. 6. In what way did he tell you that it could be used or dispensed, that is, in response to what character of calls on demands?

A. As Coco-Quinine.

Q. 7. What kinds of calls for Coco-Quinine?
274 A. Either prescriptions or calls over the counter."

State whether or not that testimony of McMillan, which I have read to you, or any part of it, is untrue?

A. The only true part of that question is that I asked him did he want some Quin-Coco.

Q. 42. What have you to say as to the rest of his answers?

A. It is untrue.

Q. 43. State whether or not that talk with a druggist would be in accordance with the policy of your house and of your instructions from the house?

A. This as he put it here would not be in accordance with the instructions of the house.

Q. 44. In selling Quin-Coco to a druggist what is your sales talk?

A. "Mr. Druggist, how is your chocolate quinine today?" I then show him my sample. "I have a nice smooth preparation here containing two grains of quinine to a teaspoonful, put up in light chocolate syrup, easy to handle, easy to dispense in a small bottle; will not sour or lump."

Q. 45. What about mentioning in such talk any competitor's name or product?

A. Never mention a competitor's name or preparation unless first brought up by a druggist.

Q. 46. McMillan further testified:

"X Q. 24. Do you say that he meant to make you a dishonest suggestion as to how you could sell Quin-Coco?

A. I would consider it dishonest if I sold it like he told me."

State whether or not you made McMillan any dishonest suggestion as to how he should sell Quin-Coco if he bought it?

A. I did not.

Q. 47. McMillan further testified in answer to X Q. 32:

275 "No, sir; we had quite an argument as to its merits when compared with Coco-Quinine."

State whether or not such argument took place?

A. It did, and he wanted to know what kind of preparation we had. I told him I considered we had the best preparation on the market of its kind and we sold it on a straight guarantee and if it did not come up to what he thought it should, why, to return it and get credit for it.

Q. 48. McMillan testified further:

"X Q. 33. What did he say of its merits?

A. That it was the same as Coco-Quinine and could be dispensed without the doctor or patient detecting it."

What have you to say as to this statement?

A. It is untrue.

Q. 49. Do you know John B. Reid, and if so, where is his drug store?

A. Yes, I know him; he is in Union Springs, Alabama.

Q. 50. How big a place?

A. About four or five thousand, I suppose.

Q. 51. State whether or not you called on Reid about three years ago last June?

A. I don't remember the date. I called on him three years ago, I don't remember, in June or July.

Q. 52. Did you offer him your entire line?

A. I did.

Q. 53. Did you offer him Quin-Coco?

A. Yes, sir.

Q. 54. John B. Reid, when called as a witness for the plaintiff, testified as follows:

"Q. 12. Do you know anything about the product called Quin-Coco, and if you do, what can you tell us about it?

276 A. I do; it is a preparation manufactured by Searle & Hereth Company. My first knowledge of it, it was represented to me to be the same as Coco-Quinine by Mr. McCarthy, a Warner salesman; that was about three years ago.

Q. 13. As near as you can recall what did Mr. McCarthy say to you upon this subject?

A. To the best of my memory, it was about something like this: He asked me if I used very much Coco-Quinine. I told him that I used a good deal. He then said that he could save me some money on the product. He showed me the sample of Quin-Coco and made me a price of $3.50 a gallon, and I bought one gallon.

Q. 14. Did he tell you how you could sell it or dispense it, and if so, what did he say?

A. He simply sold it to me as a product to take the place of Coco-Quinine; said that it contained the same amount of quinine, and would take the place of Coco-Quinine.

Q. 15. In what way would it take the place of Coco-Quinine?

A. It would have the same effect, that is, Quin-Coco would have the same effect as Coco-Quinine.

Q. 16. You already testified you never had any demand for Quin-Coco; how did you expect or he expect for you to dispense Quin-Coco if you had no demand for it?

A. I gathered from his conversation at the time that I bought it, that I bought Quin-Coco, that I would have to sell it as a substitute for Coco-Quinine.

Q. 17. Do you mean, to supply the demand for Coco-Quinine?

A. I do."

What have you to say as to the truthfulness or untruthfulness of this statement? I hand you the printed plaintiff's record and indicate the questions and answers which I have just dictated to the stenographer in this question.

277 A. At the time I called on Mr. Reid and showed him this Quin-Coco I never mentioned Coco-Quinine at all. He w

miliar with the Quin-Coco preparation before and I never made ny suggestions whatever as to how he was to dispense of it or sell it.

Q. 55. Had he bought Quin-Coco before from you?

A. Not from me; no, sir.

Q. 56. Do you know whether he had previously carried Quin-Coco n his shelves?

A. I don't remember, but I think he said he had. Any way he ad other preparations similar and some he said had not given tisfaction.

Q. 57. Did he name such other preparations?

A. I don't remember him naming them.

Q. 58. Do you know a druggist named John M. Moseley, and here is his drug store?

A. Yes, I know him; he is located at Geneva, Alabama.

Q. 59. How big a place?

A. I suppose about two thousand.

Q. 60. Did you ever call on him for his trade?

A. Yes, sir.

Q. 61. John M. Moseley, when called as a witness on behalf of ne plaintiff, testified as follows:

"Q. 15. Please state as near as you can recollect what Mr. Mc-Carthy said to you when he offered to sell you Quin-Coco?

A. Well, he was in my prescription room looking over my wants nd asked me if I needed some Coco-Quinine, and I don't know ust what reply I made to that, but the questions came up that is people did not make Coco-Quinine and he told me his was a imilar and just as good a preparation.

Q. 16. What else did he say about it, if anything?

A. He said his sales on that preparation were larger than Coco-Quinine. He told me the other people were using it; that there vas a saving in the price, but I don't remember the exact amount.

Q. 17. What did he tell you that the other people were 78 using it for, and what did he tell you that you could use it for?

A. For Coco-Quinine.

Q. 18. What do you mean by that it could be used 'for Coco-Quinine'?

A. I gave my testimony that it was used on physician's prescriptions and dispensed on calls, that is the only way I could use it. There is no other purpose for it."

What have you to say as to the truthfulness or untruthfulness of this estimony of Moseley? I hand you the plaintiff's printed record, and all your attention to the questions and answers which I have just dictated to the stenographer.

A. On this call on Mr. Moseley I asked him when we were in the prescription room, I asked him about his chocolate quinine. He had on the shelf at the time a gallon of H. K. Wampole Chocolate Quinine preparation, and Mr. Moseley said that his experience had not been very good with those preparations, and that he would prefer Lilly's, and of course he never bought any Quin-Coco from me.

Q. 62. I call your attention to question 17 put to Moseley and his answer. What have you to say to his testimony in answer to that question?

A. I made no suggestions whatever as to what he should use it for.

Q. 63. State whether or not you ever personally saw a retail druggist dispense Warner's Quin-Coco—I mean Searle & Hereth's Quin-Coco, when Lilly's Coco-Quinine was specifically called for?

A. No, sir.

Q. 64. You are a registered pharmacist, I understand?

A. Yes, sir.

Q. 65. As such and as a drug salesman state whether or not a retail druggist can by special effort create a market or demand for a given preparation?

279 Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

A. Yes.

Q. 66. By what efforts can be accomplish this?

Mr. Bradford: Same objection.

A. By recommending them to his customers.

Q. 67. What customers?

Mr. Bradford: Same objection.

A. His friends or his patrons that call on him and ask him to recommend any preparation for sickness or for babies, different kinds of diseases, and by advertising them.

Q. 68. How about his doctors who send him their prescriptions?

Mr. Bradford: Same objection, and as leading.

A. By recommending them to the doctors.

Q. 69. On what calls can a druggist sell Quin-Coco?

A. On calls for Chocolate Syrup, Chocolate Quinine Syrup, Sweet Syrup of Quinine, on calls for something for babies' colds, fever, malaria.

Q. 70. At that interview with Mr. Moseley how much time did you spend with him?

A. I suppose about forty-five minutes.

Q. 71. State whether or not in this forty-five minutes you took up your entire line and went over it with him?

A. Yes, sir; I sold him an order of the entire line.

Q. 72. How large an order, do you remember?

A. Well, I don't remember exactly, somewhere between fifty and seventy-five dollars, I think.

Q. 73. Do you remember what the order consisted of that he gave you?

A. I don't remember all. There was pharmaceuticals, "non-secrets," Pfeiffer's goods and also some patents.

Direct-examination closed.

280 Cross-examination.

By Mr. Bradford:

X Q. 74. Did you receive any instructions as to the selling policy of the house or as to its products at any time from any other person than Mr. Hitavik?

A. No, sir; only by letter.

X Q. 75. You mean by circular letter from the house?

A. By circular letter from the house.

X Q. 76. Had you ever visited the laboratories at St. Louis?

A. Yes, sir.

X Q. 77. While there did you ever have any conversation with any person with reference to products?

A. I had it with the head of the department.

X Q. 78. Mr. Merner has testified that it is part of the training of the salesman to have them when they visit laboratories to visit each department of the plant. You followed this general plan, did you?

A. I did; yes, sir.

X Q. 79. You remember the heads of the several departments?

A. No, sir; I do not.

X Q. 80. When was this?

A. It is about a year or nine months ago as well as I remember.

X Q. 81. Only the one time?

A. One time.

X Q. 82. You remember any conversation with Mr. Garvin in the manufacturing department?

A. Nothing special, only showing me how the different preparation was kept, the crude drugs and everything, and the sanitary conditions and that everything was tried to be put out in the very best shape and they tried to keep everything clean.

X Q. 83. Didn't he show you how similar some of your products were to the products of other houses?

A. He did not.

X Q. 84. Didn't he show you how similar Quin-Coco was to Coco-Quinine?

281 A. No, sir.

X Q. 85. You remember mentioning or having Mr. Garvin mention to you the subject of Quin-Coco or Coco-Quinine?

A. The only thing he mentioned of Quin-Coco was, we passed—I don't know what you call the place they make it—he showed me where they make Quin-Coco; that is all he said. I was familiar with Quin-Coco.

X Q. 86. Did you see any of the original bottles or packages of Coco-Quinine at that time?

A. No.

X Q. 87. You left the employ of William R. Warner & Company, November 11th, 1915?

A. Yes, sir; November 11th, 1915.

X Q. 88. At present you have no employment?
A. No employment.
X Q. 89. Any in prospect?
A. Yes, sir.
X Q. 90. What prospect?
A. Going into the drug business.
X Q. 91. Where?
A. In Mobile, Alabama.
X Q. 92. By yourself?
A. No.
X Q. 93. With whom?
A. With Sutton Brothers and Julius Hammel and Dunas.
X Q. 94. As a clerk?
A. As manager.
X Q. 95. Of their several stores?
A. Yes, sir. In fact, we were figuring—there was two stores sol there Monday—we were figuring on buying these out. I don't know whether we got them or not.
X Q. 96. Why were you changed from the Alabama territory t the Tennessee territory?
A. When they changed several different territories I asked fo a change from the Alabama territory and they changed
282 several different salesmen to make the Tennessee territory for me.
X Q. 97. You say in visiting the druggists in your territory you always sold the entire line?
A. As near as I could I pushed the whole line.
X Q. 98. You don't have any favorites?
A. None whatever.
X Q. 99. Among your items?
A. No, sir.
X Q. 100. And the line consists of five to six thousand items?
A. Yes, sir.
X Q. 101. You made as much effort on each of these items as you did on any other item in the line?
A. Yes, sir.
X Q. 102. And you showed Mr. Moseley the entire line in forty-five minutes?

Mr. Rawle: That is objected to because the witness has not really said so.

A. About forty-five minutes. He was not busy at the time and we went through the whole line.
X Q. 103. Can't you remember or state with some degree of accuracy about how many druggists there are in the first territory where you were working?
A. No, sir.
X Q. 104. You haven't any idea?
A. No, sir.
X Q. 105. Did Mr. Ritayik travel with you in the territory at any time?

A. Yes, sir.

X Q. 106. You remember the dates of any trips he made with you?

A. No, sir.

X Q. 107. Did he make a trip with you when you were first employed?

A. Yes, sir.

X Q. 108. How many days did he spend with you at that time?

383 A. Three days.

X Q. 109. What was the date of that?

A. I don't remember exactly. It was the last of August, 1911.

X Q. 110. You remember the territory worked during that three days?

A. Montgomery and adjacent territory.

X Q. 111. When was Mr. Ritayik with you last?

A. November 11th, 1915.

X Q. 112. Where?

A. At Columbia, Tennessee.

X Q. 113. How long at that time?

A. Two days.

X Q. 114. Both days at Columbia?

A. No.

X Q. 115. What other place?

A. Well, I don't remember all of them; some small towns on the Louisville and Nashville road; I don't remember the names of all of them.

X Q. 116. What did Mr. Ritayik say to you with reference to the matter on pages 86 and 87 of your "Salesman's Confidential?"

A. We were to be governed strictly by those instructions.

X Q. 117. Did he pay any special attention to those two pages or instruct you to follow the "Confidential" generally?

A. He instructed me to follow the "Confidential" generally, but laid special stress on those two pages.

X Q. 118. Did he read them to you?

A. Yes, sir.

X Q. 119. In full?

A. Yes, sir.

X Q. 120. What have you to say of Mr. Ritayik's testimnoy already in the case that he merely instructed the salesman to read the "Confidential" from cover to cover?

A. I have nothing to say about that. The only thing I have to say is what he did to me.

384 X Q. 121. He picked out pages 86 and 87 for you?

A. No, he instructed me to follow the whole "Confidential," but read to me pages 86 and 87 and I read it myself.

X Q. 122. Can you repeat part of it?

A. It is the way a salesman is supposed to treat his trade and the methods of the house for handling the trade.

X Q. 123. How recently have you read those pages?

A. I haven't read them in a year or two years.

X Q. 124. Haven't you read them in the last day or two?
A. No, sir.
X Q. 125. Your attention was called to them and to special part in your direct-examination; didn't you refer to them then?
A. My attention was called to them.
X Q. 126. Yes.
A. Of course, the "Confidential" that they give me I read, but I haven't read it in the last two or three days.
X Q. 127. When was the "Confidential" given to you?
A. When I first went to work for William R. Warner & Company
X Q. 128. Did you ever have more than one?
A. I had them changed for new prices.
X Q. 129. Was your attention called to pages 86 and 87 when you had your first copy?
A. Yes, sir.
X Q. 130. By Mr. Ritayik?
A. By Mr. Ritayik and the house also.
X Q. 131. And that is the time he read you those pages?
A. Yes, sir.
X Q. 132. In August, 1911?
A. Yes, sir.
X Q. 133. Have pages 86 and 87 been changed in the "Confidential" since that time?
285 A. Not that I know of.
X Q. 134. Same now as they were then?
A. Yes, sir.
X Q. 135. You are very familiar with the stock of drugs behind the prescription counter of your trade?
A. Yes, sir.
X Q. 136. You noticed Mr. Moseley's stock of preparations?
A. Yes, sir.
X Q. 137. Whose make of the preparations similar to Quin-Coco did you say you saw?
A. Henry K. Wampole's.
X Q. 138. Any other?
A. No.
X Q. 139. You didn't see any Coco-Quinine, Lilly?
A. No, sir; he had none.
X Q. 140. Was he selling the Wampole preparation?
A. I couldn't say.
X Q. 141. He didn't have a Lilly bottle in his store?
A. None that I saw.
X Q. 142. But you did see the Wampole bottle?
A. I did.
X Q. 143. Yet he told you he preferred the Lilly preparation?
A. He said he had bad luck with the other preparation and from them on he would prefer Lilly's.
X Q. 144. And he had been selling the Lilly's?
A. He didn't say he had been.
X Q. 145. Didn't he tell you that Wampole bottle had been setting on his shelves for a number of years?

A. No, sir.
X Q. 146. And he had been using Lilly's?
A. No, sir.
X Q. 147. And that Wampole's preparation was spoiled?
A. No, he did not.
X Q. 148. He didn't tell you any of those things?
A. No.
X Q. 149. How can you remember the Wampole bottle so clearly and can't remember the other?
286 A. Because I saw it.
X Q. 150. Isn't the Lilly bottle quite as conspicuous as the Wampole bottle?
A. It is, but I didn't see Lilly's.
X Q. 151. Where did you get the information that Quin-Coco was the original preparation, as stated to Mr. McMillan?
A. I didn't get that information. Mr. McMillan stated an untruth.
X Q. 152. Is Mr. McMillan a man you had known for some time?
A. For about a year and a half, two years.
X Q. 153. You know him pretty well?
A. No, sir; I only called on him three times, I believe.
X Q. 154. You know nothing about his reputation in the community?
A. Nothing whatever.
X Q. 155. But in this particular you say that he perjured himself?
A. Yes, sir.
X Q. 156. Can you imagine any reason why he would?

Mr. Rawle: I object to the use of the word indicating a statutory crime, which may be misunderstood by the witness.
Mr. Bradford: I think the witness should understand the gravity of the charge he has made against Mr. McMillan, and also the gravity of an offense of testifying falsely under oath.

A. Yes, sir.
X Q. 157. Can you imagine any reason why he would?
A. Well, none whatever. I don't know him very well.
X Q. 158. Does he have any feeling against you?
A. No, none that I know of.
X Q. 159. Has he ever shown any disposition antagonistic to your house?
287 A. No, sir.
X Q. 160. Or the house you represented at that time?
A. No, sir.
X Q. 161. You asked Mr. McMillan if he wanted some chocolate quinine?
A. Yes, sir.
X Q. 162. That is the way you introduced the subject to him?
A. Well, I was selling him patents and we were in the prescription room talking over the different pharmaceuticals and I was endeavoring to sell him a five gallon assorted bill of pharmaceuticals and at

that time I mention Quin-Coco or chocolate quinine. I generally asked him how is his chocolate quinine.

X Q. 163. That is the way you usually introduced the subject to the druggists?

A. Yes, sir.

X Q. 164. Asking them how is their chocolate quinine?

A. How is your chocolate quinines, being a number of different other manufacturers making similar preparations.

X Q. 165. What other preparations have you in mind?

A. Well, Tilden & Company, H. K. Wampole & Company, Henry S. Wampole, G. F. Harvey & Company, National Drug Company and Meyer Brothers and Allan-Pfeiffer.

X Q. 166. All of those houses have chocolate quinine preparations in that territory?

A. Yes, sir.

X Q. 167. All in competition with you?

A. Yes, sir.

X Q. 168. Those are all you remember?

A. Possibly some others, but that is all I remember at present.

X Q. 169. Did you ever hear of Coco-Quinine, Lilly?

A. Yes, sir.

288 X Q. 170. That was not in your territory?

A. Yes, sir; that was in my territory.

X Q. 171. Why are you so careful from refraining to mention this preparation?

A. In the case we were talking of I didn't think it necessary to mention it.

X Q. 172. Which preparation did you meet most frequently in your trade?

A. I am unable to say. They were all very well distributed through the country.

X Q. 173. Did you find the drug stores as well stocked with the other makes as you did with the Coco-Quinine, Lilly?

A. Not all of them.

X Q. 174. Any of them?

A. Yes, sir.

X Q. 175. Name them?

A. I can't name them now.

X Q. 176. Name any who carry all lines?

A. Not all lines; they had one or some two similar preparations.

X Q. 177. Please name some having two similar preparations?

A. There is Moseley, for one he had Wampole's.

X Q. 178. Who else?

A. I don't remember the rest of them now. I never paid any special attention to that.

X Q. 179. What other preparation did Moseley have besides Wampole's?

A. Nothing that I know of but Wampole's.

X Q. 180. You were in that territory from 1911 until 1915?

A. Until 1915.

X Q. 181. Calling on the drug trade four times a year approximately?

A. Four to five times a year.

X Q. 182. And can't remember any drug store but Moseley's that sold any specific preparation of this character other than Lilly's or Warner's?

289 A. It is immaterial to me. I never paid any special attention to it.

X Q. 183. You had no trouble in remembering the Wampole package. You saw it in Moseley's?

A. That was brought up after this case was started.

X Q. 184. You say you never mentioned the name of a competitor or a competitor's product in introducing your products at all?

A. No, sir; until brought up by the druggist.

X Q. 185. You remember saying anything to Mr. McMillan or Mr. Reid or Mr. Moseley about Coco-Quinine?

A. Only this: They asked me how Quin-Coco compared with Coco-Quinine. I told them it contained two grains of quinine to a teaspoonful and a taste of chocolate syrup.

X. Q. 186. Did you tell each of them that?

A. I don't remember of telling each of them that.

X Q. 187. Did each of them ask you that question?

A. I don't remember.

X Q. 188. What other preparations of this character had Mr. Reid used before you visited him and introduced the subject of Quin-Coco?

A. I don't know.

X Q. 189. Do you know whether he had handled Coco-Quinine?

A. I don't know.

X Q. 190. You didn't ask him?

A. I didn't ask him.

X Q. 191. You didn't see any Coco-Quinine bottles?

A. Not behind his prescription counter I didn't.

X Q. 192. Ever been behind his prescription counter?

A. I have been back there, but at the time this occurred I was not.

X Q. 193. At any time you have been behind his prescription counter did you see a Coco-Quinine bottle?

A. I did.

X Q. 194. How long have you known Mr. Reid?

290 A. Something like three and a half, or four years.

X Q. 195. Is he a man of good reputation?

A. As far as I know. I have no intimate acquaintance with him.

X Q. 196. Yet you unhesitatingly charge him with testifying falsely in this case?

A. When he says I told him how to dispense Quin-Coco, I do.

X Q. 197. Can you recall what you did say to Mr. Reid?

A. The usual sales talk of the Quin-Coco, the consistency of the preparation; that is, the quality and the quantity of quinine it contained, and it could be handled easily and dispensed in small-necked bottles.

X Q. 198. That is all?

A. That is all.

X Q. 199. How long have you known Mr. Moseley?

A. About the same time.

X Q. 200. Is he a man of good reputation?
A. As far as I know.
X Q. 201. You also charge him with testifying falsely, do you?
A. In saying I offered to sell him Coco-Quinine I do.
X Q. 202. In any other particular?
A. And as far as telling him how to dispense it.
X Q. 203. Did you by any word or suggestion indicate to either of these gentlemen, Mr. McMillan, Mr. Reid or Mr. Moseley, that your product, Quin-Coco, could be used as a replacer or substitute for Coco-Quinine?
A. I did not.
X Q. 204. Or to any other druggist in your territory?
A. None.
X Q. 205. Did you ever make such a suggestion or intimation in reference to any other products in your line, I mean, that any
291 of your products could be used as replacers or substitutes for well-known products of other houses?
A. No.
X Q. 206. What do you consider the original liquid quinine preparation containing chocolate?
A. I have no idea.
X Q. 207. When did you first hear of Lilly's Coco-Quinine?
A. About 1907.
X Q. 208. Where?
A. Mobile.
X Q. 209. Did you ever know of another similar preparation prior to the Lilly preparation?
A. None that I know of.
X Q. 210. This was when you were in the retail drug business?
A. In the retail drug business.
X Q. 211. Did you handle it in the store where you were?
A. Yes, sir.
X Q. 212. Did the customers then sometimes call for chocolate quinine?
A. They did.
X Q. 213. Whose preparation did you understand was intended when they asked for chocolate quinine?

Mr. Rawle objects to the extreme length and irrelevancy of most of this cross-examination, and to this particular question as not proper for cross-examination.

Mr. Bradford replies that counsel for defendant closed his direct examination at 11 o'clock, and that it is now 11.32. Mr. Rawle occupied nearly an hour and a half with the witness. Counsel for plaintiff has occupied thirty-two minutes. Please read the question. (Question read.)

A. No special preparation.
292 X Q. 214. Whose preparation did you furnish?
A. We carried in stock Quin-Coco and Coco-Quinine Lilly.
X Q. 215. What store was that?

A. Sutton Brothers.
X Q. 216. In 1907?
A. Well, it might not have been in 1907, but I know later on we carried it, but I don't remember the date.
X Q. 217. Later on you carried what?
A. Quin-Coco and Coco-Quinine, Lilly, I don't know the time. We had very little sale on any chocolate quinine preparation.
X Q. 218. You remember when the Sutton store put in Quin-Coco first?
A. I do not.
X Q. 219. You remember who sold it to them?
A. No, sir.
X Q. 220. Were you the buyer?
A. I was possibly not the buyer when they first put it in.
X Q. 221. Who instructed you on what calls Quin-Coco might be sold?
A. No one.

Mr. Bradford: That is all.

Cross-examination closed.

Deposition closed.
Signature waived.

By agreement of counsel for plaintiff and counsel for defendant the signature of the witness, Clinton Gordon McCarthy, to the foregoing deposition, is hereby waived.

293 Ernest B. De Vall, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your full name, age, residence and occupation.
A. Ernest B. De Vall; present age is 29; residence, Memphis, Tennessee; occupation, salesman for William R. Warner & Company.
Q. 2. State briefly and chronologically your connection with the drug business from the start.
A. I started in the drug business in Hot Springs, Arkansas, some twelve years ago in the capacity of soda dispenser for F. J. Mobb, and after six months with him his store was sold to Charles Schneck, and was with them for several years, probably four and one-half years. I was in that store five years all told, as a soda dispenser for the first two years and then prescription clerk. After dispensing soda for probably two years I was moved into the drug department. Some year and a half after that I became registered as a pharmacist in the State of Arkansas. I was out of the drug business for some twenty-one months and went back in as manager of the Hot Springs

Pharmacy. I was in that position for some six months and went on the road for H. K. Mulford & Company. I was with them probably two years and five months in the West Tennessee territory. I was after that for six months or seven months with James S. Robinson as prescription man in the city of Memphis, retail drug business. On October the 20th or 21st, 1912, I went with the Pfeiffer Chemical Company and William R. Warner & Co., and have been in that capacity ever since as a salesman.

Q. 3. State the limits of your present territory.

A. I have what is considered Western Tennessee and the
294 Northern third of Mississippi, including the city of Memphis, Tennessee.

Q. 4. If you have previously had any different territory, state that territory.

A. Until four months ago my territory was middle and western Tennessee, including Nashville and Memphis.

Q. 5. Can you approximate the number of druggists in either of these territories?

A. In Northern Mississippi and Western Tennessee, including Memphis, I should say there are 450 or 500; that is the territory I am working at present. There is probably the same amount in middle Tennessee and western Tennessee.

Q. 6. How often do you call on these numerous drug stores per annum?

A. The cities I cover every sixty days; the smaller towns every four months.

Q. 7. To what extent do you call on doctors?

A. Limited extent only.

Q. 8. Give the proportion, if you can?

A. There is some territory where I call on the doctors regularly every four months. If I have a drive that I can make to see the doctors whereby I can see as many as four in a day, why I call on them regularly every four months. There are probably 100, maybe 125, accounts in my territory of that kind.

Q. 9. When you were taken on as salesman by Warner & Company, state what instructions you had as to your duties as salesman, and from whom?

A. I was hired by Mr. Ritayik in Memphis, and my instructions from Mr. Ritayik were that I would find the policy of the William R. Warner & Company in the back pages of the Salesman's Confidential. Mr. Ritayik actually read the instructions from the Confidential book to me. That was the only instructions that I had on the policy of the house at that time.

Q. 10. Did you receive a copy of this and have had one ever since?

295 A. Yes, sir.

Q. 11. State whether or not you have observed the rules as laid down in this "Confidential"?

A. I have.

Q. 12. Is there a rule there with regard to competitors' goods?

A. There is.

Q. 13. What is it, or what is the substance of it?

A. The substance of the rule is to think well of your competitor and never speak ill of him or his goods.

Q. 14. Anything else along that line?

A. That is all that I can recall to mind right now in reference to competitors.

Q. 15. State whether or not there is any rule on the subject of mentioning your competitor's goods?

A. Well, it is the policy of the house never to mention any competitor's goods at all.

Q. 16. State whether or not you have obeyed that rule?

A. I have obeyed it.

Q. 17. Did Mr. Ritayik travel with you, and for how long, and when?

A. When Mr. Ritayik hired me he was with me for three days and I went one week by myself and he came back to me for three days. Since that time Mr. Ritayik has been with me any way from two to three times a year.

Q. 18. When he has been with you has he visited customers with you?

A. He has.

Q. 19. On such visits do you do the selling or does he?

A. Both.

Q. 20. If a retail druggist has a prescription or a counter call for a certain preparation specifically naming the maker and he fills it with a similar preparation of a different maker, state whether or not in your opinion as a retail druggist and drug salesman that is honest business on the part of the druggist?

296 A. I think it is dishonest.

Q. 21. State what is the ethics of the retail drug business in that respect; that is, whether that is considered honest or dishonest in a retail drug business?

A. It is considered dishonest by all retail druggists.

Q. 22. If a drug salesman in soliciting a sale of a given article should suggest to a druggist that he could dispense that article on prescription or counter calls where another make was specifically named, state whether or not in your opinion this would be honest business on the part of such salesmen?

A. It would not be honest business on the part of the salesman.

Q. 23. Do you know a druggist named Gus A. Blodau, and where is his place of business?

A. I know Gus A. Blodau, of Nashville, Tennessee.

Q. 24. You remember soliciting his trade on your lines?

A. I solicited business from Mr. Blodau several times.

Q. 25. About how often?

A. At least five times a year for the last three years.

Q. 26. Gus A. Blodau, when called as a witness for plaintiff, testified that you had solicited an order for Quin-Coco, and he then testified as follows in answer to Q. 5:

"A. He gave me to understand that by the use of this preparation it would be a saving of money for me and why pay the price I did for Coco-Quinine. Naturally the impression to be made upon me was that I should use his preparation in place of Coco-Quinine."

I hand you the plaintiff's printed record, and call your attention to the answer I have just quoted, and ask you to state whether or not you said anything to Blodau which could give him such an impression, as he states you did?

297 A. I have never said anything to Mr. Blodau that would leave him under an impression as he states.

Q. 27. What was your talk with him on Quin-Coco, if any?

A. When I talked to Mr. Blodau on Quin-Coco it was on the quality of the preparation and I also brought in the price of the product. I told Mr. Blodau the quantity of quinine that our preparation contained, the smoothness of it, that he would be able to pour it into very small-necked bottles, it would give absolute satisfaction where any quinine was necessary. My talk also to him was the question of customers that wanted preparations for malaria and bad colds and things of that nature where Quin-Coco could be sold.

Q. 28. In what words did you first call his attention to your product; that is, what did you say?

A. Well, I couldn't say the exact words that I gave Mr. Blodau on talking to him of that item, but the usual method of selling any of my items is from a sample. I had a sample of Quin-Coco in my pharmaceutical sample case and called his attention to the merits of the item.

Q. 29. State whether or not you began reference to this item by asking Blodau, as he testifies you did, if he "was using Coco-Quinine." to which he replied, "Yes"; is this correct?

A. I did not.

Q. 30. State whether or not you in that interview were soliciting his trade of your entire line?

A. I was.

Q. 31. How long did you spend there with him?

A. I usually spent from forty-five minutes to three hours in his store.

Q. 32. Going over your entire line?

A. The entire line, yes, sir.

Q. 33. Do you know William M. Scott, and if so, where is he located?

A. I knew Mr. Scott of Memphis, but I don't know his

298 present whereabouts. He was not a retail druggist when I knew him in Memphis. He was a clerk in a retail drug store when I knew him in Memphis.

Q. 34. William M. Scott, when called as a witness for plaintiff, testified as follows, as a part of his answer to Q. 2:

"Mr. De Vall, representing William R. Warner & Company, called on me either in last September or October and stated that Quin-Coco could be dispensed and sold as Coco-Quinine, Lilly's. In De-

cember the 24th, 1914, at that time, I was manager of Lavison's Pharmacy, McLemore & Patton Sts., Memphis, Mr. De Vall called on me and stated that I could put up and dispense Quin-Coco on specified prescriptions for Lilly's Coco-Quinine."

Please state what you have to say of the trutfulness or untruthfulness of this statement just quoted. I hand you the plaintiff's printed record with the quoted passage marked.

A. I called at Lavison's Pharmacy December 23d of 1914. Mr. Scott was manager for the time being, Mr. Lavison being out of town for a few days on account of ill-health. I did not urge him to buy Quin-Coco and did not mention Eli Lilly's product. He states here that in September or October I called on him. I did not. I don't know where he was in business at that time.

Q. 35. Do you know whether Lavison's Pharmacy had been handling Quin-Coco before December 23d, 1914?

A. They had.

Q. 36. How do you fix the date specifically as December 23d, 1914?

A. It was very near Christmas and I had been trying to see Mr. Lavison previous to that and his health would not permit my seeing him, so I heard he had a manager out there that was in position to talk business, so I went out to see him.

299 Q. 37. How do you fix the exact date?

A. I keep a record of all sales with dates. I refreshed my memory on that date.

Q. 38. Did you solicit William M. Scott's trade when he was in the retail drug business at 902 Chelsea Avenue, and before he went to Lavison's?

A. No, sir.

Q. 39. State whether or not you ever solicited William M. Scott's trade when he was in the drug business by himself?

A. I never did.

Q. 40. Mr. Scott further testified in answer to X Q. 35:

"A. Why he first came to me at 902 Chelsea Avenue, spoke to me in a friendly way, and asked me if I would not give him some business and made the statement that he was glad to see me in business for myself and believed that was a good stand and wanted to sell me a line of Warner's preparations, non-secrets, etc., and remarked, 'Scott, you know we have the Quin-Coco which is the same as Lilly's Coco-Quinine, sold to you by Winchester; shall I show you the preparation or have you ever seen it? You can use it on specified prescriptions for Lilly's Coco-Quinine. I have the old reliable line of non-secrets. Will come out to see you in a very short time. Make me out an order and I will give you satisfactory terms. Hoping you will do well.' That is all the conversation that I recall."

What have you to say as to the truthfulness or otherwise of this testimony of Scott's? I hand you the plaintiff's printed record and point out the words I have quoted.

A. I never saw Mr. Scott at 902 Chelsea Avenue. I never had any such conversation with him as that.

Q. 41. Scott further testified in answer to X Q. 26:

"A. If I may be allowed to express this, I don't think Mr. De Vall intended that reflection upon me as according to Mr. De Vall's
300 statement so many were using and substituting this so-called Quin-Coco, and my opinion was that Mr. De Vall wanted to let me in on a close substitute. That is the way I felt about Mr. De Vall's suggestion to me in regard to Quin-Coco."

Read the passage in the plaintiff's printed record, which I hand you, and state what you have to say in regard to this statement of Scott's?

A. I never had any such conversation as that with Mr. Scott.

Q. 42. Mr. Scott testified:

"X Q. 27. But have you not testified that he suggested to you that you should use Quin-Coco in prescriptions calling for Coco-Quinine?

A. He did not suggest that I should use them. He said it could be done, and was being done.

X Q. 28. Didn't he mean that you could do it?

A. I didn't take it that way. I took it that it could be done if I was disposed to do so, that is the impression the interview had on me."

What have you to say as to these statements of Scott, and whether they are true or not true?

A. I have never had any conversation with Mr. Scott along that line whatever.

Q. 43. State whether or not you suggested to Scott that he should use Quin-Coco in prescriptions calling for Coco-Quinine?

A. I did not.

Q. 44. Scott testified:

"X Q. 30. Haven't you said that De Vall's suggested to you that you could use his Quin-Coco in prescriptions calling for Coco-Quinine?

A. No, sir, not me. That it could be used. He did not specify me.

X Q. 31. Wasn't he talking to you at the time?

301 A. Yes, sir, he was leaving me under the impression that it could be done and was being done by others."

State whether or not you made such a suggestion to Scott as he states or any suggestion carrying the same meaning?

A. I would say I had no conversation like that with Mr. Scott.

Q. 45. Scott further testified as follows in answer to X Q. 47:

"A. Why Mr. De Vall called on me at the second interview. I was then manager of Lavison's Pharmacy, McLemore and Patton Streets. Mr. De Vall—I don't recall the exact conversation that took place previous to his mentioning the Coco-Quinine proposition. Then Mr. De Vall said to me that this Quin-Coco of theirs was being used and substituted, to use his words, for Lilly's Coco-Quinine so

by Mr. Winchester. I can't recall much of that conversation at the last part of this answer.

X Q. 48. Can't you give the words he used with reference to his efforts to sell you Quin-Coco?

A. Yes, he left the impression upon me that it was being used and substituted for Lilly's Coco-Quinine."

What have you to say as to the truthfulness or untruthfulness of this testimony of Scott?

A. I had no such conversation with Mr. Scott on that subject.

Q. 46. State whether or not you said to Scott what he testified that you did say to him?

A. I did not.

Q. 47. State whether or not you have a regular and settled method of introducing a particular preparation to a retail druggist when you are going through your line, and if so, what it is, illustrating by Quin-Coco?

302 A. I have no set rule for selling every person. I have no set argument that I use.

Q. 48. How do you introduce Quin-Coco in practice?

A. I introduce Quin-Coco by the quality of the item and let the quality of our item sell it. I give suggestions to the trade in numerous ways that Quin-Coco could be sold by them.

Q. 49. State whether or not in soliciting an order for Quin-Coco you begin by mentioning a competitive article?

A. I never under any circumstances mention a competitive item on anything unless the man whom I am trying to sell first brings up that point.

Q. 50. You have said that you are in the habit of suggesting to druggists ways in which they can sell Quin-Coco? What are those ways?

A. Well, in my territory there is a good deal of malaria. I suggest that they sell it for malaria, that it is a palatable way of giving quinine, they could sell it for colds, coughs, they could sell quinine in our preparation of Quin-Coco wherever quinine is indicated; in any disease that it might be indicated Quin-Coco is certainly indicated.

Q. 51. On what sort of calls over the counter?

A. Quin-Coco, chocolate syrup of quinine, or sweet quinine, or syrup of quinine.

Q. 52. You have been a retail druggist and a drug salesman. State whether or not a druggist can by personal effort create a market for a particular preparation.

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. 53. By what efforts?

Mr. Bradford: Same objection.

A. By constant thought of an item and constant push, selling talks.

303 Q. 54. With whom?

Mr. Bradford: Same objection.

A. Anyone who might possibly be a customer or user.

Q. 55. Do you know of instances in which this has been done?

Mr. Bradford: Same objection.

A. I do—on all items, you mean?

Q. 56. Name some instances in which druggists have been successful in creating a market for a given preparation or a particular make of preparations; give the line of preparation.

Mr. Bradford: Same objection.

A. Why, we have a line of package goods, Pfeiffer Chemical Company make, Hobson items. Well, there are several items there the druggist builds up his own business on those goods. They are not advertised at all to the laity. By constant selling talks and selling the goods he will build himself up a business on a quality line.

Q. 57. Can you give me the names of any other similar lines?

Mr. Bradford: Same objection.

A. Yes, there are several. Take the Nyal lines, for instance, the Penslar lines, the Dike lines.

Q. 58. How are they built up?

Mr. Bradford: Same objection.

A. By the push and salesmanship of the druggist.

Q. 59. You mean retail druggists?

Mr. Bradford: Same objection.

A. Retail druggists, yes, sir.

Direct examination closed.

304 Cross-examination.

By Mr. Bradford (not waiving objections):

X Q. 60. During what period were you a traveling salesman for H. K. Mulford & Company?

A. January the 1st, 1910, until probably May—April or May of 1912.

X Q. 61. And what territory did you cover?

A. Western Tennessee exclusive of Shelby County.

X Q. 62. You have continued to have the same territory since being with William R. Warner & Company, have you not?

A. Yes, sir, with additions.

X Q. 63. What territory did Mr. Ritayik cover with you during his first visit?

A. We went from Memphis, Tennessee, to Milan, on the Louisville & Nashville Railroad.

X Q. 64. Solicited trade from all the drug stores in the towns on this line?

A. We did.

X Q. 65. Also doctors?

A. Well, I am not positive that at that time we did solicit doctors.

X Q. 66. In referring to calls on doctors, you mean dispensing doctors or all doctors?

A. Dispensing doctors.

X Q. 67. In October, 1912, did Mr. Ritayik read to you the matter in the back of the Salesmen's Confidential that you have referred to?

A. He read part, if not all. I won't say he read it all.

X Q. 68. Can you recall the substance of what he read?

A. No. The thing that Mr. Ritayik impressed on me was that I should read it myself.

X Q. 69. You have had a copy of this Confidential from that time to the present?

A. I have.

305 X Q. 70. Have you the original copy that Mr. Ritayik presented to you in October, 1912?

A. No, sir; I have not.

X Q. 71. You know where it is?

A. Well, those things are reprinted every once in a while.

X Q. 72. And the house exchanges the new edition for the old, I presume?

A. Yes, sir.

X Q. 73. Have you read the matter on pages 86 and 87 of the present edition of the Salesmen's Confidential?

A. I have.

X Q. 74. And does it correspond with what Mr. Ritayik read to you at that time in October, 1912?

A. It does.

X Q. 75. When did Mr. Ritayik make the last trip with you—his last trip with you?

A. In August or September of this year.

X Q. 76. What territory did you cover then?

A. Two days adjacent to Nashville—no, one day. He was with me only one day and it was near Nashville.

X Q. 77. You remember the stores you called on?

A. No, sir; I do not.

X Q. 78. You remember the particular territory you covered?

A. I do not; I couldn't say positively; I know it was near Nashville.

X Q. 79. You remember any trips he made with you in 1914?

A. Yes, he made trips with me in 1914—two or three.

X Q. 80. Do you recall the territory that you covered on any of those trips?

A. We made some territory on the N. C. & St. L. R. R., I think Jackson on one trip. We made some territory in Middle Tennessee and some territory south of Nashville on the N. C. & St. L. road.

X Q. 81. Won't you name some of the smaller towns that
306 were included in this trip?

A. Well, there was Bellbuckle, Tennessee, Shelbyville, Christiana, Springfield, Green Brier. We probably made some more territory, but that is all I am positive of.

X Q. 82. You have from 450 to 500 drug stores and from 100 to 125 dispensing doctors to call on in your territory, as I understand from your testimony?

A. I never kept a record of these; that was just a guess on my part.

X Q. 83. And you show each of these customers your entire line?

A. All druggists I show the entire line to, yes, sir.

X Q. 84. You spend from forty-five minutes to three hours with each druggist as you did with Mr. Blodau?

A. If I can talk business at all it takes me from forty-five minutes to three hours to do it.

X Q. 85. Are you sure that you never mentioned a competitor's product until the subject is first mentioned by your customer?

A. In talking to a customer, yes.

X Q. 86. Won't you state again how you introduce the subject of Quin-Coco to your prospective customers?

A. I have never used any one item in our list as a special item. I sell most everything in a general way. In selling Quin-Coco I lay heavy stress on the quality of the item, its thinness, the amount of quinine it contains, the fact that it does not ferment or will not lump.

X Q. 87. Do you say anything about the demand for this product to your customers?

A. Those that have a demand for it I don't have to mention it. Certainly if a man has never handled our Quin-Coco, he has got to create a demand for it. I lay a good deal of stress, however, on the amount of it that could be sold if he would get behind it properly.

X Q. 88. What product do you push it against?

A. Push it against? I push it as an item, not against
307 anything. In fact, I don't, as I say, lay special stress on Quin-Coco. It gets no more push from me than any other item in the pharmaceutical line.

X Q. 89. Have you ever suggested to any retail druggist in your territory that he could use any of your products or pharmaceuticals when any well-known product or pharmaceutical of a competing house was called for?

A. Never.

X Q. 90. Have you ever suggested to any retail druggist in your territory that any of your products are the same as certain products of other houses?

A. No, sir.

X Q. 91. Is Mr. Blodau a man of good business reputation?

A. He is.

X Q. 92. Is he a man you think would be liable to misrepresent matters that he is called on to testify concerning under oath?

Mr. Rawle: Objected to as immaterial.

A. I don't think that Mr. Blodau would misrepresent anything intentionally.

X Q. 93. Do you think his testimony on behalf of the plaintiff in this case was given unintentionally.

A. Well, Mr. Blodau's testimony there claims that I urged him to use Quin-Coco in preference to some other items, was mistaken, and I am certain that he didn't intend to lay that kind of stress on his testimony.

X Q. 94. You did say to him, however, that he could save money by buying your preparation?

A. Yes, sir.

X Q. 95. In competition with what other product?

A. I don't know what items he is handling at the present time. I know that he has handled Eli Lilly's Coco-Quinine and probably some others, but I didn't name any special preparation when I said that he could save money.

308 X Q. 96. Wasn't your comparison of the price of your product with the price of Coco-Quinine, Lilly, in your talk with Mr. Blodau?

A. Well, my talk with Mr. Blodau there—I had several with him, you know in selling him goods, and I don't remember of ever—in fact, I am certain that I have never mentioned any competitive item to Mr. Bloudau in that way.

X Q. 97. You are certain that you didn't compare the price of your product, Quin-Coco, with the price of the Lilly product, Coco-Quinine, in seeking to sell him Quin-Coco?

A. I probably mentioned the price of my item, but inasmuch as he never had any business on our item I never mentioned saving him any money. If he could sell our item, why he would certainly reap a nice profit from it.

X Q. 98. You know of any other similar preparation on the market selling for a higher price than yours except Coco-Quinine?

A. Yes, sir.

X Q. 99. Which?

A. H. K. Mulford.

X Q. 100. Did you meet the Mulford preparation in competition with Quin-Coco in your territory?

A. Yes, sir, they sell chocolate-quinine.

X Q. 101. Did you sell it for them when you traveled for them?

A. I have sold it for them, yes, sir.

X Q. 102. Did you say anything to Mr. Blodau about the formulae of the preparation, Quin-Coco?

A. Yes, I made the point that it had two grains of quinine sulphate to each 90 minims.

X Q. 103. Did you tell him your house had a man that formerly worked for Lilly & Company?

A. No, sir, I never had any knowledge that a Lilly man ever worked for the house.

309 X Q. 104. And you didn't say to him that other druggists were using your product, Quin-Coco, for Coco-Quinine?

A. No, sir.

X Q. 105. You say you never called on Mr. Scott except one time,

on December 23rd, 1914, while he was temporarily in charge of the Lavison Pharmacy?

A. No, sir, I didn't say that. I said that I called upon him once there. That I never did call upon him at 902 Chelsea.

X Q. 106. What other place have you called on him?

A. At Brownsville.

X Q. 107. What did you say to him in reference to Quin-Coco at Brownsville?

A. Didn't even open my sample case, never mentioned anything.

X Q. 108. Did you have any conversation with him at all?

A. Yes, sir.

X Q. 109. Do you remember the conversation?

A. Yes, sir, I wanted to get an eighty-dollar past due account I was there to collect and not to sell.

X Q. 110. That was the first time you had met Mr. Scott?

A. First time I ever saw him, yes, sir.

X Q. 111. You remember when that was?

A. It was either in the fall of 1912 or may be the early part of 1913, I would not say positively, about that date. It might have been in '13—1913.

X Q. 112. Are you certain that your day, December 23rd, 1914, is correct, and Mr. Scott's date of December 24th, 1914, is a mistake?

A. Well, my records show that I got his order on December 23rd, 1914.

X Q. 113. Could it be possible that you actually called on the 24th, and dated your order on the 23rd, in order to complete the 23rd day's business for any purpose?

A. No, sir, my orders are usually in the post office every night.

X Q. 114. Do you ever make a mistake?

A. I do.

310 X Q. 115. Did you ever in showing your sample of Quin-Coco to a retail druggist compare it with Coco-Quinine in his stock?

A. No, sir.

X Q. 116. You never compared your product with the Lilly product in seeking an order from any customer?

A. No, sir.

X Q. 117. What is the first preparation, liquid preparation, of quinine sulphate containing cocoa that you ever heard of?

A. I think Coco-Quinine was. However, I am not positive about that.

X Q. 118. Isn't it true that customers frequently ask for Coco-Quinine by the name chocolate quinine.

A. Well, for that I can't say. When they ask for chocolate quinine I can't say that they are asking for Coco-Quinine. There are a lot of people, however, that call for chocolate quinine.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 119. State whether or not you ever said to Blodau that he could save money by selling Quin-Coco?

A. I told Mr. Blodau that in pushing chocolate or syrup of quinine to his trade that ours was a pretty good price. I don't known that I ever went into details, to figure any great saving, or anything like that for him.

R. D. Q. 120. Was it any part of your duty as a salesman to collect this unpaid bill from Scott?

A. It was.

R. D. Q. 121. How often did you call on him for the purpose of collecting it?

A. One time only.

R. D. Q. 122. You know if it has been paid?

A. It has not.

R. D. Q. 123. Has it been charged off?

311 A. Charged to profit and loss, yes, sir.

R. D. Q. 124. You know the amount?

A. It was approximately eighty dollars.

R. D. Q. 125. If there is any difference in your testimony on the notes as to whether you did or did not tell Blodau that he could save money on Quin-Coco, state now which is the fact?

Mr. Bradford: Objected to as improper.

A. We had quite a talk about that business, which could be built up, of building up a business on Quin-Coco, and I pointed out the profits to him that could be made by handling and pushing the item, but as to mentioning any saving I don't know for certain that that was brought in.

Redirect examination closed.

Recross-examination, without waiving objections.

By Mr. Bradford:

R. X Q. 126. Why are you now seeking to modify statements which you have heretofore made in reference to this subject?

Mr. Rawle: I object to that question in form, and in fact; the witness is not seeking anything of the sort. He is answering the question I put to him.

A. Extra money made is certainly money saved. If he could build up a business on Quin-Coco, there is certainly an extra amount of profit to him. He might probably sell him quinine in a syrup instead of tablets, by making a 25c. sale instead of a 10c. sale.

R. X Q. 127. Didn't you know at the time that Mr. Blodau was handling Coco-Quinine?

A. He might possibly have mentioned that to me. Of course, I am not certain about that.

R. X Q. 128. Didn't you have access to his stock of pharmaceuticals?

312 A. No, his pharmaceuticals are in the rear of his store that is, in the rear of the prescription case. We did business out in front on his wrapping counter.

R. X Q. 129. Isn't it your custom to go behind the druggist's prescription counter?

A. No; I do that with some customers, with customers who are probably a little bit more friendly towards me than Mr. Blodau.

R. X Q. 130. You didn't go behind Mr. Blodau's prescription counter?

A. I don't remember of ever going behind his counter, and I know that I haven't been back there to look at his stock.

R. X Q. 131. Are you willing to say that Mr. Blodau's statement that you told him that he could save in price over Coco-Quinine is untrue?

A. I tried to sell Mr. Blodau Quin-Coco at the regular price and if Coco-Quinine was brought in it was not brought in by me.

R. X Q. 132. You never compared the price of your product, Quin-Coco, with the price of Coco-Quinine?

A. If the price of Coco-Quinine was mentioned, it was mentioned by Mr. Blodau.

R. X Q. 133. Did you have as a part of your outfit a document which has been called in this testimony a "Blue List?"

A. I don't know what you have reference to there.

R. X Q. 134. I show you a document and ask you if you recognize it?

A. I don't believe I have ever seen one of these. I never had one of these in my possession any way.

R. X Q. 135. Anything like it?

A. I had nothing in the way of a list there, except price lists.

R. X Q. 136. You spoke of Mr. Blodau in a way that would indicate that he may not be very friendly with you, is that true?

A. Not especially friendly, no, sir.

R. X Q. 137. Is there any unfriendliness between you?

A. No, sir, I don't think that there is.

313 R. X Q. 138. Does he buy goods from you?

A. Yes, he has bought goods from me ever since I have been with the house.

R. X Q. 139. Always treat you cordially and friendly?

A. Yes, sir.

R. X Q. 140. Are there any unpleasant relations between you and Mr. Scott?

A. None whatever.

Recross-examination closed.

Re-redirect examination.

By Mr. Rawle:

R. R. D. Q. 1. State whether or not you have had intimate relations with either Blodau or Scott?

A. No, sir, I have not. My association with them has been purely business.

R. R. D. Q. 2. What exactly do you mean by "friendly relations?"

A. Well, there are some people in my territory whom I have been calling on a good deal longer than I have on Mr. Blodau.

R. R. D. Q. 3. And know them better?

A. And know them better and more intimately acquainted with them, and they are people I can get next to, get closer to, than I could to Mr. Blodau.

R. R. D. Q. 4. Or Mr. Scott?

A. I have only seen Mr. Scott three times in my life, knowingly.

Re-redirect examination closed.

Deposition closed.

ERNEST B. DE VALL.

Sworn to before me the 8th day of December, A. D. 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk U. S. Dist. Court, East. Div.,
Eastn. Jdcl. Dist. of Missouri.

At this point a recess was taken to 2:30 P. M., December 8th, 1915.

314 Pursuant to adjournment as before stated, at 2:30 P. M., December 8th, 1915, the further taking of these depositions was had as follows:

WILLIAM C. KERSTANN, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your full name, age, residence and occupation?

A. William C. Kerstann; thirty-six; Memphis, Tennessee; Assistant Manager of William A. Webster Company, manufacturing chemists with their business and plant at Memphis, Tenn.

Q. 2. When did you go into the drug business at Memphis, Tennessee, first?

A. In the Fall of 1906, with the Webster-Warnock Chemical Company, manufacturing chemists. I was superintendent of the factory.

Q. 3. Did you have an interest in the business?

A. I had no interest in that business. That was in 1910.

Q. 4. Did you help to organize it?

A. Not in 1910. I helped to organize the William A. Webs Company, Memphis, Tennessee, manufacturing chemists.

Q. 5. Did you have an interest in the company?

A. I have an interest in the company.

Q. 6. And are general manager of the plant?

A. Assistant manager.

Q. 7. State whether or not the first of these two concerns, t Webster-Warnock Company put out a chocolate quinine preparati and if so, when?

A. They were putting it out when I left there, and I presume th are still putting it out.

315 Q. 8. What is its general make-up?

A. The general make-up was Yerba Santa, Licorice, po dered cocoa, sugar and aromatics with quinine sulphate, two grai to the fluid dram.

Q. 9. Was that listed in your catalogue?

A. It was not.

Q. 10. Was that listed in your catalogue with the Webster-Wa nock Company when you left there?

A. It was not.

Q. 11. Had it been put out at that time?

A. Yes, I believe it had been put out.

Q. 12. To what extent had it been sold throughout the country

A. Not very greatly because there was no great demand exce when a salesman sold it.

Q. 13. What was the name of the preparation on the market?

A. Chocolate Syrup Quinine.

Q. 14. Did your second company, the William A. Webster Com pany put out a chocolate-quinine preparation?

A. Yes.

Q. 15. When?

A. It was put out about the time we started, included in ou general list.

Q. 16. What was the name of that?

A. Chocolate Syrup Quinine.

Q. 17. What is the general make-up of that?

A. The general make-up is similar to the form I have just stated previously.

Q. 18. Is it listed in your catalogue?

A. It was listed in our catalogue.

Q. 19. You have salesmen on the road selling it?

A. Yes, we do.

Q. 20. All over the country?

A. No, not all over the country, we merely work the southern states.

Q. 21. State what is the value of Cocoa in this preparation?

316 A. My experiments have proven conclusively cocoa is a valuable aid both in suspending the crystals of quinine sul phate and helping to disguise the unpleasant bitterness of quinine. I have always felt a certain amount of the chocolate syrup coate

the crystals of the quinine sulphate. When introduced in the sulphate in this way, it assists in allaying the bitter taste of the quinine, becoming predominant. I have also found that it was necessary to use herbus licorice, some saccharine to assist in disguising the taste of quinine, very nearly complete.

Q. 22. Also Vanilline?

A. Yes. We use that. I have the formula with me as far as that is concerned.

Q. 23. Do you usually put vanilline in cocoa and chocolate?

A. Vanilline is used to bring out the aromatic flavor of cocoa.

Q. 24. Is that usual to mix vanilline in small quantities with cocoa to bring out the aromatic flavor of the cocoa?

A. It is not usual except in this particular preparation I presume. I had no occasion to use it in other preparations of this kind.

Q. 25. Will you state whether or not the crystals of sulphate are held in suspension in this preparation?

A. They are held in suspension. If they were not held in suspension the bitter taste of quinine could not be disguised.

Q. 26. State whether or not in your opinion you can make a satisfactory pharmaceutical preparation if you omitted the cocoa from it?

A. I could not.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 27. Are you a graduate of pharmacy?

A. No, sir, I am not.

317 X Q. 28. Are you a graduate in chemistry?

A. I am not; I am a practical chemist.

X Q. 29. What do you mean by a practical chemist?

A. I mean that continually working under the supervision of Professor F. S. Hereth, who was a professor of pharmacy in the Chicago College of Pharmacy. During the time I was employed by the Searle & Hereth Company I worked under Professor Hereth's personal supervision for twelve years and also in the pharmaceutical business under his direction.

X Q. 30. When did you leave the employ of the Searle & Hereth Company?

A. In 1906.

X Q. 31. When did you begin your employment with the Webster-Warnock Company?

A. August 1st, 1906.

X Q. 32. When did you leave the employment of the Webster-Warnock Company?

A. It was either 1909 or 1910; I am not sure. I think it was 1910.

X Q. 33. Just immediately prior to your forming the William A. Webster Company?

A. Yes.

X Q. 34. Did you leave the Webster-Warnock Company for the purpose of becoming one of the organizers of the William A. Webster Company?

A. Yes, I did.

X Q. 35. How long prior to leaving the Webster-Warnock Company was it that they put out the chocolate-Quinine preparation you have reference to?

A. I have no records of it. I can merely state from memory, and it seems to me that they put it out just for a short time prior to the time I left there.

X Q. 36. Who prepared their preparation for them?

A. I prepared it for them.

X Q. 37. Who worked out the formula for it?

A. I made up the formula.

X Q. 38. Where did you get the formula?

318 A. I worked on it.

X Q. 39. From what?

A. From various experiments.

X Q. 40. With what?

A. My original experiments. I used the preparation that the Searle & Hereth Company put up that they called "Quinomel." It was as a basis for this formula which we now have spoken of.

X Q. 41. Was Quinomel used in the preparation of the Webster-Warnock Company that you have reference to?

A. Quinomel was not, but partly the constituents were, such as Yerba-Santa.

X Q. 42. Did you have anything else to aid you in preparing this formula?

A. Fenner's formula.

X Q. 43. What did you find in Fenner's formula that aided you?

X Q. 44. Fenner's formula states that cocoa or chocolate is used in medicine to disguise the unpleasantness of some medicines, as near as I can remember the wording of it.

X Q. 45. Did you have any of Lilly's product, Coco-Quinine?

A. Yes.

X Q. 46. At the time of your experiments?

A. Yes.

X Q. 47. Did you analyze it?

A. No, sir.

X Q. 48. Did you seek to duplicate it?

Mr. Rawle: Question objected to as not proper cross-examination and as immaterial.

A. Certainly.

X Q. 49. Wasn't the purpose of the preparation to be put out as a replacer for Coco-Quinine, Lilly?

Mr. Rawle: Same objection and because the word "replacer" is not apparent or necessarily known to the witness.

319 A. I do not believe it was ever intended to be a replacer. It was offered as a competitive article.

X Q. 50. What first suggested to you the advisability of putting out such a preparation?

A. Well, we were always more or less interested in discovering a preparation which would disguise the bitter taste of quinine. For this purpose, this Quinomel which I have spoke of had always previously been used.

X Q. 51. You were familiar with the success of Lilly's preparation, Coco-Quinine, as a liquid quinine preparation at that time, were you not?

A. Yes.

X Q. 52. You knew that there was a large demand for it in the drug trade?

A. I have no way of knowing how much demand there was.

X Q. 53. You knew it was a good selling item?

A. I would not say that because I do not handle the preparations, consequently I would not know.

X Q. 54. Did Mr. Hereth give you any information in reference to the product?

Mr. Rawle: Objected to as hearsay.

A. I do not recall whether he did or not. It is too long a time ago. I never thought of anything coming up in this record, so consequently kept no records as to whether he gave me any instructions or not. What I did, I did of my own accord. I was only interested in a pharmaceutical preparation, and it was my duty to do the experimental work entirely.

X Q. 55. Is the formula used by William A. Webster Company the same as was used by the Webster-Warnock Company?

A. It is not. The formula has been improved upon from time to time.

X Q. 56. Under your supervision?

A. Under my supervision, yes.

320 X Q. 57. What is the name of the preparation put up by William A. Webster Company?

A. Chocolate-Syrup-Quinine.

X Q. 58. Is it an easy matter to work out a working formula for the preparation of pharmaceutical products such as Coco-Quinine?

A. It is not an easy matter.

X Q. 59. How long did you require in your experiments before you reached a satisfactory result?

A. I never kept an accurate record; I would not say. I will say I spent a great deal of time on it.

X Q. 60. Covering a period of how many years?

A. Well, the past five years there has been time spent by me as well as our chief Chemist, who also has worked on the formula to make a more satisfactory preparation.

X Q. 61. Who is your chief chemist?

A. Mr. C. F. Kessler.

X Q. 62. In what particular was your preparation unsatisfactory?

A. At one time we had trouble. The preparation became too thick from the use of chocolate, and the quality of course was cut down or added to as the case demanded.

X Q. 63. The ingredients remained the same?

A. The ingredients remained substantially the same.

X Q. 64. Has vanilline any medicinal value in preparation?

A. It has no medicinal value in this preparation on account of the comparatively small quantity used.

X Q. 65. It does, however, affect the flavor or taste of the preparation to some extent, does it not?

A. It does.

X Q. 66. Are you positive that no other agent than cocoa can be used in preparing a liquid quinine of sulphate medicine?

A. I am not positive about that.

321 X Q. 67. Did you ever make any experiments with other syrups than cocoa?

A. I did.

X Q. 68. What did you use?

A. I used as a base the formula of Quinomel which I spoke of before. This preparation made a fairly tasteless preparation but it was not tasteless enough to satisfy the trade.

X Q. 69. What other syrups did you use as a base in your experiments, if any?

A. No other syrups were used.

X Q. 70. What were your duties while you were in the employ of the Searle & Hereth Company?

A. I was manager of the elixir and syrup department.

X Q. 71. The manufacturing department?

A. Yes.

X Q. 72. Were any experiments made in the Searle & Hereth Company while you were with them to bring out a similar preparation one of similar character?

A. As near as I can recall I did some small amount of experimenting but the experiments were not completed when the Searle & Hereth Company was absorbed by, I believe, the Pfeiffer Chemical Company, or at that time, becoming associated with it, and the matter was then dropped as near as I can recall.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 73. During any part of your work on this formula, state whether or not you were marketing the product at the same time and keeping up your experiments?

A. Yes, we were. We were trying to make a better preparation than we had been formerly; of course, we were trying to improve upon it at all times.

R. D. Q. 74. State whether or not by the word formula you include not only the ingredients of your preparation but the method of making it?

A. Well, the formula, what is meant in pharmacy, are the ingredients, compounding of the formula, that requires pharmaceutical skill. Whether that is embraced in the formula of course I cannot state.

WILLIAM C. KERSTANN.

Sworn to before me the 8th day of December, 1915.

EDWIN W. TOBIN,
Deputy Clerk of the U. S. District Court, Eastn. Div., Eastn. Judicial Dist. of Missouri.

EUGENE R. BROWN, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and present occupation?

A. Eugene R. Brown; thirty-six; St. Louis, Missouri; 740 North Euclid Avenue; Traveling for William R. Warner & Company, as a Drug Salesman.

Q. —. State your course of life in the drug business beginning at the start and coming on down to date.

A. Well, I graduated in medicine at the Washington University, St. Louis. I studied there four years and I practiced five years and then went on the road for H. K. Mulford & Company, manufacturing druggist, pharmaceutical house; Philadelphia. I was with them six months; then with Abbott Alkaloid Company, Chicago, also pharmaceutical manufacturers; I was with them two years; I then went with the Webster-Warnock Company, Memphis, Tennessee; I was with them three years. They are also pharmaceutical manufacturers, as drug salesman. I then became sales manager and was director and stockholders of the Pullen, Richardson & Company, St. Louis, chemists, also pharmaceutical manufacturers, and was only with them three months when we sold out to the Allen Pfeiffer Chemical Company of St. Louis. I then went with the I. Samelson Company of Memphis, Tennessee, Cigar Jobbers. I was with them twenty-one months, and I left them to go into the drug brokerage business for myself. I was in the drug brokerage business about eight months and the European war came up and I could not have anything to sell. I handled a line of imported drugs and drug sundries and then I came with the William R. Warner Company in August of 1914 and I have been traveling for them in Southern Missouri and Central Missouri since that time.

I never worked any territory in St. Louis or St. Louis County. I has been outside of St. Louis. I am a registered druggist in Missouri.

Q. 4. About how many druggists are there in your territory, a proximately?

A. One thousand.

Q. 5. How often do you make your visits to these drug stores year?

A. Three months and a half between trips, on an average.

Q. 6. On what proportion of the doctors in your territory do yo call?

A. I endeavor to see all the dispensing physicians in my territor every trip, that is the three times a year.

Q. 7. If a retail druggist has a prescription or a call over th counter for a given preparation made by a specified drug house an he fills that with a similar preparation made by a different hous state whether that is honest business on the part of the druggist?

A. Absolutely no.

324 Q. 8. State whether or not you express the ethical standar of the drug business?

A. Yes, I believe I do, it is among all druggists and doctors, it i considered unethical to substitute.

Q. 9. Is that your personal opinion of the morals?

A. It is.

Q. 10. If a drug salesman offered a given product to a druggis suggested to him that he could dispense that product when a similar product was specified in a prescription or a call over the counter of a different make, state whether or not that is honest business on the part of the salesman?

A. It is a violation of all rules of right or wrong it looks to me.

Q. 11. Did you ever do it?

A. I never have.

Q. 12. Do you know a druggist named James A. Kinder, and if so, state where his drug store is?

A. His drug store is in Cape Girardeau and he is a member of the firm of Miller & Kinder on Good Hope Street, and he does the buying for that store.

Q. 13. Have you solicited his trade, and if so, how often?

A. I have called on him on my regular trips to Cape Girardeau ever since I have been in the territory; that is about five times that I solicited his business.

Q. 14. Does Kinder carry Quin-Coco in stock?

A. No, sir.

Q. 15. James A. Kinder when called as a witness for the plaintiff on page 137, testified as follows:

"Q. 12. What did Mr. Brown state, if anything, as his reasons for expecting you to sell Quin-Coco, if you had no calls for it?

A. He stated that it had been and was being successfully used wherever Coco-Quinine was having a good sale; that they were identical preparations and could not be distinguished.

Q. 15. Did he or did he not explain to you how you could

325 use or sell Quin-Coco and if so what did he say?

A. He simply suggested that we could use it wherever there

was a demand for Coco-Quinine, and that it could not be told from Coco-Quinine."

I hand you the plaintiff's record in this case and call your attention to the questions I have dictated, and ask you to state whether those statements of Kinder are true or not true?

A. They are not. I have read it over. The question twelve, I have read, the question and answer that he said I made, there is a qualification in that for this reason, that in my talk to him I never suggested a substitution to him. I told him that we did not detail the doctors on Quin-Coco; that our house does not make a practice, and I suggested to him, we have a good preparation here with two grains of quinine sulphate to the teaspoonful, if you show this preparation to physicians I believe that you can get them to use that preparation because there is not a superior preparation to that product on the market. So the way this language was brought out, there is nothing said in regard to the physician at all. That is the way my talks were made. I think he said something about "Well, I am getting no call for your product and I said that is for you to do. I said we do not detail products. We make the prices on products that should be an inducement to the druggist to detail the doctor. We cannot afford to spend two or three days every time I come to Cape Girardeau, and if I did, we would have to charge more for the product and the man who buys the goods will have to pay the freight. My talk with him was entirely on the physician, whether I am calling on the dispensing physician; I talked straight from the shoulder to him. I showed him our product. I said it will pour in and out of a one-ounce bottle and let him judge for himself where he wanted to buy. That is up to him. I have told a great many doc-
326 tors you have brains, you have graduated in medicine; having brains you have a right to practice; if a preparation comes up to the two grains per spoonful strength, it will pour readily, that is what you want. I was in a doctor's office and I poured it in a one-ounce bottle and after that he did not buy any other product, chocolate-quinine, but ours.

Q. 16. Do you know Joseph N. Wolsey, and where is his place of business?

A. He is located in Cape Girardeau; I don't know where his store is located. His store is known as the City Drug Store.

Q. 17. Did you ever solicit his trade?

A. Yes.

Q. 18. How often?

A. On my regular visits, about three times a year.

Q. 19. Did he stock Quin-Coco?

A. I believe that he did.

Q. 20. Did he buy any from you?

A. No, I do not think he did.

Q. 21. Joseph N. Wolsey, called as a witness for the plaintiff, testified as follows:

"Q. 13. Anything else. I mean did he tell you of any other reasons why you should buy it?

A. That I could make more money on buying it. That is the same thing and I could dispense it as the same article.

Q. 14. Do you mean that he told you that you could dispense it when the Eli Lilly & Company's Coco-Quinine is called for?

A. Yes, sir."

What have you to say as to the truth or untruthfulness of that statement?

A. Well, it is a mis-statement of facts. My conversation was entirely in relation to a doctor whose office is next to his store
327 and from whom he gets all his prescriptions, and I suggested to him that he buy a gallon bottle of our Quin-Coco and when the doctor came in pour it out and let him taste it, and if you do not find the product satisfactory in every respect the gallon will not cost you anything. If it is, use it and pay for it. My conversation with him on the subject was on account of this doctor from whom he gets his prescriptions. In fact he is the only doctor from whom he gets prescriptions and they are very close friends and I knew if he would bring this matter up with him, he would have an excellent chance of opening a market for our Quin-Coco.

Q. 15. State whether or not you told him that he could dispense Quin-Coco when Lilly & Company's Coco-Quinine was called for?

A. I did not.

Q. 16. Mr. Wolsey further testified:

"R. D. Q. 28. By Q. 13 I asked you if he told you of any other reason why you should buy it. You replied 'that I could make more money on buying it, that it is the same thing and I could dispense it as the same article.' Is this correct?

A. Yes, sir.

R. D. Q. 29. My questions are for the purpose of clearing up a seeming confusion between your direct and your cross-examination. I want to ask you again did or did not the Warner representative tell you that you could furnish Quin-Coco when Coco-Quinine was called for?

A. Yes, sir."

State whether or not you said those things?

A. I do not know of a conversation that I have ever held with the druggist where he brought up the subject of comparison between Coco-Quinine and Quin-Coco. I have told him they were putting out a product that runs two grains to the ninety-six minims. We put out a product that is thinner and will pour more readily
328 than the Eli Lilly & Company's product and I believe that is what I said.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 30. In comparing Quin-Coco with a like preparation what preparation did you mean, usually compare it with?

A. That depends on the preparation that the druggist mentions in his conversation; some of them mention Meyer Brothers Drug Company's, some mention Mulford's, some mention Lilly's, some mention Wampole and some mention William A. Webster, then my comparison was made on that one drug.

X Q. 31. In the case of Mr. Wolsey and Kinder, whose product was mentioned?

A. Lilly's.

X Q. 32. Please give the names of those who mentioned Lilly & Company's product?

A. I do not recall any druggist specifically mentioning any product only those two that came up in this case.

X Q. 33. Please mention the name of any druggist who mentioned Mulford's product?

A. I cannot recall any druggist who mentioned any other product or any other druggist that mentioned Lilly's product, simply these two specific cases.

X Q. 34. Is it not a fact that Lilly's product, Coco-Quinine has a large sale in your territory?

A. I believe that it has.

X Q. 35. Was it Lilly's product that created the demand that you were seeking to fill?

A. Well, I cannot tell you that. All these lines were sold in this territory before I came in charge. I only have been in charge fifteen months.

X Q. 36. Did you ever compare your product with the Lilly product in demonstrating it with druggists?

329 A. Yes.

X Q. 37. Did you demonstrate to them it was the same color?

A. It is not.

X Q. 38. Did you demonstrate to them it was the same taste?

A. Yes.

X Q. 39. It is very difficult to tell the difference?

A. Well, I think there is a difference. Ours is a thinner product and pours more readily than theirs. In fact up until recently Lilly had a preparation that I did not consider a very good article; it was too heavy. They are making a thinner preparation now than they did, and I have mentioned that fact to some druggists that we put up a thinner product than the Lilly, but theirs is almost as thin as ours now, but we are putting out the best chocolate-quinine on the market.

X Q. 40. Is it not identical with the Lilly product?

A. In strength.

X Q. 41. And in appearance?
A. No.
X Q. 42. In what particular?
A. There is a little difference in color.
X Q. 43. A distinguishable difference?
A. Yes, ours runs darker.
X Q. 44. Counsel for your house has recently had an expe chemist analyze the two and examined them, and he has testifie he could detect no difference.

Mr. Rawle: Question objected to for the reason it is not a corre statement of the expert chemist's testimony. What have you to sa to this?

A. I have seen our product and the Lilly product side by side an ours looks blacker, and I have had druggists tell me that is a blacke chocolate in your product than Lilly has in theirs. I do not know anything about the composition of the two outside of the formula on the bottle.

330 X Q. 45. What was the occasion of the druggist mention- ing this?

A. The two products being on a shelf together.
X Q. 46. Mr. Kinder in his answer to Q. 8 stated that you told him that your preparation had caused Lilly to thin down their Coco-Quinine syrup in order to meet the efforts *of* Warner & Company were making, is this true?
A. I believe I told him that; that we were selling so much Quin-Coco throughout the United States that Lilly & Company thinned their product in an endeavor to put out as elegant a preparation as we were putting out.
X Q. 47. You sell considerable Quin-Coco in your territory?
A. Quite a little.
X Q. 48. It is a pretty good selling specialty?
A. Yes.
X Q. 49. You say that Mr. Kinder told an untruth in the testi- mony that you had read which he gave on behalf of the plaintiff in this case?
A. He mis-stated the facts.
X Q. 50. Do you say that Mr. Wolsey, stated an untruth in his deposition on behalf of plaintiff in this case?
A. Both of them omitted the essential part in their statements with me. The conversation with them was entirely with regard to the physicians' prescriptions. Neither one mentioned the fact that I suggested that they take up our Quin-Coco with the physicians who sent prescriptions to the store.
X Q. 51. So far as the statements went were they true?
A. No, because I did not tell them to substitute or suggest that to them.
X Q. 52. Nor was there anything upon which they could infer they might substitute?

A. Absolutely no. I discouraged substitution in every
331 transaction, as a physician would not send a prescription to a druggist that he thought would substitute. I would not take a chance on it.

X Q. 53. Why didn't you call on the physician who was next door to the druggist and persuade him to prescribe your products?

Mr. Rawle: Question objected to as irrelevant.

A. Our house has instructed their salesmen not to detail a physician; that is a loss of time and an expensive proposition and I do not detail a doctor except when I am in a town and there is no train out and nothing else to do, I might go around to his office and loaf with him and talk about the merits of our product, but I never lose any time in doing it.

X Q. 55. Who gave you such instructions in your house?

A. Why, I think Mr. Merner and Mr. Ritayik both.

The Witness May I make an addition, that is not to detail a prescribing physician. Of course I sell dispensing physicians.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 56. What were your instructions as to detailing physicians?

Mr. Bradford: Question objected to as the witness already answered fully.

A. If I was in a town and had time to spare I would go around and see as many doctors as I could and detail them on our specialties, but if I would have to miss a train or lay over, or anything like that, I would just pass it up.

Re-direct examination closed.

332 Recross-examination.

By Mr. Bradford:

R. X Q. 57. I assume that in calling on a thousand drug stores, three or four times a year, selling your entire line, you had very little spare time?

A. That depends on the trains. Now, yesterday, I was in a town that had one druggist and that druggist was away from two o'clock until nine o'clock last night, so all I did was loaf and that frequently happens owing to the rotten railroad service in my territory. I do not have anything else to do.

Recross-examination closed.

EUGENE R. BROWN.

Sworn to before me the 8th day of December, 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

FRED C. STEVENSON, a witness called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Fred C. Stevenson; forty-six; Alhambra, California; Traveling Salesman.
Q. 2. State whether or not you are an old Warner salesman, and since when?
A. Yes, about twenty years.
333 Q. 3. How long have you had a territory on the Pacific Coast?
A. About fifteen years.
Q. 4. Do you know Charles L. Hooper, who at one time was in the employ of the Warner Company?
A. Yes.
Q. 5. Where and when did you know him?
A. I first met him in the D. & S. drug Store, San Francisco, 20 Ellis Street; that was before he went in the employ of William R. Warner & Company.
Q. 6. What year?
A. 1911.
Q. 7. Did you employ him for the house?
A. Yes.
Q. 8. Did you give him any instructions as to the sales policy of the house?
A. Yes.
Q. 9. Did you give him a copy of the "Salesman Confidential?"
A. Yes; I gave him one and instructed him to study it from cover to cover as that covered all the prices and also the direct policy of the house.
Q. 10. Did you travel with him?
A. No, sir; that is only the city trade, not on the road.
Q. 11. Did you watch him sell?
A. Yes.
Q. *11.* And gave him instructions from time to time as he was selling?
A. Yes.
Q. 12. Charles L. Hooper when called as a witness for the plaintiff testified as follows in answer to Q. 6:

"A. In the capacity as the representative for the Pfeiffer Chemical Co., I received instructions from Mr. F. C. Stevenson who was representing the Pfeiffer Chemical Company to sell Quin-Coco as a substitute product for Coco-Quinine, that being the only way that we could sell Quin-Coco, as there was no demand at all for Quin-Coco."

334 What have you to say as to the truth or untruthfulness of this statement?

A. I did not specialize on Quin-Coco. That came up as part of the regular work. We had a great many items to go over and inasmuch as it is one of our poorest sellers in the territory, we did not devote but very little time to it.

Q. 13. State whether or not what he testified to in the words read to you, is true. I hand you the printed volumn?

A. I did not instruct him to sell Quin-Coco as a substitute for Coco-Quinine.

Q. 14. Charles L. Hooper was handed "plaintiff's exhibit Document three," and was questioned as to it and testified as follows:

"Q. 13. Did Mr. Stevenson, to whom you have before referred make any statement to you as to this document?

A. Yes, sir.

Q. 14. What were they?

A. Mr. Stevenson told me in my leisure moments to study up and get posted on competing preparations.

Q. 15. What did he say, if anything, relative to the Coco-Quinine?

A. That to go ahead and sell Quin-Coco for Coco-Quinine, as it was the same and cost the druggists less money."

State whether or not you said that to Mr. Hooper?

A. I did not say to Mr. Hooper that it could be sold as Coco-Quinine.

Q. 15. Mr. Hooper further testified in answer to X Q. 73:

"Quin-Coco was the product I was given explicit instructions to sell against Coco-Quinine, as Coco-Quinine had an enormous sale in California."

335 State whether or not you gave him such instructions?

A. No, sir."

Q. 16. Mr. Hooper testified:

"X Q. 89. Can you remember the facts he emphasized in regard to any other product than Quin-Coco?

A. Castoria.

X Q. 90. What did he emphasize on that?

A. Sell Castoria as a replacer of Fletcher's Castoria.

X Q. 91. What do you understand 'replacer' means?

A. Replacer, I understand as a substitute."

State whether or not you gave him such instructions in regard to the sale of Castoria?

A. Fletcher's Castoria was not mentioned, to my knowledge. There are so many other Castorias on the market.

Q. 17. State whether or not Fletcher's Castoria is sold in original bottles to the customer?

A. Fletcher's, yes.

Q. 18. State whether or not Pfeiffer Chemical Company's Castoria is sold to the customer in the original bottle?

A. Yes.

Q. 19. State whether or not a substitution would be possible in such a case?

A. It would not.

Q. 20. Mr. Hooper further testified in answer to R. D. Q. 101:

"A. I can't remember the words Mr. Stevenson used, but the gist of my instructions was to sell Quin-Coco for Coco-Quinine as he had been slipping it to Lilly on Coco-Quinine in the Sacramento Valley."

336 State whether or not you gave any instructions to Mr. Hooper to that effect, and stated anything about slipping it to Lilly on Coco-Quinine in the Sacramento Valley?

A. I did not.

Q. 21. If a retail druggist has a prescription or a call over the counter for a given preparation of a given maker and dispenses a similar preparation of a different maker, state whether or not that is honest in the druggist?

A. It is dishonest.

Q. 22. State whether or not you thereby express the moral code of the drug business?

A. It is against the moral code of the drug business.

Q. 23. State whether or not it is against your own personal moral code?

A. It is.

Q. 24. If a drug salesman should suggest to a retail druggist when offering him a given perparation that he could dispense it on prescriptions or calls over the counter for a similar preparation of another make, state whether or not you would consider this honest in the salesman?

A. It would be dishonest.

Q. 25. You have been a drug salesman of long experience, state whether or not in your opinion a drug salesman in the long run would benefit his business by suggesting to a retail druggist that he should use one maker's product when another maker's article was specified, either on a prescription or on a call over the counter?

A. No. It would be detrimental to him in the long run.

Q. 26. What effect would such conduct on the part of a salesman doing such a thing have on his reputation with the customer?

A. They would feel that they did not have any confidence in him.

337 Q. 27. State whether or not in your opinion a good drug salesman would understand that method of his would be bad for his business?

A. Yes, it would be very bad.

Q. 28. What effect would it have on a house that he represented if a salesman should pursue that course of business?

A. The druggist would soon find that they did not have any confidence in him either.

Q. 29. You mean in the house?

A. In the house.

Q. 30. In your experience, could a retail druggist create a market for a given preparation if he chose to push a specialty?

Mr. Bradford: Question objected to as irrelevant, immaterial and incompetent.

A. Yes.

Q. 31. In what way?

Same objection.

A. By recommending it to a customer that might come in with some particular ailment and he could counter-prescribe some particular item for that ailment, and in that way increase the sale of a given item.

Q. 32. What work could he do in that line with doctors, if any?

A. The same. Doctors could dispense any item that they choose to buy from any house.

Q. 33. What work could a druggist do in pushing a particular preparation with his doctors?

A. He could recommend it to them, showing them the difference between one of the other preparations, he thought was a better preparation, and in that way create a demand for it with his physicians.

Direct examination closed.

38 Cross-examination.

By Mr. Bradford (without waiving objections):

X Q. 34. Are you at present actively traveling or merely looking after other traveling salesmen in your territory?

A. I travel.

X Q. 35. What territory do you cover?

A. My territory is Southern California, Arizona, New Mexico, part of Colorado and part of Utah.

X Q. 36. You visit retail drug stores in this territory how often?

A. In Southern Califorinia about every ninety days, the balance of the territory, twice a year.

X Q. 37. Please state as near as you can the exact conversation that took place between you and Mr. Hooper when you were instructing him in reference to the sales policy of your house?

A. It was to be thoroughly honest in every way, with himself, the house and the trade.

X Q. 38. Is that the conversation that took place?

A. That is part of it.

X Q. 39. What else was said?

A. Well, we had about five thousand items to go over and we did not dwell very long on any particular item. It was general work in going over the whole line to give him those instructions.

X Q. 40. What did you say to him in reference to this blue list?

A. I showed him the blue list as a comparative list of the various preparations that were on the market.

X Q. 41. In respect to what?

A. In respect to there being preparations that were called for and could be used in different ways with the druggists.

X Q. 42. I note this list enumerates the preparations put out by other houses in the first column and the preparations of your house corresponding thereto, in the next column; do you know
339 why this arrangement was made?

Mr. Rawle: Question objected to as not correctly stating the contents of the blue list.

X Q. 43. I will restate the question, before you answer, I note that the blue list in the first column gives the names of the preparation put out by the original house, the name of the original house, and the price of the original preparation, and in the second column lists the name of your preparation which was similar, with the exception of those preparations formerly belonging to the Searle & Hereth Company, and William R. Warner Company afterwards acquired by the interests controlled by the Pfeiffer Chemical Company. Will you please state the significance of this fact as understood by you?

Same objection.

A. The preparation in the second column is similar to the preparation in the first column and can be sold to the drug trade and they can call attention to the physician of having a preparation that costs considerably less money and reduce the expense to the patient by supplying the Pfeiffer or Warner goods.

X Q. 44. Referring to the item Coco-Quinine on this list, what information does the list give in reference to the item referred to?

A. It gives Coco-Quinine in the first column and Quin-Coco in the second column.

X Q. 45. Does it indicate Quin-Coco is an original preparation?

A. I cannot answer.

X Q. 46. Does it indicate that Coco-Quinine was the original preparation manufactured by Eli Lilly & Company and gives Eli Lilly & Company prices, and that Quin-Coco is the Searle & Hereth preparation to sell in the place of Coco-Quinine and gives your price for this product?

340 A. I cannot say from the list whether it was an original preparation or not.

X Q. 47. Do you know from your knowledge?

A. No, sir.

X Q. 48. Which of these preparations was the first?

A. I do not recall either one of them until I got the Searle & Hereth list.

X Q. 49. You never knew of Coco-Quinine, Lilly, in your territory prior to the time Quin-Coco was listed by your house?

A. No, sir.

X Q. 50. Never heard of it?

A. Never heard of it.

X Q. 51. You had been traveling in your territory in the drug trade prior to that time?

A. Yes; that is in that territory where they used Coco-Quinine.

X Q. 52. Where were they using Coco-Quinine?

A. Sacramento and San Joaquin Valley.

X Q. 53. But you were not traveling in this territory at that time?

A. No, sir.

X Q. 54. You knew, however, that it was being sold in that territory?

A. Not at that time, because I had no other preparation like it and paid no attention to it.

X Q. 55. You just assumed that it was being sold in that territory at that time?

A. Not at the time I went into the territory. To get clear on that, you see I was out on the Pacific Coast before they acquired the William Warner & Company line.

X Q. 56. I am speaking now of Eli Lilly & Company's product?

A. Yes.

X Q. 57. Coco-Quinine, and ask you when that first appeared in the drug stores in the territory you say you solicited trade from?

341 A. I do not remember.

X Q. 58. How long ago, approximately?

A. Eight or nine years ago.

X Q. 59. No longer than that?

A. No, sir, not to my knowledge.

X Q. 60. Please state as near as you can what was said by you to Mr. Hooper in regard to this item, Quin-Coco?

A. I showed him our preparation among the others and stated that we had a preparation which I considered a superior product to Coco-Quinine or any other chocolate mixture, chocolate-quinine sold on the market, it being smoother, thinner, could be poured into a narrower mouthed bottle, and did not turn sour.

X Q. 61. Does Coco-Quinine turn sour?

A. I have had druggists say it did.

X Q. 62. What druggist ever told you that Coco-Quinine, Lilly, turns sour?

A. Eugene Whiting, Orville, California.

X Q. 63. When was this?

A. I should judge about four or five years ago, four years ago.

X Q. 64. Four or five years ago when he told you that the product turned sour?

A. Yes, the time he told me.

X Q. 65. What did Mr. Hooper say to you with reference to the subject of Quin-Coco and Coco-Quinine, if you recall?

A. Nothing at all that I remember.

X Q. 66. He accepted your instructions and followed them?

A. That part of them.

X Q. 67. Do you know whether he disobeyed your instructions?

A. I think he did.

X Q. 68. In what particular?

A. I think he misrepresented a great many things that were told to him. He used his own initiative to further the sale of certain goods.

342 X Q. 69. What is the chief policy of your house?

A. To be strictly honest with the trade, with the customer and with themselves and morally right.

X Q. 70. Did you have one of these Salesmen Confidentials?

A. Yes.

X Q. 71. Did you give one to Mr. Hooper?

A. I cannot say positively but I think so.

X Q. 72. Did you call his attention to the moral teachings in the last part of the book, pages 86 and 87?

A. No, sir. I gave him a book and told him he would have to study it from one end to the other because the whole instruction was in that book.

X Q. 73. Did you ever read these instructions yourself?

A. Yes.

X Q. 74. How long ago?

A. Possibly two years.

X Q. 75. Were they in the same Confidential prior to that time?

A. Yes.

X Q. 76. How long ago?

A. I cannot state.

X Q. 77. In which edition of the Salesman Confidential did this part, pages 86 and 87, first appear?

A. I don't know.

X Q. 78. I call your attention to page 85 of the Salesman Confidential, the first part of the paragraph at the bottom of the page, as follows: "We have written quite fully on this subject, as we consider it second in importance only to the selling of goods," I infer from this that one of the important duties imposed upon salesmen was to get orders for goods?

A. Yes.

X Q. 79. Nothing more important than that?

A. To be honest in getting the orders.

X Q. 80. What did you say to Mr. Hooper in reference to the Castoria item, if anything?

A. I showed him a bottle of Pitcher's Castoria and told
343 him to sell it because it contained more, and the customer got twice as much for his money as any other package on the market I knew of, and also that it contained no alcohol.

X Q. 81. You did not refer to Fletcher's Castoria at all?
A. Not to my knowledge.
X Q. 82. In the particulars and matters called to your attention by counsel for your house, Mr. Hooper's statements then are false, in your opinion—do you state that Mr. Hooper's deposition to be false?
A. The Judge can draw his own conclusions from his testimony and mine.
X Q. 83. Have you ever represented to any of the druggists in your territory that any of your products or any of the products sold by your house could be used as a substitute for products of other houses?
A. No, sir, not as a substitute.
X Q. 84. Have you told them that they could use your products in place of products of other houses without being detected?
A. No, sir.
X Q. 85. Have you ever told them that certain of your products were just the same as certain products of other houses?
A. No, sir.
X Q. 86. Have you ever told any customer that he could use certain products which you were offering him for products of other houses that were called for?
A. No, sir.

FRED C. STEVENSON.

Sworn to before me the 8th day of December, 1915.

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastn. Div., Eastn. Judicial District, of Missouri.

Not being able to complete the taking of these depositions, by agreement of counsel for plaintiff and counsel for defendant, the same was adjourned until Thursday, December 9th, 1915, at 10.00 a. m.

Pursuant to adjournment as before stated, on December 9th, 1915, at 10.00 a. m., the further taking of these depositions was had as follows

ULYSSIS S. MCCLELLAN, a witness being called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Ulyssis S. McClellan; forty-nine; Kirkwood, Missouri; General Manager of John T. Milliken & Company; Manufacturers of pharmaceuticals, with their plant and business in St. Louis, Missouri.

Q. 2. State whether or not your house, John T. Milliken & Company, has manufactured and placed on the market a chocolate or cocoa and quinine preparation?

A. Yes, we have a chocolate quinine preparation known as "Koquin."

Q. 3. State when that was first put out by your house?

A. Well, according to the records, we have there they first made that in July, 1905. Now, of course, this name we have only had a short time, "Koquin." We called it quino-chocolate before if I remember aright.

Q. 4. In what part of the United States has this product been marketed?

A. In just the territory tributory to St. Louis, that is Texas,
345 Louisiana, Arkansas, Tennessee, Alabama, Kentucky, Illinois, Iowa, Nebraska, Kansas, Washington, and of course Missouri.

Q. 5. State whether or not it is listed in your cataalogue and offered to the trade by your regular sales force?

A. It is.

Q. 6. State whether or not it is sold direct to the retail druggist?

A. Well, in some cases sold direct to the retail druggist, but mostly through the jobber.

Q. 7. For how many years have you been in the drug manufacturing business?

A. Most of my time was on the road, in the neighborhood of twenty-four years.

Q. 8. For how many years have you known of the defendant William R. Warner & Company as a drug manufacturing house?

A. Ever since I can remember.

Q. 9. Do you know what their reputation is as a drug manufacturing house, and if so, please state it?

A. I always considered it one of the oldest and reliable concerns in the country.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 10. When was the chocolate-quinine preparation of Milliken & Company first listed in its catalogue?

A. I cannot tell you about the catalogue, but according to the records we have down there, they were made July 8th, 1905. Now, that is the manufacturing card; that is all we got to go by.

X Q. 11. Is this a record of experimental work or actual turning out of a commercial product?

A. Actual turning out of the product.

X Q. 12. What does this record show?

346 A. Just simply gives the working formula.

X Q. 13. What is the working formula?

A. I cannot tell you.

X Q. 14. How long have you been with Milliken?

A. Four years the 11th of November.

X Q. 15. This product is still being sold by your concern and has been since your connection with it?

A. Yes.

X Q. 16. To a considerable extent?

A. Well, I don't know to just what extent; we sell quite a little of it.

X Q. 17. About how much per annum?

A. I cannot state at all.

X Q. 18. Can't you approximate?

A. No, I cannot give you an idea.

X Q. 19. It is one of your leading items?

A. No, it is not one of our leading items.

X Q. 20. For whom did you travel when you were on the road?

A. Over fourteen years for Parke-Davis & Company, before that time, first with Tilden & Company, and then Moffit-West Drug Company, and then Parke-Davis & Company.

X Q. 21. Were you employed with Parke-Davis & Company up until the time you took employment with Milliken?

A. Yes.

X Q. 22. What territory did you cover?

A. I had charge of the traveling salesmen south of the Chicago branch, and south of the St. Louis branch for a number of years. I covered a great many states for Parke-Davis & Company. I was for three years and had charge in Colorado, Idaho, Montana, Wyoming.

X Q. 23. During that period did you ever hear of Eli Lilly & Company's product, Coco-Quinine?

Mr. Rawle: Objected to as not proper cross-examination.

647 A. Well, I do not remember just exactly when Lilly & Company first marketed Coco-Quinine, in fact I did not pay much attention to it.

X Q. 24. How long ago, from your personal recollection, would you say it was that Lilly first put Coco-Quinine on the market?

A. A number of years, but I would not want to say specifically because I do not remember.

X Q. 25. Ten years?

A. Well, I am pretty sure ten years.

X Q. 26. Fifty years?

A. Well, I don't know about that; I would not want to say.

X Q. 27. Which was the first preparation of general character which you ever heard of?

A. The first that I remember of course was Lilly, I do not know whether there was one before that or not.

X Q. 28. Is it not generally understood in your house and in the trade that your product is an imitation of the Lilly product?

A. No, I do not look at it that way. We do not sell substitutes for anything. We have sold everything since I have had charge of Milliken & Company strictly on its own merits. I do not go and tell anyone this is like so and so, or anything of the kind. There is

a certain demand for it and that is the reason we were listing it. We do not tell anyone that is Coco-Quinine, or that it is as good as Lilly's or as good as anyone else, but we sell it on its own merits.

X Q. 29. While you were employed by Parke-Davis & Company, did you ever suggest to them or ask them to make a product to sell against Coco-Quinine?

Mr. Rawle: I object to that as not proper cross-examination.

A. No.

X Q. 30. Did you ever solicit them to duplicate Coco-Quinine?

Same objection.

348 A. No.

X Q. 31. How long have you known the house of William R. Warner & Company?

A. For years.

X Q. 32. How does its reputation compare to-day with its reputation in the drug trade ten years ago as a pharmaceutical house?

A. I have heard no complaint.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 33. To what extent have you the management of the entire business of your house?

A. I have the management of the entire business.

R. D. Q. 34. State whether or not in your opinion the reputation of William R. Warner & Company in the drug trade is as good as it was ten years ago?

A. Yes, I believe it is, because they are still in business, and any concern manufacturing pharmaceuticals nowadays has got to be about right to stay in business. One is as good as the other in my opinion.

Re-direct-examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 35. You have knowledge of the fact, have you, that William R. Warner & Company, since August, 1908, has been controlled by the Pfeiffer Chemical Company interests?

A. Yes. I do not know how long they have been controlled, no; I do not know whether it was since 1908 or how long. I know that for some time they have been controlled by the Pfeiffer Chemical Company.

ULYSSIS S. McCLELLAN.

349 Subscribed and sworn to before me this 31st day of March, A. D. 1916.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

OSCAR G. SALB, a witness called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?
A. Oscar G. Salb, twenty-seven, St. Louis, Missouri, chemist, John T. Milliken & Company, manufacturers of pharmaceut-als, St. Louis.
Q. 2. Does your house put out a chocolate or cocoa and quinine preparation?
A. Yes. A cocoa preparation with quinine sulphate.
Q. 3. What are the functions of the cocoa in this product?
A. We use the cocoa in there in order to give it a pleasont taste, suspending the mixture.
Q. 4. State whether or not the cocoa has any effect in disguising the bitter taste of the quinine sulphate in your preparation?

Mr. Bradford: Objected to as leading.

A. In regard to this preparation, it is hard to say whether the cocoa helps to disguise the quinine itself completely.
Q. 5. If you made two mixtures, one of quinine sulphate with a simple syrup, and the other of quinine sulphate with simple
350 syrup cocoa, mixing them in the same proportions that you now use in your preparation, state whether or not the bitter taste of the quinine sulphate in the second of these mixtures would be masked as against the same, the first of these, and to what extent?
A. Whether the taste would be masked?
Q. 6. Yes?
A. Well, cocoa syrup would aid in masking the taste of the quinine sulphate.
Q. 7. In your perparation is the quinine sulphate in crystal-ine form?
A. Yes, it is crystals.
Q. 8. State whether or not it being in crystallized form, it is held in suspension in the product?
A. It is held in suspension.
Q. 9. State whether or not you can make equally satisfactory pharmaceutical preparations without the use of the cocoa?
A. Not and get the taste.
Q. 10. State whether or not your house has manufactured and

put on the market the cocoa and quinine sulphate preparation that you have referred to?

A. The records show it was made in 1905.

Q. 11. When did you see this record?

A. This morning.

Q. 12. State whether or not it gave the date of the first turning out of the product?

A. I cannot say whether this is the first or not.

Q. 13. State whether or not it gave the date for turning out some of this product?

A. You mean whether this is the date of turning it out?

Q. 14. I am asking whether the statement on the record that you saw this morning gave a date on which some, at least some, of the product was turned out?

A. No, the finishing card shows that the preparation had
351 been finished in the manufacturing department.

Q. 15. What date was on the card do you say?

A. July 8th.

Q. 16. What did the entry show about turning out the product on that date?

A. The return ticket shows that the product was made up according to the formula.

Q. 17. On that date?

A. On that date.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 18. Did the ticket show that a sale had been made?

A. The ticket did not.

X Q. 19. This may have been then this experimental turning out of a quantity of it, I presume?

A. Well, the original card called for forty-five gallons which was duplicated, showed ninety gallons were made.

X Q. 20. On that date?

A. On that date.

X Q. 21. How long have you been employed by John T. Milliken & Company?

A. Two years and four months.

X Q. 22. What are your duties?

A. Chemist.

X Q. 23. To what extent is this product turned out by your house?

A. I do not quite understand.

X Q. 24. To what extent, during the past two years, has this product been manufactured by your house?

A. You mean in what amounts?

X Q. 25. Yes?

A. Well, I really cannot give any definite amount without referring to the records.

352 X Q. 26. How often did you make ninety gallons?
A. We make ninety gallons two or three times a month.
X Q. 27. Is that the size of each lot you turn out?
A. No, the size is forty-five gallons, the original ticket.
X Q. 28. Did you ever make up samples of a quinine sulphate preparation with simple syrup alone?
A. Yes.
X Q. 29. And then with quinine sulphate, simple syrup and cocoa alone?
A. Yes.
X Q. 30. What was the result as to the taste of the two products?
A. Well, the cocoa preparation had a more pleasant taste.
X Q. 31. It tasted of the cocoa?
A. No, it did not taste of cocoa, more of chocolate, sweet.
X Q. 32. Were both of the preparations bitter?
A. Yes.
X Q. 33. What is the formula used by John T. Milliken & Company in making that preparation?

Mr. Rawle: Mr. Rawle suggests to the witness he is not compelled to disclose the nature of the private matters of his firm and objects to the question as calling for such.

X Q. 34. You may make any explanation you see fit?
A. I would not have to give the amounts, I would just have to give the ingredients; we use Yerba Santa, cocoa, quinine, sulphate, sugar, soda bicarbonate, water, vanillin, I do not remember the exact formula.
X Q. 35. This formula was with the house when you came to them?
A. Yes.
X Q. 36. Do you know who did the original work in the preparation of this product for Milliken & Company?
353 A. I do not know.
X Q. 37. Is the person still in the employ of the company, do you know?
A. No, I am pretty sure they are not.

OSCAR G. SALB.

Subscribed and sworn to before me this 18th day of March, A. D. 1916.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

EDWARD F. HELBIG, a witness called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?
A. Edward F. Helbig, forty-five, 5949 Von Versen, St. Louis, Missouri, department manager of Meyer Brothers Drug Company, manufacturing pharmacists, with plant and office at St. Louis, Missouri.
Q. 2. How long have you been in their employ?
A. Since 1889.
Q. 3. State whether or not this house of Meyer Brothers Drug Company has been putting out a chocolate cocoa and quinine preparation?
A. Yes they have.
Q. 4. Under what name is it sold on the label?
A. Quinico.
Q. 5. State when that was first manufactured and put on the market?
A. 1905.
354 Q. 6. Were you with the house at that time?
A. Yes.
Q. 7. Is it cocoa or chocolate with the quinine?
A. Cocoa.
Q. 8. State in what parts of the United States it has been marketed?
A. Well, through all the south and southwest, west.
Q. 9. State whether or not it is marketed by your regular sales force in that territory?
A. It is and has been.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 10. Who had charge of the making of this preparation in your house?
A. You mean the man who made it for us?
X Q. 11. Yes.
A. I am not positive but I think the name is Leftwich.
X Q. 12. When was it?
A. In 1905.
X Q. 13. Were you in the laboratory at that time?
A. Yes.
X Q. 14. Familiar with the manufacture of the article?
A. Well, no. That is I do not make any of these things myself.

X Q. 15. Did you have Lilly's Coco-Quinine in the laboratory at the time?

A. I do not know about that.

X Q. 16. Was it handled in the house?

A. Oh yes, we sold it.

X Q. 17. Your house also does a wholesale drug business as well as manufacturing business?

A. Yes, jobbing business.

X Q. 18. Do you know whether a considerable quantity of your product was sold in 1905?

355 A. I don't know how much.

X Q. 19. Do you know as to the present output of Quinico, your product?

A. I cannot give the exact figures. I did not look it up.

X Q. 20. State approximately?

A. About forty gallons a month, I guess.

X Q. 21. Has this product been manufactured and marketed by your house continuously since 1905?

A. Every year since that time.

X Q. 22. Has it never been discontinued since then?

A. We did at one time quit making it for a short time.

X Q. 23. What was the reason of your quitting the manufacture of it?

A. We did that at the request of Lilly & Company.

X Q. 24. Why did you resume?

A. Because others were making it.

X Q. 25. Thought you might as well have a piece of the good thing inasmuch as others were doing the same, is that true?

Mr. Rawle: The question is objected to because the witness is not in business and does not occupy any position which would justify him in answering the question or making his testimony of any value.

A. Well I don't know whether to answer yes or no. We then considered it a regular standard article and therefore made it.

X Q. 26. You knew, did you not, that it was an original product of Lilly & Company?

A. Yes.

X Q. 27. This was well recognized in the trade was it not?

A. Yes.

X Q. 28. And your product was intended as an imitation of the Lilly product was it not?

Same objection.

356 A. Not an imitation, a similar product.

X Q. 29. Is it not a fact that it was made in as close imitation of the Lilly product as you could possibly make it?

Mr. Rawle: Objected to because the witness is not qualified to answer.

A. Well, it made the same kind of appearance.

X Q. 30. Was it similar to the Lilly product brought before you to work from and compare it with?

A. I presume it was. I did not work on it myself.

Cross-examination closed.

EDWARD F. HELBIG.

Subscribed and sworn to before me this 18th day of March, A. D. 1916.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court, Eastern Division, Eastern Judicial District of Missouri.

It is stipulated by and between counsel for the respective parties that the defendant's time for taking its proofs may be extended, the Court approving, until February 1st, 1916, it being understood that should the defendant conclude before that date, the plaintiff, if it desires, may proceed at once with taking rebuttal; and that plaintiff may have until April 15th, 1916, to conclude its rebuttal testimony, the Court approving.

Counsel for respective parties stipulate that inasmuch as the following witnesses—James W. Wilkins, B. F. Jones, Henry Richards, Henry Joseph Gonzales, Clinton Gordon McCarthy, Ernest B. De Vall, William C. Kerstan and Fred C. Stevenson—having come from a distance and have returned home, that the Special Examiner, after the depositions have been transcribed by the
357 stenographer and approved by Edward W. Tobin, that the deposition of each witness shall be sent to each of said witnesses for the purpose of obtaining his signature thereto, and that the signing of the depositions by the respective witnesses before the Special Examiner, shall, as to the witnesses above mentioned, be waived, and the depositions signed as herein provided, shall be read at the final hearing with the same effect as if each of them had been signed by the witness himself, in the presence of the Special Examiner.

The further taking of depositions in this cause is adjourned by stipulation of counsel until Tuesday, December 28th, 1915, at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pennsylvania.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, Edward W. Tobin, acting in this cause as Special Examiner pro hac vice by agreement of counsel for the respective parties, do hereby certify that the foregoing depositions of Garfield D. Merner, Henry J. Ritayik, James W. Wilkins, B. F. Jones, Howard Henry Richards, Henry Joseph Gonzales, Clinton Gordon McCarthy, Ernest B. De Vall, William C. Kerstann, Eugene R. Brown, Fred C.

Stevenson, Ulyssis S. McClellan, Oscar G. Salb and Edward F. Helbig, were taken on behalf of the defendant in cause No. 1355, pending in the District Court of the United States for the Eastern District of Pennsylvania, wherein Eli Lilly & Company is complainant, and William R. Warner & Company is defendant, before me at room 144 Planters Hotel, in the City of St. Louis, State of Missouri, more than one hundred miles from Philadelphia, Pa.; that said witnesses and each of them were, pursuant to stipulation of
358 counsel for the respective parties, duly sworn by me as Deputy Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, before the commencement of their testimony, to testify the truth, the whole truth and nothing but the truth, as appears in the foregoing record; and I do hereby further certify that I am a duly appointed and qualified Deputy Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri; that the testimony of each of the said witnesses was taken down in shorthand and transcribed by William H. Corcoran, acting by consent of parties; that the depositions of the respective witnesses were commenced and concluded on the dates as shown in the record; that the depositions of witnesses Garfield D. Merner, Ulyssis S. McClellan, Oscar G. Salb and Edward F. Helbig, were read over and signed by the respective witnesses in my presence, and that each witness made oath to the correctness of his deposition at the time of subscribing to the same; that the depositions of witnesses Henry J. Ritayik, James W. Wilkins, B. J. Jones, Howard Henry Richards, Henry Joseph Gonzales, Ernest B. De Vall, William C. Kerstann, Eugene R. Brown and Fred C. Stevenson, who are all non-residents of the City of St. Louis, were by agreement of counsel for the respective parties forwarded to the said witnesses for signature; that the signature of witness Clinton Gordon McCarthy to his deposition was by agreement of counsel waived; that I am not connected either by blood or marriage with any of the parties, nor interested directly or indirectly in the matter in controversy in said cause.

In testimony whereof, I have hereunto set my hand, in the City of St. Louis, State of Missouri, this 8th day of April, A. D.
359 1916, and do now return the foregoing depositions, duly signed, sealed and marked, into the District Court of the United States for the Eastern District of Pennsylvania.

[SEAL.]

EDWARD W. TOBIN,
Special Examiner pro hac vice, Acting by Consent and Agreement of Counsel for the Respective Litigants.

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Depositions on Behalf of the Defendant, Take Before George Brodbeck, Esq., Special Examiner, at the Office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Tuesday, December 28th, 1915, at 10 o'clock a. m.

Met at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., pursuant to adjournment taken at St. Louis on December 9, 1915.

Present:

George Brodbeck, Esq., Special Examiner.
E. W. Bradford, Esq., representing the plaintiff.
Francis Rawle, Esq., representing the defendant.

H. E. STARRING, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, residence, age and occupation?
A. H. E. Starring; thirty years old; residence, Detroit, Michigan; occupation, traveling salesman.
360 Q. 2. State briefly and chronologically what has been your connection from the first in the drug business?
A. Since about high school time——
Q. 3. When did you first go into the drug business?
A. I went to work in a drug store when I was about ten years old, and have been connected with the drug business practically ever since. I am a registered pharmacist in Michigan, but have never owned a drug store of my own.
Q. 4. Did you ever work in a drug store as a prescription clerk?
A. I worked in a drug store as a prescription clerk for about seven years.
Q. 5. Mention when. Up to what time was the end of the seven year period?
A. Up until about December, 1912. .
Q. 6. Where?
A. Detroit, Michigan.
Q. 7. Then where did you go?
A. Shortly afterward, in February, 1913, I entered the employ of William R. Warner & Company. My territory was Detroit and six surrounding counties. In the latter part of August, 1914, my territory was enlarged to include several more counties surrounding this district. That is, my present territory.
Q. 8. About how many retail druggists are there is that territory.
A. I estimate about eight hundred or more retail druggists in this territory.
Q. 9. About how often do you call on these druggists?
A. On an average of three times a year.

Q. 10. Approximately how many items are there in the entire lines which you sell?

A. I estimate five thousand or more.

Q. 11. What is your practice as to pushing particularly one or a few items, or, on the other hand, your entire line?

A. Our policy is to sell assorted lines, a variety.

361 Q. 12. Do you mean to sell the entire line if you can?

A. Yes.

Q. 13. How long does the usual call on a given druggist occupy in offering him the entire line?

A. From one to two hours or more.

Q. 14. Up to how long?

A. Very seldom over three hours.

Q. 15. State whether or not you have made sales of Quin-Coco, S. & H., in your territory?

A. Yes.

Q. 16. How good a seller is it?

A. Fair.

Q. 17. Did any assistant sales manager of William R. Warner & Company instruct you in your selling duties when you first went to them?

A. Yes.

Q. 18. Who was it?

A. Mr. Hagaman, who is now with the house.

Q. 19. State whether or not he gave you a copy of the "Salesman's Confidential"?

A. Yes.

Q. 20. What instructions did he give you with regard to studying that and following its teachings?

A. He informed me that the "Salesman's Confidential" contained rules and regulations of the house which should be followed.

Q. 21. Have you had a copy of that ever since?

A. I have.

Q. 22. How carefully have you read the rules governing the sales policy?

A. I have read it over several times.

Q. 23. Can you state what they say on the subject of competitor's goods?

A. One rule says "never to speak ill of a competitor."

Q. 24. Do you remember any other rule on that same subject of competitor's goods?

A. "Never to speak ill of competitor's goods."

362 Q. 25. State whether or not you received any instructions from Mr. Hagaman as to honesty in selling?

A. Yes, he instructed me to adhere to the truth in selling goods.

Q. 26. Will you state whether or not there was any rule in the "Confidential" as to mentioning competitors' goods?

A. There is one rule, which we interpret, from the instructions which Mr. Hagaman gave us, that we should not mention our competitor's goods, but sell our own.

Q. 27. Do you remember whether you ever came to the Philadelphia house about the time you first were employed?

A. I remember that I came shortly afterward.

Q. 28. Who did you see there?

A. I saw Mr. Pfeiffer.

Q. 29. Did you come to the house later and see Mr. G. A. Pfeiffer?

A. Yes, sir.

Q. 30. State whether or not Mr. G. A. Pfeiffer gave you any instructions as to selling policies, and how to do it?

A. Mr. G. A. Pfeiffer said that the policy of the firm was to sell assorted lines, or variety, and not to speak ill of a competitor or his goods, and treat the customer right.

Q. 31. If a retail druggist on a prescription or call over the counter for a preparation of a given make should dispense a similar preparation of a different make, state whether or not you would consider that honest in the druggist?

A. I would not consider it honest.

Q. 32. State whether or not in the ethics of the drug trade that is considered honest?

A. It is not.

Q. 33. State whether or not in the ethics of salesmanship it is considered honest?

A. It is not.

363 Q. 34. State whether or not if a drug salesman suggested to a retail druggist that he should do that thing, you would consider him an honest drug salesman?

A. I would not.

Q. 35. What do you know about a William M. Merithew of Michigan?

A. He is a retail druggist in Highland Park, Michigan.

Q. 36. Do you remember when, if ever, you called on him for the first time?

A. I remember calling on him in the spring of 1913, and again in the fall of 1913, and after that at periods of about every three or four months, until about June 1915, since which time I have not called on him.

Q. 37. William M. Merithew, when called as a witness for the plaintiff, testified as follows:

"Q. 5. Do you know anything of a product called 'Quin-Coco,' and if so, what?

A. Mr. H. L. Starring, representing the William R. Warner Company, offered to sell me a preparation known as 'Quin-Coco,' stating that it could be dispensed as 'Coco-Quinine,' when 'Coco-Quinine' was called for. He exhibited a sample from his sample case, and stated to me that in both taste, physiological action and appearance it could not be distinguished from the original 'Coco-Quinine.'"

State whether or not you said this to Merithew at any one of those visits. I hand you the Plaintiff's printed record?

A. On any of my visits to Mr. Merithew I did not offer to sell a preparation known as "Quin-Coco" stating that it could be dispensed as "Coco-Quinine" when "Coco-Quinine" as called for, neither did I say that in both taste, physiological action and appearance it could not be distinguished from the original "Coco-Quinine."

364 Q. 38. Mr. Merithew also testified as follows:

"Q. 6. What other inducements, if any, did Mr. Starring offer as reasons why you should purchase the product he thus offered to you?

A. He stated to me that this product would be a great deal more economical in price than the original 'Coco-Quinine' preparation. That several druggists were using it in preference to the original 'Coco-Quinine,' in several cities, in Michigan, some of which he named as Saginaw, Bay City and Flint."

State whether or not you said this to Merithew at any one of those visits? I hand you Plaintiff's printed record.

A. I did not state that this product would be a good deal more economical in price than the original "Coco-Quinine" preparation, or that several druggists were using it in preference to the original "Coco-Quinine" in several cities in Michigan, some of which he named as Saginaw, Bay City and Flint.

Q. 39. Merithew testified as follows:

"X Q. 19. Then, he was asking you, according to your testimony, to do something that was not honest, was he not?

A. He was."

Please state whether or not you asked Merithew or suggested to him that he should do something in respect to the sale of "Quin-Coco" that was not honest in the druggist?

A. I did not.

Q. 40. Merithew in answer to X Q. 20, testified that he politely informed you that he had never substituted, and that he did not care to start to do the same. State whether or not Merithew said that to you at any of those interviews?

A. I remember of no such conversations.

365 Q. 41. State whether or not in any of these conversations you talked with Merithew as to the similarity of "Quin-Coco" to Lilly's "Coco-Quinine?"

A. No special mention was made of "Quin-Coco" as compared with the Lilly's "Coco-Quinine."

Q. 42. Do you remember how long these interviews with Merithew occupied?

A. Less than an hour.

Q. 43. How much of your entire line did you go over with Merithew in that hour?

A. I rapidly went through my demonstration books, showing him the entire line.

Q. 44. In offering your line to Merithew in these interviews,

when you came to "Quin-Coco," what did you say to him? What was it you did say to him?

A. I said, "Could you use any 'Quin-Coco,' " and he did not seem interested in buying this product, so I passed on to the other preparations.

Q. 45. Did he ever buy any "Quin-Coco" from you?

A. He did not.

Q. 46. Did you take up your line with him at every time you went to his store?

A. I did the first three times.

Q. 47. Why did you go there the other times that you have mentioned?

A. After the third time I went principally to collect his past-due account.

Q. 48. How many calls for that purpose?

A. About four or five.

Q. 49. Approximately, how much was the account?

A. The past due account at that time was about $15.00.

Q. 50. Did you collect it finally?

A. I finally collected it.

Q. 51. On these visits to collect the account, did you attempt to sell him any drugs?

A. I did not.

Q. 52. Do you know Albert F. Knowles?

366 A. I do. He is a retail druggist of Saginaw, Michigan.

Q. 53. Do you remember calling on him to sell your line?

A. I do.

Q. 54. When?

A. In the fall of 1914.

Q. 55. What did you offer him?

A. I opened up my case and showed him my tray of pharmaceutical preparations, and told him we had a special offer in the liquids, five gallon assortment, and he did not seem interested in this. So I passed on to the other numbers of the line until I finished showing him the entire line.

Q. 56. State whether or not "Quin-Coco" was included in the first tray that you took out of your case?

A. It was.

Q. 57. How long did you spend on that tray?

A. About five minutes.

Q. 58. How many preparations were there in that tray?

A. About seventeen samples.

Q. 59. State whether or not you discussed any one of the seventeen with him at that time?

A. No special mention was made of any one preparation. I dwelt upon the offer as a five gallon assortment, leaving it to him to decide which of the preparations he was going to use to make up the assortment.

Q. 60. By a "five gallon assortment" you offered him five gallon prices, and he could take a gallon of each of the five different articles. Is that correct?

A. Yes.

Q. 61. Albert S. Knowles, when called as a witness for the plaintiff, on March 24, 1915, testified as follows:

"X Q. 25. Has he been at your place this year?
A. Not that I know of."

State whether or not this is true?

367 A. That is not true. I called on him in the early part of March, 1915, about the 8th, I reckon.

Q. 62. How do you fix the date as March 8th?
A. I sold him a bill of goods on that date.
Q. 63. Have you the record of it?
A. I have a record of it, a copy of the order being on file in the house.
Q. 64. At Philadelphia?
A. At Philadelphia, made out in my handwriting.
Q. 65. Have you seen it this morning?
A. I saw it this morning, and noticed that he had bought a gallon of "Quin-Coco."

Q. 66. Knowles also testified in answer to question eight:

"A. A representative of the William R. Warner Company introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of 'Coco-Quinine' when I could use his product at a cheaper price.
Q. 9. Use his product for what purpose?
A. For dispensing purposes, and also to sell on call.
Q. 11. Please state what, if anything, the representative of William R. Warner Company said to you in reference to the dispensing of this product called 'Quin-Coco' on call? I mean on call for what?
A. For 'Coco-Quinine' or Chocolate Quinine, Syrup Quinine, or where the syrup of quinine is used."

State whether or not this statement made by Knowles was true?

A. I did not represent to Mr. Knowles that he was foolish for paying $4.80 for a gallon of "Coco-Quinine," nor that he could use our product at a cheaper price for dispensing purposes, or to sell on call, nor for "Coco-Quinine."

Q. 67. Knowles also testified:

368 "X Q. 28. Won't you state the salesman's exact words with reference to selling his product on call &c.?
A. He took a sample of 'Quin-Coco' from his grip and asked me if I handled that product. I said 'No, I have always used "Coco-Quinine" for all such calls.' He said, 'Well, don't you think you could handle this to your advantage.' I said, 'I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to use the "Coco-Quinine"'. Then he stated the price that I was paying for the 'Coco-Quinine' and that I could use his product and save the difference. I told him 'no, I will continue with the 'Coco-Quinine' as it always gave the best satisfaction.'"

State whether or not Knowles made those statements to you and you made those statements to Knowles?

A. I did not make those statements to Knowles nor did Knowles make those statements to me.

Q. 68. State particularly whether anything was said at that interview on the subject of "substitution"?

A. No mention was made of substitution.

Q. 69. How long before March 24, 1915, when he so testified, had you sold him "Quin-Coco"?

A. About two weeks before that time.

Q. 70. State whether or not you have since sold Knowles any "Quin-Coco" and when?

A. I sold him one gallon of "Quin-Coco" on December 9, 1915.

Q. 71. Will you now state what was said between you and Knowles at the interview when you offered him "Quin-Coco"?

A. No special mention was made of "Quin-Coco." He bought the article to make up a quantity buy, which accorded him a special price on the whole order.

369 Q. 72. I meant to ask you what conversation really did take place between you and Knowles, as to which he has given his version?

A. There was no conversation which took up the subject of "Quin-Coco" in particular. It was included as one of the many articles in the line which I had to sell.

Q. 73. Have you in practice a uniform manner of introducing "Quin-Coco" to a new customer who has never kept it in stock, and, if so, what is your method?

A. I have a method of introducing "Quin-Coco" to a customer who is not familiar with it, by showing him that it is a good method of administering quinine sulphate, being a palpable chocolate syrup containing two grains of quinine to the dram or teaspoonful, and especially nice for children, as well as for adults.

Q. 74. Anything about its consistency?

A. That it is a smooth mixture, being readily handled, that is, being poured from one bottle into another.

Q. 75. Will you state whether or not there is a demand in your territory for a preparation containing quinine and disguising the bitter taste of the quinine?

A. There is such a demand.

Q. 76. On what calls?

A. There is a demand or call by the people at the counter of the drug stores for a palpable syrup of quinine which is dispensed by the druggists, sometimes under the name of "Baby Tonic."

Q. 77. Can you mention any names under which a preparation of that syrup is called for?

A. I believe "Baby Tonic" or "Chocolate Quinine" is the principal name used.

Q. 78. What about customers stating that they are sick and asking for a remedy?

Mr. Bradford: Objected to as leading. Also as immaterial.

A. It gives an opportunity to the druggist to recommend a preparation like "Quin-Coco."

370 Q. 79. State whether or not a retail druggist can, if he chooses, by special efforts, create a market for a given preparation?

A. He can.

Q. 80. How?

A. By showing and recommending it to his customers and physicians.

Q. 81. Do you know whether this is a common practice among druggists?

A. It is.

Q. 82. Can you mention instances that are rather specially important in the drug trade?

A. We have preparations which druggists have bought with the special intention of introducing them to their customers, and also to their physicians. One of these is a preparation known as "Tolu-Heroin (Syrup) Compound," Elixir Salicylate Comp," "Gonichon," "Formin Lythia Tablets," and many other preparations, which I could name.

Q. 83. State whether or not there are drug houses whose lines are exclusively pushed by certain drug stores?

A. There are.

Q. 84. Name the drug houses?

A. The United Drug Company, Frederick Stearns & Company, Nelson Baker & Company, Dupree Chemical Company, American Druggist Syndicate, Park Davis & Company, and many others.

Q. 85. State whether or not you have come across any other make of a chocolate quinine preparation in your territory except "Quin-Coco" and "Coco-Quinine"?

Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

A. I have seen chocolate quinine preparations manufactured by the Norwich Chemical Company, Chicago, and Wampole & Company, Philadelphia.

Q. 86. Do you work among the dispensing doctors?

371 A. I do, some.

Q. 87. State whether or not you find a market for "Quin-Coco" with them?

A. I find a market for "Quin-Coco" among the dispensing doctors.

Mr. Rawle: Direct examination closed.

Cross-examination, beginning at 11.32 a. m.

By Mr. Bradford:

X Q. 88. What part of your time do you devote to work among dispensing doctors?

A. A small part of my time is devoted to calling on dispensing doctors, most of my time being taken up with calling on the retail druggists.

X Q. 89. How many dispensing doctors do you call on?

A. I should estimate them to be about forty or fifty.

X Q. 90. How many dispensing doctors are there in the territory which you serve?

A. I do not know.

X Q. 91. How much "Quin-Coco" have you sold to dispensing doctors in your territory during the year 1915?

A. I should think probably five gallons or more.

X Q. 92. How much "Quin-Coco" have you sold to the retail drug trade in your territory during the year 1915?

A. I don't know how much.

X Q. 93. What would be your estimate?

A. Probably twenty gallons or more.

X Q. 94. Is this about an average year's business of this product?

A. I should think so, although I never kept any track of any one item of my sales.

X Q. 95. How many years have you been in that territory?

372 A. My present territory since the latter part of August 1914.

X Q. 96. Who was your predecessor in the territory?

A. Mr. Rogers.

X Q. 97. Has Mr. Rogers traveled in the territory at all since you have been in it?

A. He has not. Not my territory.

X Q. 98. In representing "Quin-Coco" to be an especially "smooth" product to your customers, what do you mean? Please explain more fully your significance of the word "smooth"?

A. The consistency of the syrup, for such it is, a chocolate syrup of quinine.

X Q. 99. You make no comparisons, as I understand, with any other products on the market?

A. Other than that, there is no comparison made.

X Q. 100. "Other than that." What do you mean by that?

A. In mentioning our product, it is, of course, compared with all similar preparations.

X Q. 101. You have not, in presenting your product for sale, compared it at any time with "Coco-Quinine," as I understand you?

A. That is not the rule.

X Q. 102. You sometimes do compare "Quin-Coco" with "Coco-Quinine"?

A. I have compared it in a few cases with "Coco-Quinine."

X Q. 103. But not in the instance concerning which you have testified? I refer to the complainant's witness Knowles.

A. Yes. I do not remember of "Coco-Quinine" being mentioned in Knowles case.

X Q. 104. In your interviews with Mr. Knowles "Coco-Quinine" was not mentioned?

A. It was not.

X Q. 105. Your product was not compared with "Coco-Quinine" either as to consistency or as to price?

A. The price of my article "Quin-Coco" was mentioned
373 along with other preparations which I was showing him at that time.

X Q. 106. But you did not state to Mr. Knowles that he could save money by buying your preparation instead of "Coco-Quinine"?

A. I told him that I had a good buy on these preparations and he could save money by making up the assortment.

X Q. 107. As I understand your direct testimony you did not, however, suggest to him that he could use your product "Quin-Coco" as a substitute for "Coco-Quinine"?

A. I did not.

X Q. 108. And that you did not say to him or in any way suggest to him that his customers could not tell the difference?

A. I did not.

X Q. 109. You did not say to him or suggest to him that the two products were so near alike, both in appearance and in therapeutic effect, that yours could be used for the Lilly product, without detection?

A. I did not.

X Q. 110. You have not made any such representations to any of the druggists in your territory?

A. I have not.

X Q. 111. You believe that any salesman who would suggest to a retail druggist that he might substitute one product for another would be a dishonest salesman?

A. Yes.

X Q. 112. And you have not done such a thing in your experience as a salesman for William R. Warner & Company?

A. I have only offered what goods I had for sale leaving it to the retail druggist to decide as to his best method of disposing of it.

X Q. 113. But you have not suggested to the retail druggist as to any methods he might employ in disposing of it?

374 A. I have offered suggestions.

X Q. 114. Nor as to what other products he might sell them in the place of?

A. What articles are you speaking of now?

X Q. 115. Any articles in your line.

A. We have a broad line and many preparations, and I wish to know what particular articles you refer to.

X Q. 116. The purport of my question is, have you ever represented to any druggist that he might use or sell any of your items in the place of other items of like character?

A. I have sometimes shown my customers where they could use preparations of ours to supply a demand where no particular preparation was specified.

X Q. 117. This is the extent of the representations concerning the use of your items in the place of other competitive items, is it?

A. Our policy is to sell the line, rather than to point out how the dealer might dispose of the line. We leave it to his judgment as to that part of it.

X Q. 118. Had Mr. Knowles any "Quin-Coco" in his store when you sold him the first gallon you have referred to?

A. I do not know.

X Q. 119. Do you know whether he had ever handled it before?

A. I do not know.

X Q. 120. Did you have any trouble in inducing Mr. Knowles to purchase this item?

A. I did not.

X Q. 121. He was thoroughly familiar with it at the time?

A. He seemed familiar with it, as he was with the other items in my line.

X Q. 122. These products are commonly known as "Baby Tonic" and "Chocolate Quinine" in your territory, as I understand it?

A. So the dealers tell me.

375 X Q. 123. What dealer ever told you this?

A. Mr. A. V. Williams of Saginaw?

X Q. 124. Any others that you can recall?

A. Mr. Lourim, of Bay City. Mr. Schmeck of Saginaw. There are many others. Mr. Kessel of Saginaw, and many others.

X Q. 125. What was the occasion of those gentlemen or any of them making such statements to you?

A. In buying "Quin-Coco" they remarked that they sold considerable of it under the name of "Baby Tonic," diluting it in some instances with simple syrup.

X Q. 126. Did any of these druggists ever mention "Coco-Quinine" to you?

A. Yes.

X Q. 127. The product is known in your territory, is it?

A. I believe it is known somewhat.

X Q. 128. Is it ever called for?

A. I believe it is.

X Q. 129. But the leading names for the product in your territory are "Baby Tonic" and "Chocolate Quinine?"

A. That seems to be the purpose for which the dealers purchase "quin-Coco" of me. Also dispensing it over the counter as a preparation of quinine.

X Q. 130. In receiving your instructions from Mr. Hagaman, did he give you any other documents to guide you in your salesmanship than the "Salesman's Confidential?"

A. Nothing other than my various price lists.

X Q. 131. Did you have a list known as the "Blue List" or "Comparative Price List?"

A. I did.

X Q. 132. What did he tell you in reference to this?

A. He said that that was merely what it indicated, the comparative price list.

X Q. 133. In testifying concerning certain dates when you called on Mr. Merithew you referred to a paper which you took

376 from your pocket. What was this paper?

A. That was a statement of the debits and credits of his account.

X Q. 134. Do you have any objection to stating why you referred to this paper in answering these questions?

A. To refresh my memory on the dates on which I called on Mr. Merithew.

X Q. 135. Where did you get this paper?

A. At the house.

X Q. 136. Here in Philadelphia?

A. Yes, sir.

X Q. 137. When?

A. Yesterday.

X Q. 138. You referred to another paper in answering another question. What was this?

A. What question do you refer to?

X Q. 139. It was in your answer to Mr. Rawle's questions relating to the calls on Mr. Knowles.

A. This was a memorandum in my own handwriting showing the dates during 1915 at which I had called on Mr. Knowles, and during which time I had sold him "Quin-Coco."

X Q. 140. When did you make this memorandum?

A. This morning.

X Q. 141. What rule in your "Salesman's Confidential" tells you never to speak ill of a competitor's goods?

A. One of the rules, the number of which I do not remember.

X Q. 142. When did you first receive a copy of the "Salesman's Confidential" from Mr. Hagaman?

A. On the day I started for the house, on the day I started working for the house.

X Q. 143. What day was this?

A. The latter part of February, 1913.

Mr. Bradford: Cross-examination closed at 12.05 p. m.

377 Redirect examination.

By Mr. Rawle:

R. D. Q. 144. You have referred to a memorandum from which you fixed the dates of your calls on Knowles. From what was that memorandum made?

A. From the original orders which I sold Mr. Knowles.

R. D. Q. 145. Where did you find it, and in whose handwriting is it?

A. I found it in the offices of William R. Warner & Company.

R. D. Q. 146. In Philadelphia?

A. In Philadelphia.

R. D. Q. 147. When?

A. Yesterday.

R. D. Q. 148. And in whose handwriting is it?

A. In my own handwriting.

R. D. Q. 149. On what dates relatively to the transactions with Knowles were those orders made out by you?

A. These orders were made out on the day on which I called on Mr. Knowles and sold him.

R. D. Q. 150. Sold him what, among other things?

A. Among others things, "Quin-Coco."

(Mr. Rawle states that these orders are here in this room, and open to the inspection of counsel for plaintiff if he desires to see them.)

Mr. Bradford: I would like to see them.

(Mr. Bradford asks for the orders, and they are produced.)

(Mr. Bradford notes that in the order dated "8-9-1915," in rubber stamp, appears under the words "Date received" the date "December 11, 1915," and another place appears the words "Credit O. K., December 13, 1915, Keller," and in another place appears the words "Registered December 18, 1915, W. R. W. & Co.")

378 By Mr. Rawle:

R. D. Q. 151. Referring to the statement just made on the record by Mr. Bradford, please explain the differences in date, and if there is any error, correct it.

A. There is an error in the "Date sold" on this order. It is given as August 9, 1915, and it should read December 9, 1915.

R. D. Q. 152. What is there on the face of the order which leads you to say so?

A. The date stamped in the house on which the order was received, which is December 11, 1915.

R. D. Q. 153. Have you any other memorandum made at the time as to this sale from which you can refresh your memory and testify to the correct date on the order?

A. I have. I produce my memorandum book, a loose leaf book, which shows that I sold A. E. Knowles on November 9, 1915, but it should read December 9, 1915.

R. D. Q. 154. Have you any uniform practice, and have you any uniform orders from the house, as to how promptly you shall report orders to the house?

A. The instructions are to mail my orders every night, and that is my practice.

R. D. Q. 155. Do you remember whether or not you ever called upon Knowles during this current month of December?

A. I do remember.

R. D. Q. 156. State whether or not you remember selling, or not selling him, "Quin-Coco" at your call during the current month of December?

A. I remember selling him "Quin-Coco" at that date in December.

R. D. Q. 157. You have been cross-examined as to a rule in the "Salesman's Confidential." Please read from the "Salesman's Confidential," which I hand you, the rules which refer to truthfulness and to the mention of competitors' goods.

379 A. Rule 16. "That it pays to adhere strictly to the truth at all times."

"Rule 17. That it don't pay to speak ill or even mention your competitor."

R. D. Q. 158. Any others?

A. No. 1, on page 87, under the paragraph "Our Policy in Dealing with the Trade, Briefly stated."

Rule 1. "We believe in honesty and fair dealing."

Rule 6. "To never speak ill of a competitor."

R. D. Q. 159. Do you know anything about the history of the expression "Baby Tonic," how it was introduced, and to what it afterwards came to be applied?

A. Several druggists have told me that several years ago there was a quinine mixture being used under the name of "Baby Tonic." Its flavoring agent was licorice, but eventually the dealers used "Chocolate Quinine" preparations, which sold better, and finally became established, and sold under the name of "Baby Tonic."

Mr. Rawle: Re-direct examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 160. What chocolate quinine preparations did the druggists mention in this connection?

A. They did not mention any particular chocolate quinine preparation.

R. X Q. 161. Didn't they mention "Coco-Quinine" in this connection?

A. I have heard that "Coco-Quinine" has been used in this connection, as several others, of similar preparations.

R. X Q. 162. Isn't it true that "Coco-Quinine" was the original preparation of this kind, so far as you know.

A. I do not know.

380 R. X Q. 163. What preparation of this character did you know of before you knew of "Coco-Quinine"?

A. I don't know which one I heard of first. I have known of quinine, chocolate quinine preparations, dating back several years.

R. X Q. 164. How long?

A. Ever since I was a boy, having been in the drug business nearly all my life.

R. X Q. 165. How many years since you first learned of a chocolate quinine preparation?

A. I don't know. It was many years back.

R. X Q. 166. Approximately how long?

A. I could not state how many years back. It is a period that is indefinitely fixed in my mind.

R. X Q. 167. You gave your age as thirty, stating that you started in the drug business at ten, and have said that you remember such a preparation as a boy. Do you mean when you first started in the employment of a drug store, when you were a boy of ten years old, that you knew of these things, I mean chocolate quinine preparations?

A. I did not know of chocolate quinine preparations when I first started in the drug business, working in the store.

R. X Q. 168. What store did you work in?

A. I worked in my father's store.

R. X Q. 169. Where?

A. Rochester, Michigan.

R. X Q. 170. Up until what time?

A. Up until about the age of nineteen.

R. X Q. 171. That would be up until about eleven years ago?

A. Yes.

R. X Q. 172. About the year 1904?

A. About that.

R. X Q. 173. Did you do prescription work in your father's store before leaving?

A. I did very little, only under his supervision.

381 R. X Q. 174. Did your father's store handle Lilly's "Coco-Quinine" before you left the store?

A. I do not remember of seeing it there.

R. X Q. 175. Where did you go after leaving your father's store?

A. I took up a business course in the Detroit Business College.

R. X Q. 176. When did you re-enter the drug business?

A. About two or three years after that time.

R. X Q. 177. About 1906 or 1907?

A. About.

R. X Q. 178. Where and with whom?

A. With M. R. Deo, North Branch, Michigan.

R. X Q. 179. How long were you with him?

A. About a year and a half.

R. X Q. 180. Did he sell "Coco-Quinine" Lilly?

A. I think he had some in stock.

R. X Q. 181. Where did you go after leaving Mr. Deo?

A. I went to Detroit, working at Simons & Cooper Company, retail druggists.

R. X Q. 182. How long were you with them?

A. About a year, I think, or perhaps less.

R. X Q. 183. Where did you go from that store?

A. From there to Bertram Brothers, retail druggists, Detroit, Michigan.

R. X Q. 184. How long were you with them?

A. I was with them I think about two years.

R. X Q. 185. Then after that.

A. After that I entered the employ of William R. Warner & Company.

R. X Q. 186. February 1913?

A. Yes, sir.

R. X Q. 187. In referring to the memorandum book in your pocket, you first stated that you sold Knowles in November 1913. Is the memorandum in that book so dated?

A. The memorandum in this book has at the top of every

382 page the month, and then down through the page I put the dates, and referring to the previous page, I notice the dat

December 4, 1915. Now on the following page, they should follow in rotation, I put down the number "11," an error, in place of "12." I put down "11-9-15" in place of "12-9-1915." It is an error which I discovered by referring to the previous page.

R. X Q. 188. And so corrected your answer?

A. And so corrected my answer.

Mr. Bradford: Re-cross-examination closed.

Re-redirect examination.

By Mr. Rawle:

R. D. Q. 189. I have the memorandum book produced by you. Please state as it is written therein the date at the top of the preceding page, when the Knowles entry is made.

A. "12-4-15."

R. D. Q. 190. Then follows what dates on that page?

A. 6-7-8.

R. D. Q. 191. Turning over the page what date did you give at the top of the next page?

A. 11-9-1915.

R. D. Q. 192. What dates follow on that page?

A. 10-11-13-14-15.

R. D. Q. 193. Please state whether or not in this book the numbers on the left hand column refer to the order numbers that you use in reporting to the home office?

A. Yes, sir.

R. D. Q. 194. State whether or not on the page headed "12-4-15" the number begins at "718" and runs consecutively down to the Knowles transaction?

A. They do run consecutively.

R. D. Q. 195. What is the order number of the Knowles transaction?

A. 736.

R. D. Q. 196. Turn to the paper which you just obtained
383 from the home office and give the number of that order?

A. 736.

R. D. Q. 197. Give the amount on your memorandum book of that sale?

A. $49.29.

R. D. Q. 198. Also the amount as taken from the order?

A. $49.29.

R. D. Q. 199. State whether or not the transaction you have referred to in the order number 736, Knowles, $49.29, is the same transaction which is contained on that order No. 736 that you just obtained from the home office?

A. It is.

Re-recross-examination:

By Mr. Bradford:

R. X Q. 200. Did you ever make any calls on Mr. Knowles when you did not sell him a bill of goods?
A. I did.
R. X Q. 201. Several?
A. Two, I think.

Deposition closed.

HENRY E. STARRING.

At 12.35 p. m. a recess was taken until 1.30 p. m.

At 1.50 p. m.

Present: Parties as before noted.

CHARLES S. ROGERS, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your age?
A. Thirty-two.
384 Q. 2. Where do you reside?
A. Grand Rapids, Michigan.
Q. 3. What is your occupation?
A. Salesman for William R. Warner & Company.
Q. 4. State consecutively but briefly your connection with the drug business from the start?
A. My first connection with the drug business was with S. E. Wells & Company, where I stayed for about two years, beginning about fourteen years ago. Then after two years I went to Foley & Company and stayed there for about two years. Both of those concerns dealt in proprietary medicines. Then I went with H. E. Buckman & Company in the proprietary drug business in Chicago. I was with them about nine years, selling. Then I went with William R. Warner & Company about three years ago, August, 1912. My territory is now Western Michigan. This includes all of the lower peninsula except Detroit and certain counties which Mr. Starring now covers. Prior to that I had Central Michigan, including Saginaw.
Q. 5. About how many drug stores are there in those territories?
A. About 800 I should say, in my present territory.
Q. 6. About how many in the preceding territory?
A. About 500.
Q. 7. How often do you call on your druggists?
A. Some once a year, some twice a year, some every four months.
Q. 8. Do you get around among substantially all of them or only a percentage of them?
A. The good ones at least twice a year.

Q. 9. Do you really visit substantially all the druggists in your territory?

A. Yes.

Q. 10. Do you visit dispensing doctors and to what extent?

A. I visit them not to any great extent, perhaps would not average more than three or four a week.

Q. 11. State whether or not there is a market for chocolate quinine preparations in your territory?

A. No great market.

Q. 12. Why not?

A. Very little quinine used.

Q. 13. Not much malaria?

A. No malaria.

Q. 14. On what calls over the counter could Quin-Coco be dispensed?

A. To cover up quinine, syrup of Quinine, or as a baby tonic, two grains of quinine to a teaspoonful of chocolate.

Q. 15. Any other calls?

A. Not that I have in mind.

Q. 16. Can a retail druggist, if he chooses, push the sale of any particular drug or preparation, and if so, how?

Mr. Bradford: Objected to as leading and immaterial.

A. By suggesting, if a man has a cold, he would need something along the line of cough syrups.

Q. 17. Any other way?

A. Not that I have in mind.

Q. 18. Will you state whether or not he could do anything along that line with his doctor, if he choose?

Same objection by Mr. Bradford.

A. By suggestion, writing prescriptions for some particular items that they carry in stock.

Q. 19. Do you know instances of drug manufacturing houses who push their sales largely through such efforts on the part of the retail druggists?

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. We have some items that are effected that way in the Pfeiffer Chemical line—profit paying items for the dealer.

Q. 20. My question is whether you know of any houses who very largely push their products through such efforts on the part of the retail druggist?

Same objection by Mr. Bradford.

A. Not largely with our house. We have a general line, do not spend any particular time on any one item—try to sell the complete line.

Q. 21. When you became employed by William R. Warner &

Company as a drug salesman, who gave you instruction as to your duties as such?

A. Mr. Hagaman, assistant sales manager.

Q. 22. Where?

A. Saginaw, Michigan, or Detroit I will say, Detroit first.

Q. 23. Detroit first and then Saginaw?

A. Detroit first, then the next visit I would say Saginaw.

Q. 24. State whether or not he gave you a copy of the Salesman's Confidential?

A. He did.

Q. 25. What instructions did he give you with regard to the use of that so far as it set forth the sales policy of the house?

A. He told me that the instructions on the policy of the house would be found in the back.

Q. 26. Did you read them?

A. I did.

Q. 27. State whether or not you became then familiar with them?

A. Not all.

Q. 28. State whether or not he gave you any instruction as to the moral questions in salesmanship and what your moral duty would be?

A. He did not.

Q. 29. Will you turn to the Confidential, pages 86 and 87, and point out which one, if any, of the teachings there cover moral ground?

A. "That it pays to adhere strictly to the truth at all times"; "It does not pay to speak ill or even mention your competi-
387 tors"; "That it does not pay to make miscellaneous promises"; "We believe in honesty and fair dealing"; "We never speak ill of a competitor."

Q. 30. At the time you became employed there did you understand these rules and what they meant?

A. Yes.

Q. 31. Will you state whether or not you have acted upon them in your work for the house?

A. I have.

Q. 32. If a retail druggist had a prescription or a call over the counter for a given preparation made by a particular house, and he dispensed in either case a similar preparation made by an entirely different house, state whether or not this would be honest business on the part of such druggist, in your opinion?

A. No, sir.

Q. 33. Will you state whether or not in your opinion that is the accepted ethical point of view in the retail drug business?

A. Yes.

Q. 34. If a retail druggist should dispense in such a case a similar drug of another house, will you state whether or not in your opinion he is an honest druggist?

A. I would not think so.

Q. 35. If a drug salesman should suggest to a retail druggist that he could do that sort of thing, state whether or not you would consider him an honest salesman?

A. I would not.

Q. 36. What do you know about Bertram A. Wright?

A. I know that he is a Saginaw retail druggist.

Q. 37. Did you ever offer to sell him goods at his drug store?

A. Yes.

Q. 38. How far back did you solicit his trade?

A. I couldn't say exactly.

388 Q. 39. State whether or not it was soon after you went with the house?

A. I worked Saginaw soon after I went with the house.

Q. 40. Do you know anything about Wright's stocking a chocolate quinine preparation that was sold under the name of Hobson?

A. Yes.

Q. 41. What do you know about that?

A. The preparation was bought by Mr. Wright before I made the territory, and I remember of having sold him Hobson's Chocolate-Quinine, three dozen lots.

Q. 42. Who put this out?

A. The Pfeiffer Chemical Company.

Q. 43. Was it part of your line?

A. Yes.

Q. 44. How is it put up?

A. In 2 and 3 ounce bottles.

Q. 45. State whether or not it was sold over the counter in the original bottles?

A. Yes.

Q. 46. How much quinine to a dose did it contain?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Two grains of quinine to the teaspoonful of chocolate.

Q. 47. State whether Wright handled Quin-Coco before you sought his trade?

A. I don't know—that is you mean the chocolate quinine package—the Hobson package?

Q. 48. No, state whether he handled Quin-Coco before you sought his trade?

A. I don't know.

Q. 49. Will you state whether or not you ever offered Bertram A. Wright Quin-Coco and told him that it was a preparation of quinine the same as Coco-Quinine?

A. I did not.

389 Q. 50. Bertram A. Wright, when called for plaintiff, testified:

"Q. 13. If you have no calls for Quin-Coco, how did they expect you to sell it?

A. Sell it as sweet quinine or Coco-Quinine."

Will you state whether or not you ever made any such suggestion to Wright, viz., that he could sell Quin-Coco as Coco-Quinine?

A. I did not.

Q. 51. Wright testified:

"Q. 14. Did or did not Warner & Company's representative tell you that when Coco-Quinine was called — you could supply the demand with Quin-Coco

A. Not directly. I told him that I would not supply it on prescription, but when people came in and called for Coco-Quinine I would possibly sell them Quin-Coco."

State whether or not such conversation ever passed between you?

A. Wright never said that to me

Q. 52. Wright testified:

"Q. 16. Have you sold Quin-Coco when Coco-Quinine has been called for in your drug store?

A. Yes, from that and prescriptions.

Q. 17. In doing so were you or were you not following the instructions of the representative of Warner & Company?

A. Warner & Company's representative told me I could sell it the same as Coco-Quinine, there was no distinction."

State whether or not you ever gave such instructions or made such a suggestion to Wright?

A. I say that conversation never came up between Wright and myself.

390 Q. 53. When you were working your line, and particularly Quin-Coco, what did you say to him about Quin-Coco?

A. Nothing particularly—a matter of selling a special five-gallon offer that we had. I have taken up the price of Coco-Quinine along with the other prices of the other goods in gallons, to make up the special five-gallon offer.

Q. 54. Coco-Quinine?

A. In comparison—in competition with——

Q. 55. Were you selling to Wright Coco-Quinine or Quin-Coco?

A. Quin-Coco.

Q. 56. Were you selling him Coco-Quinine in connecton with your other gallon articles or Quin-Coco with the other gallon articles?

A. Quin-Coco.

Q. 57. Will you state whether or not in offering him Quin-Coco you proceeded to compare it with Coco-Quinine?

A. I might have mentioned the price of the two items.

Q. 58. Have you a regular practice in regard to how to offer your articles to a retail druggist and how to put them before him?

A. We had a special proposition always in connection with the general line.

Q. 59. When you approach a particular item in the general line how do you put the proposition before him as to that item?

A. In different ways. We have Sloan's Liniment, that we have an actual demand for. We have King's New Discovery, which we have an actual demand for.

Q. 60. How do you put it when it is Quin-Coco?

A. I sell but very little Quin-Coco in my territory.

Q. 61. What do you know about Albert F. Knowles?

A. I know that he is a retail Saginaw druggist.

Q. 62. Was he in your territory?

A. He was.

391 Q. 63. Have you ever solicited his trade?

A. I have.

Q. 64. When?

A. The last call in March, 1914.

Q. 65. Knowles, when called as a witness for plaintiff in this case, testified that you had called on him in the fall of 1914. State whether or not this is true?

A. It is not true.

Q. 66. What leads you to say so?

A. Because my last visit to Saginaw was in March, 1914, the territory having been changed at that time.

Q. 67. Albert F. Knowles, when called as a witness for plaintiff, also testified as follows in answer to Q. 8:

"A representative of William R. Warner & Company introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of Coco-Quinine when I could use his product at a cheaper price."

What do you say as to ever having made such a statement to Knowles?

A. I will say that I never made that statement to any dealer—not good business, not the policy of the house.

Q. 68. Knowles also testified:

"Q. 11. Please state what, if anything, the representative of William R. Warner & Company said to you with reference to the dispensing of this product called Quin-Coco on call? I mean on call for what?

A. For Coco-Quinine or Chocolate-Quinine, Syrup-Quinine, or where the syrup of quinine is used."

Please state whether or not you ever made such statement to Knowles?

A. I did not.

Q. 68. Knowles, in answer to X Q. 28, testified:

"He took a sample of Quin-Coco from his grip and asked
392 me if I handled that product. I said 'No, I have always used Coco-Quinine for all such calls.' He said, 'Well, don't you think you could handle this to your advantage?' I said, 'I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to use the Coco-Quinine.' Then he stated the price that I was paying for the Coco-Quinine and that I could use his product and save the dif-

ference. I told him, 'No, I would continue with the Coco-Quinine as it always gave the best satisfaction.' "

What have you to say as to whether or not that transaction and conversation took place?

A. I will say that I never had that conversation with Knowles.

Cross-examination.

By Mr. Bradford (beginning at 2.40 p. m.):

X Q. 69. Will you please state what conversation you had with Mr. Knowles with reference to the product called Quin-Coco?

A. I had no conversation with Mr. Knowles in regard to Quin-Coco.

X Q. 70. The subject of Quin-Coco was never mentioned between you at any of your calls?

A. No, sir.

X Q. 71. In what way would you discuss the subject of Quin-Coco with any dealer when the subject came up for discussion?

A. There is very little Quin-Coco used in my territory, there is but very little Coco-Quinine or Quin-Coco used in my territory—a discussion never comes up.

X Q. 72. You sell some of it, do you not?

A. Very little.

X Q. 73. But you do sell some?

A. Very little.

X Q. 74. To whom have you sold Quin-Coco?

393 A. Dispensing doctors only to my knowledge.

X Q. 75. Never sold any Quin-Coco to a retail druggist?

A. Not that I remember of.

X Q. 76. Never solicited a retail druggist for an order of Quin-Coco?

A. Not in my territory that I remember of.

X Q. 77. You mean in your present territory?

A. In my present territory.

X Q. 78. Did you ever solicit an order for Quin-Coco in your former territory?

A. The business I say was already made for me in Saginaw when I made that.

X Q. 79. By whom?

A. By the former salesman.

X Q. 80. What was his name?

A. Before me was Mr. Grimaldi, Mr. Berkeley.

X Q. 81. Is that all?

A. Yes.

X Q. 82. When did you first read the rules to which you have referred in the back of the Salesmen's Confidential?

A. Upon receipt of it.

X Q. 83. When was that?

A. When I started to travel for William R. Warner & Company

X Q. 84. Have you still the copy of the Salesmen's Confidential you had at that time?

A. Yes.

X Q. 85. Have you the copy with you?

A. No, sir.

X Q. 86. Have you ever been furnished any other copies since then?

A. No.

X Q. 87. How long after you began work for William R. Warner & Company was it that you solicited the order of Mr. Wright?

A. I don't remember.

394 X Q. 88. Did you ever solicit an order from Mr. Wright more than once?

A. I called on him more than once.

X Q. 89. Did you ever call on him to solicit an order?

A. I never called on this dealer but that I was after an order.

X Q. 90. When was the last time you were in Saginaw?

A. For these purposes?

X Q. 91. For any purpose?

A. I stayed over Sunday there about four weeks ago.

X Q. 92. When was the last time you saw Mr. Knowles?

A. In March 1914.

X Q. 93. You had no conversation with him since?

A. No.

X Q. 94. How do you fix this date?

A. I have it in my expense book.

X Q. 95. When was the last time you saw Mr. Wright?

A. In March 1914.

X Q. 96. You have had no conversation with him since?

A. No.

X Q. 97. As I understand your testimony, you regard it as dishonest to represent to a druggist that he can use any product as a substitute for any other product called for or prescribed, is that true?

A. Yes.

X Q. 98. And you have never sold any of your products to a druggist or solicited an order on the representation or suggestion that he might use your product in the place of another product called for?

A. No.

X Q. 99. That has been your invariable rule?

A. Yes.

X Q. 100. What else did Mr. Hagaman offer you besides 395 the Salesmen's Confidential in the way of documents?

A. Nothing that I remember.

X Q. 101. Were you given a list known as the "Blue List?"

A. Yes.

X Q. 102. For what purpose was that used?

A. Comparative prices.

X Q. 103. What do you mean by comparative prices?

A. Comparative prices.

X Q. 104. Won't you please explain still further what you mean by comparative prices—comparative with what?

A. Different manufacturers.

X Q. 105. As between what products of different manufacturers?

A. I don't remember any particular one.

X Q. 106. Does not the list give the product of your house which is intended to take the place of the product of the other house, as well as the price of your product compared with the price of the product of the other house?

A. I have never considered it that way.

X Q. 107. Is it not a fact?

A. I don't think so.

X Q. 108. What does the information on the list convey to your mind?

A. Comparative prices.

X Q. 109. There is nothing of information on that list so far as you are concerned except the information concerning prices?

A. No.

X Q. 110. That is all that you can see of significance of that list?

A. That is all I have ever used it for.

Cross-examination closed at 2.53.

Deposition closed.

CHARLES S. ROGERS.

396 STONEWALL JACKSON NOTTINGHAM, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your age?

A. Thirty-nine.

Q. 2. What is your residence?

A. Atlanta, Georgia.

Q. 3. What is your occupation?

A. Drug salesman for William R. Warner & Company.

Q. 4. State consecutively and briefly your connection with the drug business from the first?

A. I started in in Macon, Georgia, with Massenburg, a retail druggist, eighteen years ago. Then I went with Mallory H. Taylor, Macon, Georgia, retail druggist, as a prescription clerk. I stayed there for about two years, and then went to Savannah, Georgia, with Livingston's Pharmacy, retail druggist and prescription man, and stayed there about seven and a half years. Then I came to Atlanta with the Elkin Watson Drug Company, Atlanta, in the same capacity, prescription clerk. I stayed there three years. I then went with Estes & Company as drug salesman, and was there for a short while. They were selling drugs wholesale. Then I went with H. K. Mulford & Company, of Philadelphia, drug manufacturers, and stayed with them for nine months, and then with William R. Warner & Company, and have been with them about seven years as drug salesman—wholesale drug manufacturers.

Q. 5. You have been in the drug business in one way or another ever since you began, have you not?

A. Yes.

Q. 6. What is your present territory?

A. Central Georgia, including Atlanta, Columbus, Savannah, August, Macon and the territory between these towns.

Q. 7. If you had a different territory previously, what was it and when?

397 A. I worked South Carolina and Georgia only for a short while, six years ago, the Piedmont section. I worked a little Georgia and western North Carolina. That was only for a short while.

Q. 8. When you joined the Warner House did you receive any instruction on your duties as salesman and from whom?

A. From Mr. H. Pfeiffer.

Q. 9. Where?

A. In Atlanta, Georgia.

Q. 10. Immediately after you joined the house?

A. Yes.

Q. 11. Did he give you a copy of the Confidential?

A. He gave me that, it was sent to me with the outfit.

Q. 12. Will you state whether or not he took it up with you?

A. The policy of the house, to be honest, and fair, and never to speak ill of a competitor. He has always said, never to mention a competitor.

Q. 13. Do you mean that he gave you those instructions?

A. Yes, those were his instructions.

Q. 14. Will you state whether or not you have endeavored to act up to those instructions?

A. I have carried out his instructions.

Q. 15. If a retail druggist on a prescription or a call over the counter, specifying a given preparation made by a certain house, should dispense a similar preparation of a different house, state whether or not you consider that as honest on the part of the druggist?

A. I think it is dishonest; I know it is dishonest.

Q. 16. Will you state whether or not you thereby express the ethical standard of honesty in a drug business?

A. It is dishonest, where a specification is given, not to supply what is specified.

Q. 17. Is that the ethical standard of the retail drug business?

A. That is the way I understand it.

398 Q. 18. If a salesman should suggest that sort of thing to a retail druggist in offering him goods, will you state whether or not you consider that would be honest on the part of the salesman?

A. It would be dishonest to suggest replacing one article for another; where one is specified it should always be given.

Q. 19. Will you state whether or not that has been your standard?

A. That is my standard.

Q. 20. What do you know about William A. Jolly?

A. He was formerly a retail druggist in Marshallville, Georgia—in bankruptcy now.

Q. 21. Did you ever solicit his custom?

A. Yes.

Q. 22. How long had you known him to be in business there?

A. He was in business about two years.

Q. 23. How old a man would you consider him?

A. I thought he was under age. I was told that one house would not ship him on account of him being under age, but I notice he says he is 23.

Q. 24. How often did you call on him?

A. An average of every three months, three or four times a year.

Q. 25. What did you offer him?

A. I tried to sell him our entire line, went through the whole line.

Q. 26. About how many items?

A. Fifteen or twenty—sometimes could not sell him that many.

Q. 27. I mean to ask you how many items you had for sale?

A. I went over our entire line whenever I could get his attention.

Q. 28. About how many items have you in the line?

A. Are you speaking of the——

Q. 29. Entire line?

399 A. Different formulæ of pills and tablets and elixirs in a pharmaceutical line—would run the items away up possibly, possibly 3,000 different items.

Q. 30. William A. Jolly, when called as a witness for the plaintiff, testified:

"Q. 20. Did he say anything about whether or not you could use it to supply the demand for Coco-Quinine?

A. He did."

Will you please consider that he was referring to Quin-Coco and state whether or not you said that to Jolly?

A. I did not.

Q. 31. William A. Jolly testified in answer to X Q. 30:

"A. He said, 'How are you fixed on Coco-Quinine?' I looked over my stock and found I was low. He offered me a product by the name of Quin-Coco, at a very much better price than Coco-Quinine, claiming that it was the same as Coco-Quinine. He said that 'You can use it for Coco-Quinine.'"

State whether or not Jolly's statements just read are true?

A. I have never suggested to him or to anyone else replacing Coco Quinine with Quin-Coco.

Q. 32. He states in the answer just read to you certain remarks that you made to him. Will you say whether or not you made those remarks to him?

A. I did not. One thing right here, I said that was cheaper than a great many others, was cheaper than a good many other chocolate quinine preparations on the market.

Q. 33. Will you state whether or not there are other chocolate reparations on the market that you ran across in competition?

A. A dozen or more.

00 Q. 34. Can you name them?

Mr. Bradford: Objected to as immaterial, incompetent and irrelnt.

A. H. K. Mulford, H. K. Wampole, Tilden & Company, Massenill & Company, G. F. Harvey Company—that is enough.

Q. 35. State whether or not you were in competition more or less your territory with these various houses on that chocolate quinine roduct?

Mr. Bradford: Same objection.

A. All of them sell it and of course there is competition.

Q. 36. William A. Jolly testified:

"X Q. 47. Did Nottingham make you any proposition that day hich you considered dishonest?

A. Yes.

X Q. 48. Please give the words he used in that connection? I hought you had told me that you had already stated the entire conersation in your answers to my questions.

A. When he told me that you could use Quin-Coco for Coco-Quinne."

State whether or not you made Jolly at any interview any proposition hich you considered dishonest along the lines of dishonesty as you ave above stated them?

A. I did not. I did not make that proposition to him. That ould have been a dishonest proposition. I would not know how o approach a man and suggest to him substitution.

Q. 37. Jolly testified:

"X Q. 51. Did he mean anything more than that you could use it n calls for 'Chocolate Quinine' or 'Quinine Syrup'?

A. Yes.

X Q. 52. What more did he mean?

A. As a substitute for Coco-Quinine."

01 State whether or not you made any statements to Jolly to the effect that he has there testified?

A. I did not. I supposed that he had a regular demand, which he as, for chocolate quinine, and which all druggists have, that is in he South, and was trying to sell him Quin-Coco to supply that deand. I tell everyone that Quin-Coco is thinner, is easier to handle han a great many of the other preparations on the market, and I ould not have suggested him replacing it, because it is a thinner reparation than the one that he states here, that Coco-Quinine—I anted him to use in the place of it.

Q. 38. Jolly testified in answer to X Q. 55:

"A. He said that Quin-Coco was the same as Coco-Quinine and could be sold as Coco-Quinine.

X Q. 56. Did he use the word 'substituted'?

A. I don't remember.

X Q. 57. Did he tell you that Quin-Coco could be sold as Coco-Quinine without informing the doctor or the customers calling for Coco-Quinine?

A. He did."

Please state whether or not you made those statements to Jolly?

A. I did not.

Q. 39. William H. Jolly testified also in answer to X Q. 84:

"A. To the best of my knowledge it was represented to me to be used as a substitute. The word 'substitute' may have been used, but at the same time it was made plain enough to me that you could use Quin-Coco as a substitute for Coco-Quinine."

Please state whether or not that testimony of Jolly is true and whether or not you said those things?

A. That is not correct.

Q. 40. Will you state whether or not there is a market for chocolate quinine preparation in your territory and on what sort of calls?

402 A. The majority of it is sold over the counter on calls for syrup of quinine, chocolate quinine, sweet quinine.

Q. 41. What have you to say about customers calling on a druggist asking for a remedy for some suggested ailment?

Mr. Bradford: Objected to as leading and immaterial.

A. There are a lot of demands—a druggist has varied calls for quinine, and this chocolate quinine is very popular, because it is not as unpleasant as a good many other preparations of quinine.

Q. 42. Can a retail druggist, if he chooses, create a market for a given drug or preparation?

Mr. Bradford: Objected to as immaterial.

A. He can create a market for anything he desires by pushing it.

Q. 43. Among whom?

Mr. Bradford: Same objection.

A. Among the laity; he can create a demand among doctors, just by pushing any certain article, he can create a demand for it.

Q. 44. Do you know of any drug houses whose products are largely marketed through the special efforts of retail druggists?

Mr. Bradford: Same objection.

A. A good many of the houses—the Santox Company—they only have one agent in a town. The Rexall, the United Drug Company only have one agency. The Nyal have more than one agent, but they are all special agents. Sometimes in larger towns they have several in a town.

Q. 45. How are their products pushed?

Mr. Bradford: Same objection

A. Through the druggists' efforts.

403 Q. 46. Do the druggists buy from those houses and then sell what they bought from them?

Mr. Bradford: Same objection.

A. They buy and then sell what they buy from them.

Q. 47. Do the same druggists who push the Rexall line for instance also sell other products?

Mr. Bradford: Same objection.

A. They sell a general line of drugs.

Q. 48. Will you state whether or not the sales of the products of these special houses are large in bulk?

Mr. Bradford: Same objection.

A. Some stores sell a lot of these special lines.

Q. 49. I meant rather to ask you whether the concerns such as you have mentioned, for instance Rexall and Nyal, do a large business in the way you have specified?

Mr. Bradford: Same objection.

A. They do a large business, yes.

Q. 50. How long do you generally stay with a customer in showing him your line?

A. It depends altogether on circumstances—twenty to sixty minutes.

Q. 51. Covering the entire line?

A. Try to cover the entire line.

Q. 52. Will you state whether or not you make any special push on any particular item in the line?

A. I push all of our products.

Q. 53. How good a seller is Quin-Coco in your territory?

A. It is fairly good, but is not a big seller.

Q. 54. To what extent do you visit dispensing doctors?

A. I go to see them wherever I think they are good for what I sell them—cut them out a whole lot of times.

Q. 55. Can you approximate the number of dispensing doctors in your territory?

404 A. I would say 400 or 500.

Q. 56. Can you approximate the number of druggists in your territory?

A. Eight hundred, about, in that neighborhood.

Q. 57. Have you sold Quin-Coco to dispensing doctors?

A. Yes.

Q. 58. Have you any definite method of practice in taking up with a retail druggist a proposition to sell him Quin-Coco, that is how do you put it up to him?

A. I ask him how is their stock of Quin-Coco, and if they ever handled it before, or chocolate quinine—I would say, "How is the chocolate quinine?" They have a regular demand for it right over the counter, for chocolate quinine. I gave the labels there of several of them. That is the way they get rid of it. A good many doctors prescribe it, preferring it to any other make.

Q. 59. If it is a new customer on Quin-Coco do you say anything else to him?

A. If it is a new man that does not know anything about it I will show him a sample of it and tell him about its being thin, containing two grains of sulphate of quinine to the teaspoonful approximately, and that it is the best preparation of chocolate quinine on the market I think.

Q. 60. State whether or not you have seen labels in drug stores prepared in the particular drug store indicating chocolate quinine?

A. I was talking last week to Hicks Drug Company in Dublin—they said that 90 per cent. of their trade was just calls for chocolate quinine, and that they did not believe that 2 per cent. of the people knew that Lilly made a chocolate quinine, they did not know who made it, just called for chocolate quinine.

Q. 61. State whether or not you have seen any druggists' labels bearing the words "Chocolate Quinine?"

A. Yes, often.

405 Q. 62. Kept on hand by the particular druggist?

A. As I said, Hicks Drug Company there, Louisville Drug Company, Thomas Drug Store in Macon—numbers of labels all around the territory.

Q. 63. Bearing what words?

A. Chocolate quinine.

Q. 64. State whether or not you have had any market for Quin-Coco in two-ounce or four-ounce bottles?

A. A lot of people prefer it that way on account of it being so convenient to sell it to druggists to retail. There are numbers that sell it that way in my territory.

Q. 65. You mean that you have sold Quin-Coco in such bottles?

A. Yes.

Q. 66. To what extent?

A. I have sold a good deal of it around my territory. I sell more in gallons than I do in that way.

Q. 67. Will you state whether or not those small bottles of two and four-ounce capacity are sold to the customer in the original bottles?

A. Sold in the original package.

Q. 68. When sold in the original package will you state whether or not they bear the original Searle & Hereth label as Quin-Coco?

A. They have that label, yes.

Direct examination closed.

Cross-examination.

By Mr. Bradford (beginning at 3. 40 p. m.):

X Q. 69. Do you remember having any conversation with Mr. olly at all on this particular subject?

A. I have talked to him every time I have been to Marshallville. was just going through the line, selling him. He has always been ery pleasant to me, but I never suggested as he says to use Quin-oco in the place of Coco-Quinine.

X Q. 70. What did you suggest to Mr. Jolly in this particular respect?

A. I sold him Quin-Coco only one time, sold him that for his call for Chocolate Quinine, that is the way I sell it to all drugg-sts, either for calls for Quin-Coco or Chocolate Quinine, which here is a big demand for.

X Q. 71. A big demand for what?

A. Chocolate Quinine.

X Q. 72. What preparation did you first know of in the drug side which answers this description?

A. I think that—I cannot say positively, but I think that Coco-uinine was the first one I knew of.

X Q. 73. Was this product handled in the drug stores where you ere formerly employed?

A. Yes.

X Q. 74. Was it frequently asked for by customers as chocolate uinine?

A. Choolate quinine, yes. Practically very few people call for oco-Quinine. The majority of them call for chocolate quinine. am speaking of the laity.

X Q. 75. As a prescription clerk, how were the prescriptions you written for it as a rule?

A. Some would specify Lilly, Coco-Quinine, Lilly. Some doctors rite for chocolate quinine.

X Q. 76. A good many write just for Coco-Quinine?

A. I have prescriptions for Coco-Quinine, Lilly.

X Q. 77. Also Coco-Quinine without the name Lilly?

A. I said the majority of the cases specified it, in some instances s not.

X Q. 78. You say that you have never represented to Mr. Jolly or anyone else that Quin-Coco could be used to supply the demand Coco-Quinine?

A. I did not.

X Q. 79. Or could be substituted for Coco-Quinine?

A. I did not.

X Q. 80. Or used as a replacer for Coco-Quinine?

A. I never mentioned Coco-Quinine.

X Q. 81. Even in comparing your product with the——

A. I say it is a better preparation, mine is, it is smoother, thinner, can be poured out of the bottle easier.

X Q. 82. You know that is largely a matter of fiction, do not?

A. I don't think so.

X Q. 83. A point that is used to persuade the druggist to buy?

A. I think it because it is just my judgment of it, that I know of it.

X Q. 84. Do you think there is sufficient difference between the consistency of the Quin-Coco and the Coco-Quinine to be detected by the laity?

A. Yes, it could be detected by anyone that knew anything about the two preparations, knew anything at all about that, because one being thinner than the other one, you can certainly detect it.

X Q. 85. You state positively that Mr. Jolly stated untruths in all of his statements concerning what you said to him on this subject?

A. I do,—not in every instance. I told him that that was a cheaper preparation, cheaper in price than any other on the market that I knew of. You take a great many are four dollars, where mine is $3.75, so he is correct there, but as far as getting him to use that in the place of Coco-Quinine, I did not.

X Q. 86. You stated that this product could be dispensed on calls for quinine, quinine syrup, syrup of quinine, sweet quinine, chocolate quinine, etc. As a retail drug clerk, will you state whether or not customers and doctors frequently called for Coco-Quinine?

A. Our customers did not, that was——

X Q. 87. Customers never called for Coco-Quinine?

A. I would not say that they never called for it, but it was not frequent.

X Q. 88. Why do the majority of retail druggists label their product Coco-Quinine that goes out to the customers in your territory?

A. I don't know that they do.

X Q. 89. You have never investigated that?

408 A. Not the majority, I do not know that they do label it——

X Q. 90. Don't you know that druggists in your territory keep stocks of labels printed Coco-Quinine, fill their bottles out of Quin-Coco bottles and put Coco-Quinine labels on them and sell them to the customers as Coco-Quinine?

A. No, I don't know any such thing.

X Q. 91. About what are your annual sales of Quin-Coco?

A. They are small. I have never figured on the annual sales; they are not much.

X Q. 92. How many gallons would you say you had sold during the present year, 1915?

A. Just roughly I would say possibly a hundred gallons, possibly not that much.

X Q. 93. That includes dispensing physician as well as retail druggists?

A. That includes the sale, that includes my entire sale.

X Q. 94. When did you interview the druggists referred to concerning their labels bearing the name Chocolate Quinine?

A. I asked one of them a week ago, just about a week, told him I would like to get a label of chocolate quinine, and he said, "I am

just out of them in the drawer, I don't think I have any more, I will soak a label off the bottle." He had a great many bottles put up with chocolate quinine. He said, "I will soak the label off" and he did. Another one,—I got a label from him just December 24th. He put up, has been putting up chocolate quinine a long time, labeling it that. He has put it up himself at the store.

X Q. 95. In your "Salesman's Confidential" which was furnished you seven years ago, did you find the code of ethics and give it careful study and consideration?

A. Yes, I have gone over it. It has been changed from time to time, but practically the same meaning.

409 X Q. 96. When was the last change made?

A. Possibly two years ago.

X Q. 97. Did Mr. Henry Pfeiffer travel with you any in your territory?

A. Yes.

X Q. 98. And was with you when orders were solicited for items of your line?

A. Yes.

X Q. 99. Did he participate with you in the sales?

A. He sold himself, either Mr. H. Pfeiffer or myself, when he was with me, one or the other would do the selling.

X Q. 100. Do you recall any of the towns that were visited by you in company with Mr. Henry Pfeiffer?

A. Yes,—Barnesville, Georgia, and Macon, Georgia.

X Q. 101. Do you remember when this was?

A. About six years and six months ago.

X Q. 102. Do you remember any of the druggists to whom you sold goods on that visit at that trip?

A. Yes.

X Q. 103. Will you give the names of some of them?

A. John H. Blackman, Barnesville; South Side Drug Store, Macon.

X Q. 104. Any others?

A. I recall those two.

X Q. 105. Was Henry Pfeiffer with you on more than one trip?

A. No, sir. He came through there—I was thinking about another time, but he was just passing through there,—Atlanta.

X Q. 106. Do you say that you never represented to any druggist that any of the items in your line might be used by them as replacers or substitutes for products of other houses?

A. I have never suggested substitution. What would you think if you were a druggist and I came in to you saying that when you get a prescription or specification for a certain thing, to use

410 another? You would not have much confidence in me.

X Q. 107. Is that all your answer to my question?

A. I never did.

X Q. 108. In speaking of your line that you discussed with Mr. Jolly, containing about fifteen to twenty items, I presume you intended to refer to the items which you were endeavoring to sell him at that visit?

A. No, the items sold—there have been different times—that is a question that absolutely cannot be answered correctly, because traveling and going through with eight or ten druggists sometimes a day, you couldn't tell whether you sold a particular customer in the course of six months, you could not tell whether you sold him twenty articles or thirty, but just say the average run of the order would be twenty items.

X Q. 109. But you made no distinction in your line of one item over another?

A. Went the whole thing, right through.

Cross-examination closed at 4 p. m.

STONEWALL JACKSON NOTTINGHAM.

VICTOR M. MOON, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your age?

A. Thirty-seven years.

Q. 2. Your residence?

A. Fredericksburg, Virginia.

Q. 3. What is your present business?

A. Salesman for William R. Warner & Company, Philadelphia.

Q. 4. State consecutively but briefly your successive steps in the drug business?

A. I began the retail drug business about twenty-four years ago in Greensboro, North Carolina, in the retail drug business
411 with S. S. Haithcock. I stayed there about three months. Then I attended school, went to Cabool College, in South Missouri. I was tending school when I went in this store. I spent two years there. Then I came back East and tended school in Richmond, a Richmond high school. I left there and began in the drug business for the Owens & Minor Drug Company, wholesale druggists, Richmond, Virginia, in one of their branch stores known as the People's Drug Store. I remained there approximately two years. I became assistant registered drug clerk there while in their employ, and acted as a prescription clerk. I left there and went to Alexandria, Virginia, and was there only temporarily, just a short time, as relief clerk in the retail drug business, and I went back to Richmond and was employed by Edgar Shine, since deceased, Richmond, Virginia, as a drug clerk. I left there and went to Hampton, Virginia, employed by G. G. Congdon as a drug clerk. I became a full, registered drug clerk while under their employment in the State of Virginia. From there I went to Newport News, Virginia, with Bilisolly & Bilisolly. From their employment I went with the old William R. Warner & Company, owned by William R. Warner, Jr. I began June 7th, 1901.

Q. 5. You have been a drug salesman all the time?

A. Yes, continually in the employment of the reorganization as

well as the old firm. By reorganization I mean the time when the Pfeiffer Brothers became connected with the firm, August, 1908.

Q. 6. What is your present territory?

A. With the exception of Frederick County, Virginia, I have all east of Roanoke, Virginia,—that is the southwestern strip I have relinquished, in April I think it was. Approximately I have had the same territory ever since the Pfeiffer Brothers came to Philadelphia. I have taken Richmond, Norfolk, Alexandria, Portsmouth and Newport News, Petersburg, Lynchburg, Roanoke, Danville and City Point.

412 Q. 7. How many retail druggists approximately are there in your territory?

A. I would say approximately 600.

Q. 8. How often do you visit them on the average?

A. About every three or four months approximately.

Q. 9. How many dispensing doctors do you visit?

A. I visit a good many up there, the different sections of Virginia, southwest Virginia have a good many dispensers, some in Eastern Virginia, some in my home town. I couldn't say exactly the number.

Q. 10. Is there a market in your territory and has there been since 1907 for a chocolate quinine preparation?

A. Yes, a good deal of demand, I have found, and I have created a good deal of demand by starting a great many using the preparation Quin-Coco, I might say, our preparation in particular.

Q. 11. How many different drug manufacturers have chocolate quinine preparations in your territory?

Mr. Bradford: Objected to as immaterial.

A. About half a dozen that I have competition with, there are some 12 or 14 on the market.

Q. 12. Name what you can of them?

Mr. Bradford: Same objection.

A. Henry S. Wampole has a preparation; Burrough Bros., of Baltimore, have a preparation; National Drug Company and G. S. Harvey people particularly have one, and the American Druggists Syndicate have a preparation—they have 23,000 members in the United States, I guess, using some of them; Henry K. Wampole has a preparation, Philadelphia; Mulford has a preparation and of course Lilly has a preparation which I have some competition with. They are all I have in my mind for the moment that I have spoken of.

Q. 13. On what kind of calls in retail druggists is there a market for Quin-Coco?

413 A. There is quite a little. A great many dispensing physicians of course who run drug stores buy Quin-Coco and sell it. There are a great many retail druggists that buy it and sell it as chocolate syrup of quinine, go so far as to have their labels printed, of which I have specific instances in mind. I even have

physicians to specify Quin-Coco, S. & H., the Searle & Hereth, and there has been quite a demand created for chocolate syrup of quinine, you might say, in the same light that a great many other pharmaceutical articles have been put on the market, and popular even to the extent of the druggist and physician as contributory factors.

Q. 14. Can a retail druggist, if he chooses, push the sale of any particular preparation or drug, and if so, how does he do it?

Mr. Bradford: Objected to as immaterial.

A. He can, he can do so. He can popularize it, he can sell Quin-Coco, he can sell any chocolate syrup of quinine he cares to sell. He can sell tasteless syrup of quinine if he chooses to sell it. Very often people come in, and want quinine, especially in the malarial places. Of course in the western part of Virginia they sell very little anyway, but in the eastern places, they will very often come in and say, "My little Willie has a cold." They can put up ten cents' worth of any chocolate syrup of quinine or a quarter's worth.

Q. 15. How about pushing it among doctors?

Mr. Bradford: Same objection.

A. I have a specific instance in mind. Some time ago I was in a drug store in the South side, Virginia, and the doctor came in, who is a good friend of mine, using other preparations of ours. The druggist said to him, "Here is a chocolate syrup of quinine, we can buy it for $3.75 a gallon," and he said, "Can you use some of it?" He said, "Yes, be very glad to use it." "Can you use a gallon?"

"I think we might get rid of a gallon." So he bought a gal-
414 lon. That is possible oftentimes. I have done a great deal of detail work of course on Warner's pharmaceutical preparations in the past fourteen years and seven months, and in pushing my goods, I very often go to the points, as "Doctor, do you use a good deal of chocolate syrup of quinine?" and they are using our other preparations. I said, "We have the smoothest and best chocolate preparation on the market today, containing two grains of sulphate of quinine to the teaspoonful." When I say it is the smoothest and best chocolate syrup on the market, I am backed by my customers, who say they would rather have it provided the price is the same, than a great many others. Incidentally of course I have physicians who use Quin-Coco, S. & H. By "detailing" I mean calling on physicians personally. I have called on hundreds of physicians down in that section.

Q. 16. When you go forth to sell your line, how many items are you selling?

A. There are approximately about 15,000 in their combined lines, I think, 14 lines of preparations, that we control, that is to the drug trade. Of course there are only two lines sold to the physician.

Q. 17. State whether or not it is your practice to push any particular preparation especially or to push the entire line?

A. I try to push preparations which the house makes a profit out of, and in particular specialties that I have been detailing and selling

for years. Of course I try to sell the whole line wherever possible,—be very glad to give these customers some of all of them if he would take them.

Q. 18. How long do you spend on the average with each retail druggist?

A. If he is inclined to purchase my goods, I cannot spend less than an hour with him. Sometimes it takes two hours, and it has been as much as three. They will average of course about an hour with the customer.

415 Q. 19. You have been with the house of William R. Warner & Company for fourteen years and seven months continuously?

A. Yes.

Q. 20. Please state what you understand from the house to be its policy in regard to honesty of dealing with the trade?

A. Honesty, square dealing, has been my experience with them, and a strict injunction from the beginning, with William R. Warner, Jr., as well as the present management,—square dealing, fair dealing, honesty is the best policy, always with my trade; not to stuff any orders, send any orders strictly that were taken or sold, and to always protect the interests of the house, the customer's interest, and my own.

Q. 21. Did you have any particular instructions from the new management when the Pfeiffer Brothers came in, on these questions?

A. Yes. Our idea is to cultivate the interests of our trade, incidentally treat them squarely and fairly, with an honest policy, which I tried to follow.

Q. 22. Will you state whether you have received any instructions, and have any practice, as to competitors?

A. I cannot say especially that I have specifically. My idea has always been to forget my competitors and try to sell my goods. I very seldom mention a competitor because it is very bad policy. I find it advertises my competitor and not myself.

Q. 23. Have you seen the "Salesman's Confidential" and read the last two pages?

A. I have glanced over it from time to time, yes,—I cannot say in detail or minutiæ.

Q. 24. If a retail druggist had a prescription or a call over the counter for a particular preparation, specifying the maker thereof and dispensed a similar preparation made by another maker, state whether or not this is honest business on the part of the retail druggist?

416 A. It is not. If a specified order comes for a specific preparation, that preparation should be given.

Q. 25. Do you know whether you are now expressing the best ethical standards of the retail drug business?

A. I am.

Q. 26. How far does that represent your standard personally?

A. It conforms to my idea of good business, good business policy, good, honest policy to begin with.

Q. 27. If a drug salesman suggested to a retail druggist that he

could do that sort of thing, will you state whether or not you consider that drug salesman an honest salesman?

A. I consider him a dishonest salesman. I have gone so far as to have a customer to ask me very often whether a preparation that was specified on prescription, if he did not have that preparation, could he use something else, and I have told him not to do so, to use that specific preparation if it called for a specific maker.

Q. 28. What would you consider the policy as a business proposition of a salesman who should suggest that sort of thing to a retail druggist?

A. I should consider it suicidal myself, as far as business went.

Q. 29. What do you know about Edgar B. Allen?

A. I think that I first ran across him approximately fourteen years ago. He was clerking for Mrs. Sterling at that time, a widow, who owned a drug store on Church Street in Norfolk. He afterwards married the widow and is clerking in this drug store now for Mrs. Allen. I quit calling on him for several years under the old management on account of reasons, I did not care to call on him on his account, under the present management I have sold him quite a few orders more recently. Mrs. Sterling does the buying in the store. Mr. Allen clerks for Mrs. Allen now. It runs under the name of Sterling's Pharmacy. They had two drug stores, one at
417 Ocean View, a branch store at Ocean View and the main store was Church Street. I have sold them several orders in the past two or three years.

Q. 30. Have you called on him on any occasion when Mrs. Allen, who did the buying, was absent?

A. Yes.

Q. 31. How often?

A. I remember specifically one instance.

Q. 32. Edgar B. Allen, when called as a witness for the plaintiff, testified as follows:

"Q. 10. Have you ever been solicited to buy the product called 'Quin-Coco' and sold by him, and what did he say?

"A. Mr. Moon, the representative of William R. Warner & Company, on several occasions has offered us a preparation which he called 'Quin-Coco,' which he stated we could use the same as 'Coco-Quinine,'' and that it would be almost impossible to tell it from 'Coco-Quinine.'

"Q. 11. Who did he say, if anyone, could not tell it from Coco-Quinine?

"A. That the physician couldn't distinguish it, that the products were identical.

"Q. 12. Did he say whether or not the patient could tell the difference?

"A. The patient would be impossible to tell the difference for the reason that the patient don't know what he is getting."

Please state whether or not the statements there attributed to you by Edgar B. Allen are true, whether you said those things to him?

A. No, I did not make the statement in that light as stated.

Q. 33. Please state what parts of what he attributed to you you did not say?

A. I solicited the business on chocolate syrups of quinine,—"How are you fixed on chocolate *sryup* of quinine?" And he stated
418 that their physician specified Lilly's Coco-Quinine and could not use our preparation. I then asked him if he did not have sale over the counter for chocolate syrup of quinine, a great many people bought chocolate syrup of quinine. He stated no, they used nothing but Lilly's, as the only article they kept in stock, and that ended the matter.

Q. 34. Please state what part of the statements attributed to you you did not make?

A. To begin with I did not say that a physician could not distinguish the difference. I did state we used a smoother and better syrup of quinine than any on the market, which you did not have to break the neck off the bottle to get out. It was not lumpy, nor you did not have to break the neck off the bottle probably to get it in, that it was smoother and better than what the physicians wanted, that it was two grains of sulphate of quinine to a teaspoonful,—and better for a therapeutic value and physiological effect. That is my selling points on our Quin-Coco.

Q. 34. Allen testified in the questions and answers which I have read to you above, that you "stated we (he) could use the same as Coco-Quinine, and that it would be almost impossible to tell it from Coco-Quinine." State whether or not you said that?

A. I did not say so.

Q. 35. Allen testified in effect that you said it would be impossible for the patient to tell the difference between Quin-Coco and Coco-Quinine. State whether or not you said that?

A. I don't remember. I could have stated that what the patient wanted was the benefit of the two grains of sulphate of quinine disguised with other ingredients and a chocolate syrup in connection, because the chocolate does not disguise the quinine sulphate.

Q. 36. State whether or not you ever sold Allen personally any goods for that pharmacy?

A. I have not.

Q. 37. How long did that interview with him when he was alone last?

A. I have not found him alone but once, and that was
419 since this testimony was taken down there. Mrs. Allen was out of the store and he made an engagement, told me to be around next morning by 8.30, and she would be there. She was away in the afternoon,—down at the Ocean View store, the branch store. That was on August 30th, 1915, and he said that the testimony had been taken and that he went through a gruelling for two solid hours, and incidentally that he was absolutely neutral, that nothing was said that was detrimental to me or my firm.

Q. 38. State whether or not you called on Allen about one year ago from last May 21st?

A. A year from May 21st?

Q. 39. Yes, about a year from May 21st, 1915?

A. I called on him April 16th, 1914, or rather the order was dated April 16th, 1914. I called on the man September 12th, 1914, May 12th, 1915, and August 30th, 1915. Mr. Hagaman was with me at that time, our Assistant Sales Manager I mean at the visit of May 12th, 1915. He did the selling and I did the putting down of the items on the order pad.

Q. 40. Was Mrs. Allen there that day?

A. Mrs. Allen was there that day, yes, I remember it very distinctly.

Q. 41. Edgar B. Allen also testified:

"R. D. Q. 26. And at that time as I understand your deposition, he stated that it was practically identical with Lilly's 'Coco-Quinine' and could be used the same as Lilly's 'Coco-Quinine,' and that the physician could not tell the difference. Is this correct?

"A. Mr. Moon, not knowing on his first visit our objection to substitution, did offer us 'Quin-Coco,' but we refused to buy same. He at that time stated 'Quin-Coco' was a preparation which could be dispensed in place of 'Coco-Quinine.'

"R. D. Q. 27. And that the physician could not tell the difference?

"A. Yes, he did."

420 Please state whether or not you made those statements to Allen?

A. I did not.

Q. 42. Allen in answer to R. X Q. 29 testified as follows:

"A. Mr. Moon came to us a perfect stranger and I do not know what he thought our standard as to substitution was. From his conversation at that time he led us to believe that we could use 'Quin-Coco' instead of 'Coco-Quinine' without detection."

Please state whether or not there was anything in your conversation with Allen or Mrs. Allen that could lead them so to believe?

A. I was not a total stranger to begin with. On selling the first order, after several years interim, Mr. Allen was absent. On my first order from Mrs. Allen (Mrs. Sterling), in which she gave me the order, and Mr. Allen was not there, I was not a stranger to Mrs. Allen, or Mrs. Sterling. I was not a total stranger, that is absolutely untrue. He was not present on my first visit there when I sold Mrs. Allen.

Q. 43. State whether or not at any subsequent visit at which he was present you said anything which would properly have led him to believe that you made any suggestion to him that you could use Quin-Coco for Coco-Quinine without detection?

A. I did not.

Direct examination closed.

Cross-examination.

By Mr. Bradford (beginning at 5.08):

X Q. 44. Please explain what the memorandum is in your hand which you have referred to in the course of your answers to direct questions?

A. Memorandum, merely dates of invoices which I took this morning, showing when the goods were sold, different dates
421 I have been selling these people. There is the memorandum (showing paper to examining counsel).

X Q. 45. Taken from what?

A. Taken from files of which I have copies of the orders, at home, in my trunk, or some other place. I retain copies of all orders, carbon sheet, triplicate.

X Q. 46. You also used the memo, in making your answers as to the interview with Mr. Allen which took place in August?

A. Yes, sir. There is the date. I called on him the other day and sold him again.

(Counsel for defendant hands to counsel for plaintiff.)

X Q. 47. I understand then that in your answers to Mr. Rawle's questions, where you have given the dates of your calls on Mr. Allen, you have obtained these dates from the records in the files of the home office here in Philadelphia?

A. Not all of them. I have them right in my mind, made when Mr. Hagaman was with me, absolutely. I think that in all probability I can show where—I can prove that I have a memory of that date very distinctly, because it was a rainy morning when I was there, and Mr. Hagaman was with me, and he left in the afternoon to catch a boat home. I remember all about it, anything you want to ask about it.

X Q. 48. (Question repeated.)

The Witness: Not necessarily, merely to substantiate what I had in mind.

X Q. 48. Then why did you refer to the memorandum in your hand?

A. He asked me there about certain dates. Of course to be more specific I had to necessarily have the memorandum when I first began selling the customer. I could not remember each visit exactly altogether.

X Q. 49. And you obtained this memorandum from the records in the home office?

422 A. From a copy of my order, yes.

X Q. 50. When did you make this memorandum?

A. I copied it down this morning.

X Q. 51. You state that you did not say either to Mr. Allen or in his presence anything from which he could infer that you intended

to have him understand that Quin-Coco could be used in the place of Coco-Quinine?

A. I did not.

X Q. 52. Do you say that you never have represented or suggested to anyone in your territory that they could buy Quin-Coco and use it the same as Coco-Quinine?

A. I have not suggested so, no, sir.

X Q. 53. Did you ever suggest to anyone that Quin-Coco was capable of being used as Coco-Quinine or sold as Coco-Quinine?

A. I have not said so.

X 54. Did you ever suggest to any customer that any of your products might be bought and sold for other products of other concerns?

A. I stated this to a customer when they had a prescription, and the other item was specified, to give him that item.

X Q. 55. What druggist asked you the question relative to using one product when another was specified on prescription?

A. The Chestnut Avenue Pharmacy in Newport News, Virginia—Mr. Dunn as manager, asked me only the other day if he could,—what he should use. He had his prescription there, said, "What would you use there?" Another item was specified. I said, "Give him that item and charge him accordingly." That is strictly the honest policy.

X Q. 56. Mr. Allen states at the beginning of his deposition that he is one of the proprietors of the Sterling Pharmacy. You refer to him as a mere clerk?

A. As Mrs. Allen's husband, yes. Mr. Allen stood there,
423 saw when the order is put down, each time. He might do some suggesting in the business, but he does not do the buying.

X Q. 57. Do you deny the truthfulness of this statement that he is one of the proprietors of the store?

A. He has a working interest in the store, yes, and he may draw a salary from the business, but Mrs. Allen owns the business.

X Q. 58. Do you know this of your own knowledge of merely from hearsay?

A. It appears to me that from hearsay and from observation, and from calling on these people. Mrs. Allen formerly owned the store, that is Mrs. Sterling, for several years, to my knowledge for fourteen years and seven months approximately, and Mr. Allen is working at the store for her. So far as his putting money in the business, I could not swear that he did or did not, but Mrs. Allen does the buying, and I am quite positive owns the business. She has several grown children who were badly opposed to the match when it came off, so I am sure that Mrs. Allen yet owns the business.

X Q. 59. You make the positive statement then merely on your conclusions from these circumstances?

A. Yes.

X Q. 60. You stated in answer to the question respecting questions 10, 11 and 12 that you did make the statements as stated in that light. How did you make the statements?

A. No, I did not make them in that light.

X Q. 61. I asked you in what light you did make them?

A. I suggested our preparation of Quin-Coco as a chocolate syrup f quinine containing two gains of sulphate of quinine to the tea-poonful, that there was quite a lot of Quin-Coco or chocolate syrup f quinine sold over the counter and that I would judge that he had ome business on the same line. He stated, "No, we only have sale for the one", and that he did not care to stock any of my 24 preparation. So I passed on to the next item.

X Q. 62. What do you mean by a statement with reference o your product, that it is not necessary to "break the neck off the ottle", and so forth?

A. A great many of my customers, one in mind specifically, as ell as others, have stated to me at times that they preferred our reparation at the same price or at a higher price than others, on ac-ount of its being smooth and not lumpy, and that it was easy to pour ut of a bottle or pour in a bottle, which is agreed by those who dis-ense it.

X Q. 63. What preparation would you compare it with?

A. I might mention several that are sold, very, very few of them. might mention specifically—Mulford's is one. One of my cus-omers had some of it and he was not able to get it out of the bottle, nd I did not get around in the season,—he buys five gallons at a ime, so of course he bought this other, and I presume he yet has ome of it on hand, and I might say that Lilly's is not as easy to pour ut of a bottle or as smooth a preparation, which I think is true from ny small pharmaceutical knowledge of about 24 years, that it is a reparation—our preparation, Quin-Coco, is more smooth and satis-actory than any of them, aside from price.

X Q. 64. If chocolate does not disguise the taste of the quinine, hat does disguise it?

A Yerba Santa is the only true disguising agent of the quinine ulphate. You take amorphous quinine, it i not so hard to disguise t. The sulphate of quinine is very bitter. A good many of my cus-omers have wasted a good deal of chocolate and quinine to make a uccessful preparation, not putting anything in but the chocolate yrup and the quinine sulphate. I might suggest here that Yerba anta—being a practical druggist—was used for a great many years efore any chocolate syrup of quinine that I knew were on the market.

25 X Q. 65. What chocolate syrup of quinine did you first know of on the market?

A. The first one that I knew much about was Quin-Coco in my elling experience. I really did not know of it. Of course we ac-uired the Searle & Hereth line. I was with the old Warner Com-any and under the new management of course samples were sub-itted to me and I gave away a few. Incidentally it was brought o my attention by my customers, by observations and other means hat we had the best chocolate syrup of the bunch, and I think so oo, and I want to go on record as saying so.

X Q. 66. Did you not know of the Lilly preparation?

A. I have heard of it, yes, but I got the business, I was getting the business, and naturally I presume that is on account of the animus shown. I got my share of the business on chocolate syrup of quinine and a little bit larger share I presume than anybody in the territory. Everybody in the State of Virginia carries Quin-Coco S. & H. Repeat orders have come from them, it causes them to use more. The hypnotic influence of a Warner salesman is not there. The consequence is, they order of their own volition, not on account of my say so.

X Q. 67. About what quantity of Quin-Coco do you sell annually?

A. I would judge, just by a guess, 400 gallons.

X Q. 68. Have you sold about 400 gallons during the present year, 1915?

A. I think so. I have placed approximately 2,000 gallons of it, I guess.

X Q. 69. Since when?

A. Since I began selling, about five years ago, approximately. It was brought to my attention—I really did not know we had it for some time until it was shown to me and my attention was called to it.

X Q. 70. Before the William R. Warner & Company was consolidated or taken over by the Pfeiffer Chemical Company, had you any knowledge of Coco-Quinine, Lilly?

426 A. I had seen very little of it.

X Q. 71. Had you heard of it in the drug trade in your territory?

A. I had heard of it, yes.

X Q. 72. Had you ever heard of any other chocolate syrup of quinine before you heard of Coco-Quinine Lilly?

A. I cannot say on that point, I don't remember.

X Q. 73. Was not Coco-Quinine, Lilly, a pharmaceutical product of a fairly good reputation with a fairly good demand while you were with the Warner Company?

A. It had some demand, yes, but it was not excessive, it was not very great, not in my territory. Of course it might have been in some other sections of the country, but I only know very largely Virginia and North Carolina. I have traveled some other sections to some extent, but more particularly those two States. Of course I gave up North Carolina when the old management went out. That was the closing of my experience in North Carolina.

X Q. 74. Is it not true that Coco-Quinine, Lilly, is recognized by yourself and others familiar with the trade as the original product of this character?

A. Not necessarily so, I don't know that. I don't know who originated chocolate syrup of quinine, whether Searle & Hereth did or not. I know they sold a good deal of it before we took the line over. After we took it over I heard they sold a good deal of it in the southwest, in Texas.

X Q. 75. Searle & Hereth sold a good deal of it?

A. Quin-Coco, S. & H.

X Q. 76. Who told you this?

A. Mr. Moore, who traveled Texas for a good many years, and I think lived in the same town where Lilly's representative lived at that time. Of course that has been a good while ago. I don't know whether they live in the same town now or not.

X Q. 77. Name the druggist where the incident took pace that you said that the physician stated he could use the Quin-Coco
427 when the druggist asked him about it.

A. W. A. Keeling, Keyesville, Viriginia. Dr. Bayly was the physician. I don't remember his initials.

X Q. 78. In the documents furnished wou from the home office, was there a document which was commonly referred to as the Blue List?

A. I don't know anything about a Blue List. What do you think of specifically?

X Q. 79. Some have referred to it as a substitute list or a replacer list, but out of respect to the defendant we call it "Blue List" (handing paper to witness)?

A. Yes, sir; I have seen that before, had one with me.

X Q. 80. Did you use it?

Mr. Rawle: Objected to as not proper cross-examination.

A. I do not now, very seldom refer to it, because my memory is very good sometimes and I do not need it.

X Q. 81. You found it useful when it was first furnished?

A. Useful to some extent in comparing prices, yes. In comparing prices it came in handy,—relative preparations.

Cross-examination closed at 5:30 P. M.

Redirect examination.

By Mr. Rawle:

R. D. Q. 83. The memorandum which you had in your hand with some dates on it, you said was made from the records of your sales in the home office. State whether or not those were your own sales orders made out in your own handwriting on the day when you made those sales respectively, or on the next day?

A. You mean whether made yesterday or today?

R. D. Q. 84. No; what you said before, were they the original orders?

428 A. Original order, yes, order for the goods; no copies, original order in my own handwriting, out of the folder.

R. D. Q. 85. Made out what day?

A. When I took the orders?

R. D. Q. 86. Yes, same day.

A. Yes, same day and mailed the same night.

Re-direct-examination closed.

Recross-examination.

By Mr. Bradford (beginning at 5:35 P. M.):

R. X. Q. 87. And the pencil memorandum is a copy made by you from those original orders?

A. Yes. I took the folder out myself, put it right out on a table and looked those over, made notes of them just simply as a matter of convenience, if you want specific dates.

R. X Q. 88. You remember distinctly the date of your last interview, August 12th, with Mr. Allen?

A. Yes, because he told me you people had been there and interviewed him,—what a trying ordeal it was for a couple of hours, that Mr. Lilly's salesmen waited on the store while the depositions were taken.

R. X Q. 89. Anything else?

A. He told me of course what I have stated to you. He stated that he was absolutely neutral, nothing said detrimental to me or my firm, and he made an engagement the next morning for his wife, and she would do the buying for the store.

R. X Q. 90. He spoke of giving his deposition as a "grueling," did he?

A. Somewhat, yes.

Re-cross-examination closed at 5.36 P. M.

Deposition closed.

VICTOR M. MOON.

The meeting adjourned until Wednesday, December 29th, 1915, at 10 o'clock A. M.

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Philadelphia, Pa.,
Wednesday, December 29, 1915—10 A. M.

Present: Parties as before noted.

HENRY K. MULFORD, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

A. Henry K. Mulford. Age, fifty. Residence, St. Davids, Delaware County, Pennsylvania. Occupation, manufacturing pharmacist.

Q. 2. State the name of your concern, and how long you have been connected with it

A. H. K. Mulford Company. We started in 1888; twenty-seven years. I have been connected with it all that time. I personally started the business. The business and plant are in Philadelphia and in Glenolden, and branches through practically all the large cities, and in foreign countries.

Q. 3. Broadly speaking, what class of medicinal preparations do
on manufacture?
A. Pharmaceutical and biological products chiefly.
Q. 4. State whether or not the business is large?
A. Of considerable size.
Q. 5. Are you and have you been for some years the president
f the company?
A. No, I have always been the vice-president of the company.
Q. 6. Who is the president?
A. Mr. Milton Campbell.
Q. 7. Will you state whether or not you are both actively engaged
in the general business of the concern?
30 A. Yes. The officers have been the same since the busi-
ness was organized. As a matter of exactness, the business
as a private business for about three years, then it was incorporated,
nder the laws of Pennsylvania.
Q. 8. Are you familiar with the business of manufacturing and
elling drugs and medicinal preparations of the kind you have men-
ioned throughout the United States?
A. Yes.
Q. 9. Will you state whether you have been in more or less close
usiness touch with the other large houses?
A. Yes. Do you mean by that close business touch, or compe-
ition? We have been in competition with them and in close touch,
oth.
Q. 10. Have you been in competition with them all?
A. Yes.
Q. 11. State whether or not when one drug manufacturer has
ut on the market an open formula preparation which has been
uccessfully on the market, other drug manufacturers have put out
preparation of a similar or like formula? To what extent, if any,
as this been common practice among the drug manufacturing
ouses?
A. It has been general. It has been the general custom.
Q. 12. Can you explain or illustrate to what extent this has been
he common practice?
A. It is the usual practice. It has been ever since the so-called
legant pharmaceuticals have been on the market. Take elixir or
on, quinine and strychine, and Beef, Wine and Iron, two of the
rst known elegant so-called, pharmaceuticals, put out by Wyeth.
very house is manufacturing them. Practically all the line of
lixirs started the same way. Take tablets. We originated a num-
er of formulas and introduced them as specialties, claimed no rights
of *proprietaryship* and no secret composition, but put them
31 out as original formulas, sampled them and detailed them,
introduced them through salesmen, special advertising, spe-
al literature. If you take any of the catalogues of the manufac-
rers you will find that in practically every one of those the tablets
e appropriated and some trade name used, and in many instances
ey have affixed their own name to it, as though they were the

ones that introduced the formula, when quite the reverse is the fact. I speak of tablets more particularly because we specialized on tablets for a number of years. Therefore, I feel more qualified to speak on that particular line of pharmaceutical products.

Q. 13. How far has this practice that you speak of extended to all classes of medicinal preparations?

A. I know of no exceptions, sir. It takes all syrups, elixirs, wines, cordials, ointments, suppositories, effervescence salts, and all the allied pharmaceutical preparations.

Q. 14. Will you state to what extent this applies to all the drug manufacturers of the country?

A. I do not know an exception. All of us are generous in appropriating the other man's formulas, if you choose to put it that way. If you want specific instances of the facts I nave stated, I will give them to you.

Q. 15. To what extent does this practice apply to the use of the same name as was used by the original producer?

A. If it was a coined name, I do not think any manufacturer would think of appropriating the name, but if it was a descriptive name or if it was a common name, there are no compunctions, of course, in using it.

Q. 16. Will you state to what extent, if any, this practice that you have mentioned, extends among the drug manufacturers to what are known in the trade as "specialties"?

A. The practice is uniform. It extends all through. It is not limited. Frequently, if a formula is once introduced under a certain name, they will put it up in a little different dress, or
432 even keep the same formula. Never, however, is their any attempt to my knowledge of the reputable houses to copy the style of package of the competitor.

Q. 17. Will you state to what extent this has been the practice of your house?

A. It has been our practice.

Q. 18. Do you know how far it has been the practice of the Eli Lilly & Company?

A. The same as the others.

Q. 19. To what extent are you familiar with The Eli Lilly and Company catalogue and the line of goods they manufacture and sell?

A. I know the list.

Q. 20. Can you give instances from the Eli Lilly & Company catalogue, which I hand you, of that having been the practice of the plaintiff in this case, The Eli Lilly & Company? I hand you the Lilly catalogue of 1913-1914.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Do you want me to mention the names?

Q. 21. Yes.

A. There is a preparation known as "Anti Constipation, Lilly." That was a formula that was introduced by H. K. Mulford & Co.

pany under the name of "Anti Constipation," H. K. Mulford & Company. That is on page 83 of the catalogue. I notice this is marked as being supplied on all "unspecified orders."

"Bronchitis," page 90, originally introduced by H. K. Mulford & Company, our own formula. These that I mention are preparations that were originated or introduced by our house. That was the first published formula. We first made the tablets. They were never known on the market. No such preparation had ever been placed on the market, and, as I stated in the beginning, they
433 were made specialities by our house. Incidentally, you might introduce here "Cascara Compound, Hinkle." That is a Warner formula. That was introduced by William R. Warner & Company. That was a formula of old Dr. Hinkle.

"Cathartic, Active," page 97.
"Cholera Infantum," page 99.
"Chlordyne" Tablets, page 99.
"Cold, Preferred," page 101.
"Cystitis, No. 1" and "Cystitis, No. 2," page 103.
"Dermatitis," page 104.
"Digestive, No. 1," and "Digestive, No. 2," page 104.
"Dipsomania," page 105.
"Endometritis," page 107.
"Expectorant, Tonic," page 107.
"Four Chlorides," page 108.
"Fever, Davis," page 108.
"Gallic Acid and Ergotin, Compound," page 108.
"Gastralgia," page 109.
"Gastritis," page 109.
"Guaiacol and Hypophosphites, Compound," page 110.
"Hypophosphites and Quinine, Compound," page 112.
"Hypophosphites and Quinine, Compound, with Creosote," page 112.
"Lupulin and Bromide, Compound," page 116.
"Nitrogylcerin, Compound," page 122.
"Nux Vomica and Ignatia, Compound," page 122.
"Pierotoxin and Belladonna," page 126.
"Sedative, Baer," page 132.
"Tonsilitis," page 138.
"Viburnum, Compound," page 139.

Q. 17. Please pursue your investigation of this Lilly catalogue to part 2, specialties, appearing on page 190.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes. What is your question?
434 Q. 18. See if there are any more items in that list.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. All specialties are practically of the same nature issued by different houses. Take alkaline antiseptics; every house has an alkaline antiseptic. No one house would claim to be the only one manufacturing such a combination. As a matter of fact, they all had their origin from the same proprietary preparations that seemed to have a good deal of usefulness. The main thing distinguishing a business such as we are engaged in is the fact that the formulas are given on the labels, so that the consumer, as well as the physician, knows exactly what he is using or prescribing, and there is no secrecy in the business whatsoever. "Specialties" largely mean the classification in which the articles are placed so as to carry different discounts.

"Gargle, Alkaline, No. 1," and
"Gargle, Astringent, No. 2," page 204.

The same name and the same formula as we introduced.

"Methylene Blue, Compound, Horwitz," page 205.
"Ichthyol-Iodine, Compound," page 208.
"Analgesic Balm," an ointment, page 214.

That is all that I see. Understand, I am not criticising Lilly for taking the same formula. We have done the same thing. That has been the custom.

Q. 19. Please state whether or not I am correct in understanding that all the items of which you have given the names from the Lilly catalogue that you examined, except the "Cascara Hinkle," were originally Mulford preparations, first put out by Mulford and then subsequently put out by Lilly.

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Correct.

435 Q. 20. Will you state whether or not you understand that the respective Lilly items were similar medicinally to the Mulford items?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. The same formula.

Q. 21. How about the names under which they were put out?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. The same names.

Q. 22. I hand you a pint bottle of "Syrup Quinine with Chocolate, H. K. Mulford Company." Please state whether or not that is your product?

Objected to as immaterial, incompetent and irrelevant to prove any issue in -his cause.

A. That is ours.
Q. 23. When did you first put that on the market?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. December 1902.
Q. 24. Have you been manufacturing or selling it continuously since then?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes, sir.
Q. 25. Where?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Throughout the United States, and in export trade.
Q. 26. When you put it out in December, 1902, was it listed?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

436 A. Yes.
Q. 27. And has been ever since?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes, sir.
Q. 28. Was it placed in the hands of your salesmen throughout the United States for sale?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. It was.
Q. 29. And it has been ever since?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes, sir.
Q. 30. Will you state whether or not it has a market?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Oh, yes.
Q. 31. Approximately how good a market?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.
A. We call it a fair seller. I could not give you the volume of business. It is not a large seller, but it sells fairly well. You

notice there is no attempt in this preparation to copy any other preparation in any way, either in the style of package or the label. It has our individual Keystone label on, which all of our products bear.

Q. 32. You mean the keystone shape of the label?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. Yes, sir.

Q. 33. Is the bottle a stock bottle?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

437 A. Yes, sir.

Q. 34. And is the method of wrapping, with transparent paper upon it, an old method?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. All of our preparations are put up that way, yes, sir. It has been done for years.

Q. 35. How far is that paper wrapper common?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. A skin wrapper, we call it.

Q. 36. How far is that skin wrapper common in your business?

Objected to as incompetent, irrelevant and immaterial to prove any issue in this cause.

A. All manufacturers use it.

Q. 37. And have for years?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. Yes, sir, for the reason that it has the advantage of showing the label and saving one label, and yet protecting the label and the bottle.

Q. 38. Please state the standing of the defendant, William R. Warner & Company, in the drug business?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. A very good house, a very reputable house.

Q. 39. Do you know how long they have been in business?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. They have been in business before I started in business I believe, probably for forty or fifty years.

Mr. Rawle: Direct examination closed.

438 Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 40. You have been familiar with William R. Warner & Company as a manufacturing concern for a good many years?

A. Since a boy.

X Q. 41. Is their reputation in the trade today the same as it was six or eight years ago?

A. I think so.

X Q. 42. As a pharmaceutical manufacturing concern?

A. They are devoting more of their time now to their own specialties, but their reputation, I think, is equally as good.

X Q. 43. Referring to the tablet preparations, when were the most of them introduced, as far as you can recollect?

A. Very early. They were introduced very early in our business, when the tablet machine, which I patented, or invented, rather, was first made, ranging from the years 1890, 1891 and 1892.

X Q. 44. And they have been common property since that date?

A. Yes. Their formula is open, you understand. That formula is given, and it has always been the custom of manufacturers, if they see a formula that is good, and a good preparation for physicians to use or prescribe, to list it.

X Q. 45. Are not many tablet preparations, and some of those you mentioned, merely physicians' prescriptions put up in tablet form?

A. Some of them are, yes, sir. Most of them are.

X Q. 46. Then, they were not original with your house?

A. They were first put up by our house. All preparations, you might say, today that are sold, originally were physicians' prescriptions, and they have been trade-marked and copyrighted and commercialized, so as to make them an article of commerce.

439 X Q. 47. Is that true of Coco-Quinine?

A. I do not know as it is.

X Q. 48. What house first put a chocolate syrup of quinine on the market, so far as you recall?

A. I do not know. I am not familiar with that. The idea of a chocolate syrup of quinine is no different from what it would be if it had a vanilla flavor or sarsaparilla flavor, or any other vehicle for administering a nauseous preparation.

X Q. 49. When your preparation was put on the market in 1902, was it made according to the present formula?

A. As far as I know. That is a matter I cannot testify to because I do not make these formulas. That is, I do not manufacture it. Mr. Stone could testify to that, should you wish to have that substantiated and correct.

X Q. 50. Mr. Stone has already testified in the case as a witness for the defendant stating that when he came to your house in February, 1904, a preparation of this kind was on the market, but that it did not contain yerba santa; that the yerba santa was afterwards added to take the place of licorice. I call your attention to Mr. Stone's testimony, questions 5 and following.

A. Then his testimony should be accepted as correct. I do not need to refer to it, because that recalls the matter to me; because I now remember his submitting this to me a great many years ago. He submitted the formula to me for my approval before it was adopted, stating then that the yerba santa would help remove the bitter taste of the quinine better than the licorice. Understand, the idea of using this base is simply to overcome the bitter taste of the quinine. That is all. There is no therapeutic property, but there is some little food value in chocolate, but it is simply a vehicle for administering the quinine so that it would not be objectionable, to children particularly.

X Q. 51. What agent is used for disguising the taste of the quinine?

440 A. Chocolate, licorice, syrup of licorice and yerba santa have been used for many years. The preparation was made just for that purpose, as an adjuvant or agent for disguising the bitter taste of quinine. Another thing is to use amorphous, or alkaloids, instead of salts. The fact that alkaloids would not be soluble in the mouth, therefore the bitter taste would not be given.

X Q. 52. Have you ever personally tried to disguise the taste of quinine sulphate with chocolate?

A. Yes.

X Q. 53. With success?

A. Not entirely.

X Q. 54. Isn't it a fact that quinine sulphate in chocolate syrup is so bitter as to be impossible as a commercial product?

A. Yes. That is why we do not use it. Groves' Syrup of Quinine, tasteless, to my knowledge was the first preparation that was ever made in which quinine in a fluid preparation was attempted to be administered to disguise the taste.

X Q. 55. Did it contain quinine sulphate?

A. No.

X Q. 56. Isn't it a fact that Lilly's Coco-Quinine was the first quinine sulphate preparation in liquid form, flavored with chocolate that was brought to your attention?

A. I do not remember it.

X Q. 57. Do you recall when your preparation was first put on the market, as to whether or not you had any trouble with it?

A. Yes, in keeping. That is why the small percentage of chloroform, as indicated on the label, was added.

X Q. 58. Do you recall whether or not you had any difficulty in introducing it to the trade on this account?

A. No. Preparations such as this are invariably introduced from the sample and from the formula and price.

441 X Q. 59. And from the detail work of your salesmen?

A. Yes, by your detail work.

X Q. 60. Do you know when your preparation was changed to using the yerba santa in the place of licorice?

A. I think that was about 1904. I cannot testify directly on that unless I look back at our formulas, because these things are a number of years ago. It is the practice in all houses that are aiming to im-

prove their products, that wherever they can find they may make a better product, so far as the adjuvant or the base is concerned, to do it, and such change, of course, always will be indicated on the label.

X Q. 61. Did you ever test any syrup preparation containing quinine sulphate without chocolate?

A. I can hardly answer that question. I presume I have, though, taken sulphate and all other forms of quinine, the most insoluble form being always the most desirable one on account of not yielding bitter taste.

X Q. 62. That is quinine sulphate?

A. Yes.

X Q. 63. Did you ever experiment to make a preparation of this character, using any other syrup as a flavoring than chocolate?

A. Yes.

X Q. 64. With what other syrups?

A. Syrup of orange, syrup of licorice and yerba santa, then using various flavoring agents, wintergreen, sassafras and a combination of flavors. You usually find the nearer you keep to ordinary condiments and flavorings used in cooking the nearer you make a preparation that is acceptable to the larger number of people.

X Q. 65. Such preparations, however, possess the same medicinal or therapeutic value, do they not?

A. Just the same.

X Q. 66. You spoke of the preparations which the Lilly
442 Company have put out similar to formulas put out by your house, as having the same names?

A. Yes.

X Q. 67. Were those names coined names?

A. Not at all.

X Q. 68. Or mere descriptive names?

A. Descriptive names. Just as I stated in my original testimony. No proprietaryship claim to them whatever. In fact, you cannot claim any proprietaryship for a descriptive name. That is impossible. You cannot hold it. You could claim it, but you cannot hold it.

X Q. 69. As I understand it, then, the preparations referred to by you in this respect are common open formulas and known by common descriptive names and used by all manufacturers alike?

A. That is right. I would say here that we have just as much right to use the name "Syrup, Quinine with Chocolate" as any other house, as we would to use "Syrup Quinine with Licorice," or Syrup Quinine with a compound of syrup of sarsaparilla, or any other base we chose to use.

X Q. 70. Is this product sold to the customer in the original package under the original label, as a rule?

A. Invariably.

X Q. 71. To the user?

A. Well, quite considerable, yes. We place this also in two-ounce bottles and in four-ounce bottles, which go direct to the user.

X Q. 72. In respect to your small packages and large packages, which do you sell the most of?

A. I think probably we sell more pints than we do any other size.

X Q. 73. These pint bottles are used by drug stores to dispense there, are they not?

A. Partly, yes, and also sold in the original packages.

X Q. 74. Are you familiar with the prices at which these products are sold?

A. No, I am not.

443 X Q. 75. Not familiar with the prices of your own?

A. Not without referring to the catalogue. I do not know whether our product sells for higher than Warner's or Lilly's, or any other.

X Q. 76. In introducing pharmaceutical products to the trade, is or is not detail work necessary?

A. It is necessary.

X Q. 77. I think you have already stated in one of your direct answers that most ethical preparations are marketed with the formulas printed on the label. Is that correct?

A. Yes, sir. "Ethical" is used as distinguishing it from selling, and as being marketed without false names. There is a great deal in that, too.

Mr. Bradford: Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 78. When you first marketed this product, beginning with December 1902, will you state whether or not it found a market and whether it was a commercial preparation?

A. Yes.

R. D. Q. 79. At that time, as I understand it, it contained no yerba santa?

A. It did not.

R. D. Q. 80. Before you put in the yerba santa did you depend on the chocolate to disguise the bitter taste of the quinine sulphate to any extent?

A. Yes.

R. D. Q. 81. Please state the selling price of your syrup, quinine with chocolate?

A. These are sold in dozen two ounce bottles, $2.25, but the four-ounce bottles sell at $4.00 a dozen. The pint size is sold at $3.75 per dozen pints. $2.00 for five pints and $3.00 per gallon. The idea is to sell, as far as possible, original packages.

444 R. D. Q. 82. Will you state how many salesmen you have on the road in the United States at the present time approximately?

A. One hundred and ninety.

R. D. Q. 83. About how many in 1903?

A. Forty. These are approximately now. I could not be exact without looking at the record.

R. D. Q. 84. You have referred to a number of tablets which your house put out originally and which were put out under the same name by the plaintiff. Will you state whether or not as to those tablets your house created a market for them?

A. Yes, sir.

R. D. Q. 85. Before Lilly put out the same article?

A. Yes, by sampling and by detail work of the salesmen.

Mr. Rawle: Redirect examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 86. It is also true, is it not, that many of the products put out originally by Lilly, and for which they had created a market, have been copied by your house and other houses?

A. That is correct.

R. X Q. 87. These, however, are all known as open formula preparations?

A. Yes, sir.

R. X Q. 88. And the market for those preparations is usually created by the detail work of the pharmaceutical manufacturing concerns?

A. Yes, sir.

R. X Q. 89. Through their salesmen?

A. Salesmen and special literature and prices.

R. X Q. 90. The prices given, in answer to Mr. Rawle's question, are your net prices to the retail trade as I understand it?

A. Yes, sir. That is the trade price.

Deposition closed.

HENRY K. MULFORD.

445 S. J. HAGAMAN, recalled, as a witness on behalf of the defendant, having been previously sworn.

Mr. Bradford: Inquiry is made as to the purpose of recalling this witness.

Mr. Rawle: I recall the witness to ask him a few questions along the same line of testimony as has been produced by preceding salesmen witnesses.

By Mr. Rawle:

Q. 1. Do you remember calling on the Sterling Pharmacy in Norfolk, Virginia, and if so, when and how do you fix the date?

A. I remember very clearly calling on the Sterling Pharmacy. It was Wednesday, May 12, 1915. It was about the noon hour when we reached the store and I remember that Mrs. Allen did all the buying.

Q. 2. Who did the selling?

Mr. Bradford: Objected to as immaterial, and further, as improper at this time.

A. I did all the selling.

Q. 3. State whether or not Victor M. Moon was with you at the time in the Sterling Pharmacy.

Objected to as immaterial, and further, as improper at this time.

A. He was. I remember, too, that Mr. Moon had nothing to say.

Q. 4. What did he do?

Objected to as immaterial, and further, as improper at this time.

A. He wrote the order.

Q. 5. Was Edgar B. Allen, the husband of Mrs. Allen, present?

Objected to as immaterial, and further, as improper at this time.

A. Yes, sir.

446 Q. 6. State what was said, if anything, on the subject of Quin-Coco, and by whom.

Objected to as immaterial, and further, as improper at this time.

A. Mrs. Allen did the buying, and all of the products I offered were offered to her. Several times Mr. Allen interrupted and suggested that she buy this or that, but I remember clearly that she told him that she would do all the buying; if he cared to take her place she would step aside. I remember that I asked if they used any chocolate quinine. Mr. Allen replied by saying that they used Coco-Quinine, as their physicians specified it. I then asked him if he did not have some counter calls for chocolate quinine. He replied no. This dismissed the subject of chocolate quinine.

Q. 7. Was anything more said on that subject?

Objected to as immaterial, and further, as improper at this time.

A. Nothing more that I remember, Mr. Rawle.

Q. 8. Edgar B. Allen, called as a witness for the plaintiff, testified in answer to X Q. 19 as follows:

* * * * * * *

"On the visit during May of this year, 1915, in talking of chocolate quinine syrups, he again stated that he had as good a piece of goods as Lilly's and one that could be used for all purposes that Coco-Quinine could be used."

State whether or not you said that to Edgar B. Allen or to Mrs. Allen at that interview.

Objected to as immaterial, and further, as improper at this time.

A. I did not say that, and Mr. Moon had nothing to say.

447 Q. 9. Do you know Robert J. Groves, now a traveling salesman for the plaintiff, who was formerly in the employ of the defendant?

Objected to as immaterial, and further, as improper at this time.

A. I do.

Q. 10. State whether or not you had dealings with him in your capacity as assistant sales manager of the defendant?

Objected to as immaterial, and further as improper at this time.

A. I had.

Q. 11. What was his territory at the time you had dealings with him in that capacity?

Objected to as immaterial, and further as improper at this time.

A. Central Pennsylvania.

Q. 12. Did it include Bristol, Pennsylvania?

Objected to as immaterial, and further, as improper at this time.

A. No, sir.

Q. 13. State whether or not you gave Groves instructions when he first became connected with the house as to the sales policy of the house, and the performance of his duties as salesman?

Objected to as immaterial, and further, as improper at this time.

A. I did.

Q. 14. Where?

Objected to as immaterial, and further, as improper at this time.

A. On the road, and evenings at the hotels.

Q. 15. Where did you travel with him?

Objected to as immaterial, and further, as improper at this time.

448 A. I remember that we worked in Reading. I am giving the visits that I recall that I had made with Mr. Groves. Reading, Pennsylvania, and Pottsville, Pennsylvania. We possibly worked Reading on more than one occasion.

Q. 16. How many days were you with him?

Objected to as immaterial, and further, as improper at this time.

A. From three to six days.

Q. 17. How soon after he came to the house was this?

Objected to as immaterial, and further, as improper at this time.

A. Mr. Rawle, Mr. Groves worked inside for some time, then he went on the road. Just how long that was I don't know.

Q. 18. How long was this traveling with Groves after he became a salesman?

Objected to as immaterial, and further, as improper at this time.

A. I would say from three to six months.

Q. 19. What instructions did you give Groves as to the sales policy of the house?

Objected to as immaterial, and further, as improper at this time.

A. I instructed Mr. Groves always to be honest and fair and not to mention the names of our competitors, as our line was very large and it would keep our salesmen busy selling our goods.

Q. 20. Did you give him a Confidential?

Objected to as immaterial, and further, as improper at this time.

A. I did not give it to him. That goes with the salesman's sample case.

449 Q. 21. He aleady had one?

Objected to as immaterial, and further, as improper at this time.

A. Yes, sir.

Q. 22. While you were traveling with him in his territory and instructing him, did you do the actual selling in the drug store, or did he, or both?

Objected to as immaterial, and further, as improper at this time.

A. Both of us. We varied. Some days he sold and other days I sold. One man he would sell and the other man I would sell.

Q. 23. When you got back to the hotel at night what did you do in the way of instructing him?

Objected to as immaterial, and further, as improper at this time.

A. We worked mostly at nights. In training our men I would take possibly two out of six nights to spend at the hotel, going over our salesman's Confidential and Manual, and our Epitome and other catalogues.

Q. 24. Robert J. Groves, when called as a witness, testified for the plaintiff, as follows, in answer to Q. 12:

* * * * * * *

"A. On calling on the druggist if I found that he was a user of Coco-Quinine I used my best efforts to sell him Quin-Coco, pointing out to him that the product was equally as good as Coco-Quinine and cost him less money and could be dispensed on prescriptions and sold over the counter as Coco-Quinine.

Q. 13. On whose authority did you make such statements and representations to the druggists?

A. On the authority of William R. Warner & Co.

Q. 14. By whom were you given the instructions or authority in this matter?

450 A. I am not sure whether it was Mr. Hagaman or Mr. H. Pfeiffer."

State whether or not you ever gave Robert J. Groves such instructions, or such authority?

Objected to as immaterial, and further, as improper at this time.

A. I positively never gave Mr. Groves such instructions. I never gave any of our salesmen such instructions. It is against the policy of our house even to make a suggestion of this nature. Our instructions to the salesmen are not to mention competitors. It would ruin any business to instruct salesmen this way.

Q. 25. State whether or not that method of selling would in your opinion be honest salesmanship?

Objected to as immaterial, and further, as improper at this time.

A. To me, it would be very dishonest salesmanship, and against all modern methods of selling.

Q. 26. Groves referring to "Mr. Hagaman or Mr. H. Pfeiffer" testified as follows:

Q. 16. What did either of them say to you if anything as near as you can recall, in regard to Quin-Coco?

A. That Quin-Coco was an exact duplicate of Coco-Quinine."

State whether or not you ever said that to Groves?

Objected to as immaterial, and further, as improper at this time.

A. I positively did not.

Q. 27. Groves testified:

"Q. 17. Did either of them tell you that Quin-Coco could be used and sold by the druggists as a substitute for Coco-Quinine?

A. Whether they told me or not I always understood and sold it as a substitute for Coco-Quinine."

451 State whether or not you ever made such a statement or gave such instructions to Groves?

Objected to as immaterial, and further, as improper at this time.

A. I never did.

Q. 28. Groves testified as follows:

"R. D. Q. 85. How did you and Hagaman push Quin-Coco? What did you tell the druggists?

A. We sold Quin-Coco as a substitute for Coco-Quinine, telling the druggists that it was a similar product to Coco-Quinine in appearance and taste, containing the same amount of quinine as Coco-Quinine, and much cheaper in price, one gallon costing $3.75, and Coco-Quinine would cost them in five pints $3.30."

What have you to say as to the statement made by Groves in that answer?

Objected to as immaterial, and further, as improper at this time.

A. I never instructed Mr. Groves to offer Quin-Coco as a substitute for Coco-Quinine, nor did I instruct him, or any other salesman, to tell that to a druggist.

Q. 29. I call your attention to the fact that Groves in the question

and answer just quoted from the plaintiff's record was testifying as to what he, Groves, and you, Hagaman, did when you were pushing Quin-Coco on the road. Please answer the question from that point of view. State whether or not you and Groves pushed Quin-Coco on the road in that way, or other States?

Objected to as immaterial, and further, as improper at this time.

A. We did not. Furthermore, we had too many lines to sell.

452 Q. 30. Which part of his statement given in that answer is true, if any, and which part is untrue, if any?

Objected to as immaterial, and further, as improper at this time.

A. I would say he is correct in so far as the appearance of it goes, the amount of the quinine, and he is correct in that it is much cheaper in price.

Q. 31. Where is he incorrect?

Objected to as immaterial, and further, as improper at this time.

A. He is incorrect in saying that we sold it as a substitute for Coco-Quinine. That simply repeats what I said before.

At 12.55 P. M. a recess was taken until 2.30 P. M.

2.30 p. m.

Present: Parties as before noted.

S. J. HAGAMAN, recalled.

Direct examination resumed.

By Mr. Rawle:

Q. 32. Is he incorrect in any other respect?

(Objected to as immaterial, and further as improper at this time.)

A. He is incorrect in that state, that we sold Quin-Coco as a subsitute for Coco-Quinine.

Q. 33. Groves testified as follows (P. R. 570):

"R. D. Q. 87. My question relates to the statements you have made relative to the sales of 'Quin-Coco' in Bristol. Did you tell

453 the druggists in Bristol that they could use 'Quin-Coco' for 'Coco-Quinine'?

A. Yes."

Please state whether or not you said that or anything like that to druggists in Bistol?

(Objected to as immaterial, and further as improper at this time.)

A. I never told a druggist in Bristol or in any other section that they could use Quin-Coco for Coco-Quinine. I have no recollection

of being in Bristol, however, with Mr. Groves. I do not recall ever having been in Bristol with Mr. Groves.

Q. 34. Was it in his territory at that time?

(Objected to as immaterial, and further as improper at this time.)

A. No, sir; it was not in his territory.

Q. 35. Groves testified in answer to R. X Q. 93 (P. R. 570):

"A. I have heard him tell druggists that 'Quin-Coco' could be sold as 'Coco-Quinine', but where I can not say.

R. X Q. 94. Can you swear that you ever heard Hagaman advise a druggist to buy 'Quin-Coco' and substitute it on calls for 'Coco-Quinine'?

A. Yes."

State whether or not you ever told such things to druggists or advised such things to druggists when travelling with Groves?

(Objected to as immaterial, and further as improper at this time.)

A. I have never told any druggists that Quin-Coco could be sold as Coco-Quinine. I have never advised a druggist or salesman to sell Quin-Coco as a substitute for Coco-Quinine.

454 Q. 36. When there was a new print of the "Confidential" from year to year, will you state whether or not copies of the new issue of the "Confidential" were distributed to your salesmen?

(Objected to as immaterial, and further as improper at this time.)

A. They were distributed, and distributed very quickly to the salesmen.

Mr. Rawle: Direct-examination closed.

Cross-examination (without waiving objections).

By Mr. Bradford:

X Q. 37. How often is the salesman's Confidential reprinted?

A. I would say every two or three years.

X Q. 38. In his testimony Mr. Groves stated that you were not with him at Bristol at the time he was testifying about. Will you state whether or not Bristol was ever in Mr. Groves' territory while he was a travelling salesman?

A. Never, as far as I remember.

X Q. 39. Please name the towns you did visit with Mr. Groves?

A. I remember we visited Reading, Pennsylvania, on several occasions, and Pottsville, Pennsylvania, at least once, and possibly some other towns that I do not recall.

X Q. 40. Mr. Groves testified, in answer to R. X Q. 91, that you travelled with him at intervals during a two years' service, and that the total periods of your travels with him would be about three weeks. How does this accord with your memory as to this fact?

A. I would say that is about correct.

X Q. 41. Do you remember about how many trips you made with Mr. Groves?

455 A. I could not say, sir, exactly on that.

X Q. 42. Your first trip with him was not earlier than three months after his beginning at his employment as a travelling salesman?

A. Not earlier than three months, I would say.

X Q. 43. Not later than six months?

A. That is correct.

X Q. 44. How long was Mr. Groves a travelling salesman for William R. Warner & Company?

A. I have no records really to indicate. That was not in my department, really. I have no definite means of knowing unless I looked it up. It would be a matter of guessing.

X Q. 45. Can you name the towns that were in the territory covered by Mr. Groves during his period of service as a travelling salesman, or the principal ones?

A. I believe I could name the principal towns; yes, sir.

X Q. 46. Please do so.

A. York, Hanover, Harrisburg, Lancaster, Shippensburg, Greencastle, Lebanon and Reading. I am just picking out the important towns.

X Q. 47. And Waynesboro?

A. That would be a small town. I would not remember that. Waynesboro would possibly be in, but it is a mighty small town. Pottsville. That is about as much as I remember, I would say, for the larger towns.

X Q. 48. But you say Mr. Groves never travelled in Bristol?

A. He never travelled in Bristol as far as I remember. Bristol is on the extreme eastern end.

X Q. 49. Do you recall any of the druggists that you visited in company with Mr. Groves in Reading?

A. Yes, sir. I called on Mr. Bell, Mr. Schaich and the Rexall Drug Store. Others that I do not recall.

X Q. 50. Do you recall any druggists that you called on in company with Mr. Groves at Pottsville?

A. I remember Mr. Gorsuch's drug store. I do not know in particular of any others there.

456 X Q. 51. Was any of the product Quin-Coco sold to any of these druggists on any of these visits?

A. Not that I remember. I would say, further, that in Mr. Groves' territory Quin-Coco or chocolate-quinine is a very small seller.

X Q. 52. There is some sold?

A. There is some sold. Very little. Speaking about the Reading trip, I would like to have noted that I remember specially the Reading trip with Mr. Groves, because he had planned to work there about two or three days, and when he was through I consulted the directory and found a good many dealers in the town that he had not called on, and instead of spending two or three days there we spent the week there. I remember that particularly, because it was

quite a surprise to Mr. Groves to find dealers in the town that he had not called on and did not know were there.

X Q. 53. Do you remember discussing the question of Quin-Coco with Mr. Groves?

A. I never remember discussing it.

X Q. 54. Do you remember mentioning Coco-Quinine to Mr. Groves?

A. I never remember it.

X Q. 55. So far as you recall, those two products were never mentioned in any conversation between you?

A. As far as I recall; yes, sir.

X Q. 56. At the time of your call on Mrs. Allen in Norfolk, which I think was May 12, 1915——

A. Yes, sir.

X Q. 57. —you stated that Mr. Moon had nothing to say. Do you mean he absolutely said nothing during the interview at that time?

A. I remember nothing that he said. He was writing the order. He put down the items as I sold them to Mrs. Allen.

X Q. 58. And you did all the talking?

A. Yes, sir; I did all of the talking.

X Q. 59. And you did all of the talking that took place
457 between yourself and Mrs. Allen or Mr. Allen on the subject of Quin-Coco, chocolate-quinine or Coco-Quinine?

A. Yes, sir.

X Q. 60. Mr. Moon did not take any part in this discussion or conversation?

A. No, sir. I remember that visit very clearly to Mrs. Allen of the Sterling Pharmacy.

X Q. 61. You did not say anything to Mrs. Allen in reference to the product Coco-Quinine?

A. No, sir.

X Q. 62. Nor to Mr. Allen?

A. No, sir.

X Q. 63. The name Coco-Quinine did not pass your lips?

A. It did not.

Mr. Bradford: Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 64. On what part of the premises did the talk with Mrs. Allen at Norfolk take place? In the store part, or in the room back of the store?

Mr. Bradford: Objected to as not re-direct-examination, and as leading.

A. In the store part, in the front store part.

Mr. Rawle: Re-direct-examination closed.

(Deposition closed.) S. J. HAGAMAN.

HARRY FRITSCH, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?

458 A. Harry Fritsch. Age, fifty last September. Residence 2061 Chelten Avenue, Germantown. I am a manufacturing chemist or pharmaceutical chemist.

Q. 2. When did you first enter the employ of William R. Warner & Company?

A. April, 1880.

Q. 3. In the same capacity?

A. Yes, I was in the manufacturing department at 1228 Market Street. I was with them until I graduated at the College of Pharmacy of Philadelphia in 1886. Then I was absent. I left William R. Warner & Company, and I was away ten years working for Smith, Kline & French Company, manufacturing druggists, and then I was with a water company, interested in a water company. In 1896, I went back to the employ of William R. Warner & Company, and I have been with them ever since.

Q. 4. What is the name of your present position in the laboratory?

A. I am foreman of what we term the wet goods department, the manufacture of liquid preparations. I have been in charge of that about for the past ten years.

Q. 5. Do you remember Robert J. Groves?

A. Yes, sir.

Q. 6. Was he in the laboratory under you?

A. Yes, sir.

Q. 7. When did he leave the laboratory?

A. He left us in the latter part of 1908, I think about the month of December.

Q. 8. What was he?

A. He was a helper to me. I had three men that helped, and he was considered one of the helpers.

Q. 9. How old was he then?

A. I judge Mr. Groves was in the neighborhood of twenty-five or twenty-six years old, something like that.

Q. 10. Robert J. Groves, when called as a witness for the plaintiff, testified as follows (P. R. 559):

"Q. 20. Was 'Quin-Coco' manufactured by William R.

459 Warner & Company during the latter part of 1908?

A. During the latter part of 1908 they were experimenting on 'Quin-Coco' in the laboratory as they had not got the working formulas from St. Louis on 'Quin-Coco,' and were unable to make a satisfactory product. I do not recollect whether it was made during the latter part of 1908 or not. During the latter part of 1908 they were experimenting."

Please state whether this testimony of Groves is true, and give the facts?

A. There were no experiments made of Quin-Coco in 1908. In the latter part of 1908 there were no experiments.

Q. 11. When did you get the working formulas from St. Louis on Quin-Coco?

A. I got my working formulas in the early part of 1909.

Q. 12. Groves further testified (P. R. 559):

"Q. 22. Do you know whether or not any 'Quin-Coco' was ever made in the laboratories of William R. Warner & Company, in Philadelphia?

A. Yes, there was 'Quin-Coco' made in the laboratories of William R. Warner & Co. during the latter part of 1908, but whether it was marketed or not, I do not know."

State whether or not these statements are true, and what are the facts?

A. There was not any made in 1908. Positively, no Quin-Coco made in 1908. The first Quin-Coco I made was in 1909. My record cards show 1909, the month of March.

Q. 13. Groves testified as follows (P. R. 560):

"Q. 26. How do you know that the experiments referred to were not the same in color and consistency as the Lilly product 'Coco-Quinine'?

460 A. Because we had samples of 'Coco-Quinine' manufactured by Eli Lilly & Co. before us."

Is that true?

A. No, sir; that is not true.

Q. 14. Groves testified (P. R. 560):

"Q. 27. Were the results of the Warner experiments compared with the Lilly product as the experiments progressed?

A. Yes."

Is this true?

A. That is not true. We did not have, and did not experiment.

Q. 15. Groves testified (P. R. 561):

"Q. 28. Were the efforts in the Warner Laboratory directed to reproducing the identical color and consistency of the Lilly product?

A. I do not know what instructions were received by the superintendent, but I do know that he did his utmost to make a product similar in color to that of the Lilly product."

State whether or not that is true, and what is the fact?

A. It is not true. We made no experiments with Coco-Quinine, and did not compare Coco-Quinine with any preparation that I was making. Positively no experiments made.

Q. 16. Groves testified (P. R. 561):

"Q. 29. Were his experiments considered successful and if not what was the objection to the product he made?

A. His efforts were not a success. So far as I can remember the color was not right."

State whether or not that is a true statement, and give the facts?

A. I made no experiments. Therefore, I could say it is

461 not true.

Q. 17. Groves testified (P. R. 561):

"Q. 30. Did you personally have anything to do with these experiments in the way of assisting the superintendent or consulting with him on the subject?

A. No, nothing to do with the experiments, but when he was doing his experimental work he generally took me into consultation and asked me what I thought of the product, before submitting it to the General Manager."

State whether or not it is true that you made those experiments and submitted them to Groves?

A. I did not.

Q. 18. Groves testified (P. R. 561):

"Q. 31. Do you recall anything that the superintendent said to you on the subject at any of these consultations and if so please state what he said, if you can recall?

A. The only thing I remember the superintendent to say was when the formulas came from St. Louis he found that the chocolate was different from what he was using in Philadelphia."

Please state when the formulas came from St. Louis, and whether that statement of Groves is true?

A. I did not get my formulas from St. Louis until the early part of 1909. The month of March I made my first batch. I had no formula for Quin-Coco in 1908, and when it comes to a difference in color, there were no experiments made, therefore we could not compare any colors.

Q. 19. When the Quin-Coco came from St. Louis, did you receive with it the formula and a bottle of the Quin-Coco made at the St. Louis laboratories?

A. I went to our stock department, and took a bottle from the shelf myself of the S. & H. Quin-Coco.

462 Q. 20. When you made the first batch of Quin-Coco in accordance with the St. Louis formula, state with what, if anything, you compared your product?

A. I compared it with the Quin-Coco, S. & H. bottle, which I had before me.

Q. 21. State whether or not you compared this first batch with a bottle of Coco-Quinine, Lilly?

A. I had not any in the place to compare it with.

Q. 22. In making this Quin-Coco under the St. Louis formula, what did you wish to make it like?

A. To make it like the same product that the St. Louis house

was putting out, because it is our aim to have both houses make identical preparations.

Q. 23. State whether or not you take any steps to standardize the precise color of the cocoa that goes into this Quin-Coco preparation?

A. I do not, no.

Q. 24. How do you buy it? In what quantities do you buy the cocoa?

A. It comes to me in barrels, about 300 pounds.

Q. 25. State whether or not you use it as it comes to you in the barrels?

A. Just as it comes in the barrels, I use it.

Q. 26. Is it the practice of your business to keep a sample of each batch of goods you make?

A. Yes, sir.

Q. 27. Have you done this in regard to each batch of Quin-Coco?

A. Yes, sir.

Q. 28. Can you produce bottles containing samples of the different batches?

A. I produce a bottle of Quin-Coco made under my supervision, No. 38,841, bearing the date 2-5-1914. Also a bottle of Quin-Coco, S. & H., lot No. 42,352, dated 10-20-1915.

Q. 29. State whether or not these samples of each batch, which you have said you keep in the laboratory, are kept under your personal supervision?

463 A. They are.

Q. 30. Will you state whether or not in filling the bottles which you have just produced you filled them yourself from the respective batches of the dates you have placed on the bottles?

A. The bottles were filled by the young men that makes it. I O. K. it. He brings the bottle over to me. So personally, this bottle I did not fill, but I know personally that it came out of that batch, which is recorded on here.

Q. 31. And the same with the other?

A. The same with the other. Every lot that is made, I go through the same thing.

Q. 32. Then, I understand that the bottle marked 2-5-14 is, to your knowledge, filled with this sample of the batch of Quin-Coco of 2-5-1914?

A. Yes, sir.

Q. 33. And the bottle marked 10-20-1915, is to your knowledge, filled with the sample of the batch of that date?

A. Yes, sir. I will state the reason I brought this one (referring to "Defendant's Exhibit, Labatory batch, sample No. 1, T. R. P."). That is the oldest one I have at the present time, and then this (referring to "Defendant's Exhibit, Labatory batch, sample No. 2, T. R. P.") is just one of the recent batches.

Q. 34. You have said you make no effort to standardize the color of the cocoa in making Quin-Coco. Will you now state whether or not you made any effort to standardize the color of the final Quin-Coco product in each batch?

A. I do not.

Mr. Rawle: The bottles produced are offered in evidence and marked "Defendant's Exhibit, Laboratory batch, samples Nos. 1 and 2 respectively."

464 By Mr. Rawle:

Q. 35. Will you state whether or not there are variations in color between different batches?

A. There are.

Mr. Rawle: Direct-examination closed.

Cross-examination (without waiving objections).

By Mr. Bradford:

X Q. 36. Where has the bottle marked "2-5-14" been since the date indicated thereon?

A. I have a small vault up there where I keep my samples. There are shelves with a collection of samples of different preparations that we make.

X Q. 37. Where has this identical bottle been since February 5, 1914?

A. 639 North Broad Street, Philadelphia, Pa., sixth floor.

X Q. 38. In what particular place?

A. I call it the vault.

X Q. 39. It was placed there by you on the 5th day of February, 1914?

A. The batch was made on that day. Probably it was on my desk for a day or two, but it went into the vault along with the other samples.

X Q. 40. And has been there ever since?

A. Yes, sir.

X Q. 41. Until today?

A. Until yesterday.

X Q. 42. How did you happen to discover this sample?

A. A question was asked in regard to the color, whether I follow, at least match each batch, and I said I did not. Then I was ordered to get my oldest sample and the recent sample, and I found that the colors were different. In fact, right along the colors are different.

X Q. 43. Why did you try to match the color of the St. Louis product originally?

465 A. Because both houses wish to make their preparations identical.

X Q. 44. Is it not true that following the same formula you will get the products substantially identical?

A. Providing you would have the same color of chocolate or cocoa, as we call it, then you would get it, but if the chocolate varies in color, you will not get it.

X Q. 45. How widely do chocolates vary in color?

A. Well, you might say from a light brown to a real dark brown. I have several samples of chocolate, and I have had about four different colors of chocolate.

X Q. 46. Some of them nearly black?

A. Well, never black. Never black; no, sir. Dark brown.

X Q. 47. This chocolate, I presume, is furnished to you by the purchasing department of your concern?

A. It comes from the purchaser; yes, sir.

X Q. 48. And received by you in its original form?

A. Yes, sir.

X Q. 49. In barrel lots?

A. In barrel lots.

X Q. 50. About how many barrels of chocolate do you use each month?

A. Oh, a barrel lasts me sometimes two months, and it has lasted me three months.

X Q. 51. You say your card shows that you made the first batch in March, 1909?

A. Yes, sir.

X Q. 52. Have you the card with you?

A. No, sir. I have not the card with me.

X Q. 53. Can you state from memory what this card shows?

A. Our card shows the month, the date and the year, then the number of the batch. On the reverse side, when finished, the amount made, and made by, and inspected by, and the date.

466 X Q. 54. What is the amount made, as shown by the card in March, 1909?

A. Thirty-eight gallons. A thirty-eight gallon formula my card is.

X Q. 55. This was your first commercial batch?

A. The first batch made.

X Q. 56. This batch was sold commercially, I presume?

A. Yes, bottled and sent out.

X Q. 57. You had made experiments prior to that time?

A. I had made no experiments with Quin-Coco.

X Q. 58. Had you made any experiments with the chocolate-quinine preparation?

A. I tried to make a tasteless syrup of chocolate-quinine.

X Q. 59. Using quinine sulphate?

A. Using quinine sulphate.

X Q. 60. And chocolate syrup?

A. And chocolate syrup.

X Q. 61. In imitation of what product?

A. In William R. Warner's time our salesmen came to my department on several occasions, and wanted to know if I could make a tasteless chocolate-quinine preparation. I told them I never made any, but I could try. I tried experiments, but without result.

X Q. 62. Did they refer to any such preparation that was then on the market when making this suggestion to you?

A. They did.

X Q. 63. What?

A. Coco-Quinine, Lilly.

X Q. 64. Did you have sample bottles or original bottles of Coco-Quinine, Lilly?

A. The manager in the office sent me a bottle of the Lilly preparation.

X Q. 65. Were any of these experiments conducted during 1908?

467 A. In the early part of 1908 I experimented, and also in 1907.

X Q. 66. Were there no experiments made while Mr. Groves was in the laboratory with you?

A. Mr. Groves saw me make experiments in the early part of 1908 and 1907.

X Q. 67. How do you know that you did not make any experiments during the latter part of 1908?

A. Because I was so busy on other preparations that I did not bother. I also knew at the time that there was a preparation similar to what I was trying to experiment with. Therefore, I did not bother with it.

X Q. 68. Is it not possible that you might be mistaken, and that some of these experiments ran into the fall of 1908?

A. No, sir.

X Q. 69. As stated by Mr. Groves?

A. No, sir, positively.

X Q. 70. Have you any written record of these experiments?

A. I have not, no.

X Q. 71. You depend wholly on your memory?

A. I do, yes, sir.

X Q. 72. Do you remember of comparing any other experiments with the original Lilly product that was in your laboratory, in Mr. Groves' presence?

A. In Mr. Groves' presence, yes, sir.

X Q. 73. And asking his opinion?

A. Asking him to taste it, but I was not successful.

X Q. 74. What did you explain to him was the reason of your failure?

A. There was no explanation made. It simply was not a success, and I did not bother with it. Dropped it.

X Q. 75. Who told you about the St. Louis formula first?

A. The St. Louis formula was sent to me by Mr. Pfeiffer in the early part, I would say, probably, of February, of the year 1909.

468 X Q. 76. How do you fix this date?

A. On account of my card making my first batch.

X Q. 77. What relation has the receipt of the formula to the time you made the first batch?

A. I received the formula about the month of February.

X Q. 78. Could it have been possible that you received the formula in December?

A. No, sir.

X Q. 79. Why couldn't it?

A. Because I got a cabinet, and the cabinet was not delivered to

me until the first of the year, January, and then one after another the cards, as I made the preparations, were delivered to my department.

X Q. 80. How do you know that the cabinet was not received in December?

A. I did not receive it. I received a cabinet in the month of January. It was really, as I considered it, a Christmas present. That is the reason I know it was the first of the year.

X Q. 81. Christmas of 1908?

A. I told the boy, I said, "I have got a Christmas present of a cabinet." That is the reason the time was clear in my mind. It was after the first of the year.

X Q. 82. The cabinet was to keep your formulas in?

A. That is what it is, yes sir.

X Q. 83. And the formulas from St. Louis were present at the time?

A. They were in the office, in the vault in the office, on the first floor.

X Q. 84. And were then transferred by you to the cabinet?

A. Then, as I made preparations, the formulas were sent from the office to my department, and it was recorded, and the date placed on the card in the cabinet.

X Q. 85. What time in 1908 was your last experiment that Mr. Groves saw in your laboratories of this product?

469 A. That I could not tell. I know it was early in the year.

X Q. 86. From whom did you receive your first instructions to make this product?

A. Mr. Garvin, of St. Louis.

X Q. 87. Personally, or by mail?

A. Personally.

X Q. 88. Did you visit St. Louis?

A. No, sir.

X Q. 89. Did Mr. Garvin visit you in Philadelphia?

A. Yes, sir.

X Q. 90. What did Mr. Garvin say to you about the product?

A. Simply, he gave me instructions, how he made the product, how he put it together, how he compounded it.

X Q. 91. What did he say about "Coco-Quinine"?

A. I do not believe the word "Coco-Quinine" was mentioned.

X Q. 92. What product was usually discussed by your traveling men and others when the subject of a chocolate quinine preparation was up for discussion?

Mr. Rawle: Objected to as irrelevant and not affecting the rights of the defendant.

A. As a rule, I never took the subject up with the traveling men. They just simply said, "We have got a dandy preparation on the market." There were really no particular names mentioned.

X Q. 93. Just a dandy preparation?

(Objected to as irrelevant and not affecting the rights of the defendant)

A. That is what they said when they came up. They brought the matter up. They said, "We have got a dandy preparation." I said, "Yes, we have."

X Q. 94. Did any of them ever say to you that the Lilly preparation "Coco-Quinine" was a dandy preparation?

(Objected to as irrelevant, and not affecting the rights of the defendant.)

470 A. Not to my knowledge, no, sir.

X Q. 95. Wasn't the fact that the Lilly preparation of "Coco-Quinine" was having a good sale one of the reasons advanced by your traveling men for getting a like preparation?

(Objected to as irrelevant, and not affecting the rights of the defendant.)

A. Not to me, because I did not come in contact with the traveling men so much.

X Q. 96. Did Mr Garvin tell you about his experience in producing this product in St Louis?

A. No, sir.

X Q. 97. Did he tell you where he got his formula?

A. No, sir.

X Q. 98. Did he tell you what experience the St. Louis house was having with it?

A. No, sir.

X Q. 99. What size batches of "Quin-Coco" do you make at the present time?

A. Thirty-eight gallons.

X Q. 100. Each lot a thirty-eight gallon lot?

A Each lot is thirty-eight gallons.

X Q. 101. How often do you make a thirty-eight gallon lot?

A. That varies. Sometimes twice a month. Sometimes in the winter time three times. It varies.

X Q. 102. You are speaking now of the Philadelphia laboratories?

A. Yes, sir.

X Q. 103. The product is still manufactured in the St. Louis laboratories, too?

A. To my knowledge, yes, sir.

X Q. 104. Did you ever compare your product with the Lilly product?

A. No, sir.

X Q. 105. Never held one sample of your product alongside of a sample of the Lilly product?

471 A. I have not got a bottle of the Lilly product in my department.

X Q. 106. Do you consider the two products very much alike?

A. I cannot say, because I have not seen Lilly's Coco-Quinine for I guess more than a year. Oh, more than a year. Clear back to

the time when I was experimenting. In fact, I dropped it then, having no more interest in it. I dropped it, and really up to the present time have not seen the Lilly sample.

X Q. 107. You did not think it was necessary?

A. No, sir, I did not.

X Q. 108. Do you remember saying to Mr. Groves you found after the formulas came from St. Louis that the chocolate you had previously used was not the same as called for by the formulas?

A. No, sir. He was not with me.

X Q. 109. You depend wholly upon your memory for your statement of this fact, do you?

A. Positively.

Mr. Bradford: Cross-examination closed.

Redirect examination, without waiving objections.

By Mr. Rawle:

R. D. Q. 110. Have you a clear recollection of the year when the Messrs. Pfeiffer first came to Philadelphia and took charge of the Warner business?

A. August, 1908.

R. D. Q. 111. How long before August, 1908, had you given up those experiments with a chocolate quinine preparation?

A. It was the early part of 1908. I am positive of that, because I went away on a little vacation, and I know there were no experiments made after that.

R. D. Q. 112. Where did you go on a vacation?

A. Atlantic City.

R. D. Q. 113. You have testified in substance that after the 472 Pfeiffers came here there was an existing chocolate *qi*unine preparation and you did not bother about it. What preparation was that?

A. Quin-Coco.

R. D. Q. 114. Who was making it then?

A. The St. Louis house.

R. D. Q. 115. In whose name, I mean?

A. Searle & Hereth.

R. D. Q. 16. This vault you have spoken about, is that on the same floor with your laboratory?

A. Yes, sir.

R. D. Q. 117. Locked up?

A. Yes, sir.

R. D. —. 118. Do you keep the key?

A. I do.

R. D. Q. 119. When you turn out a batch of Quin-Coco these days, do you make any attempt to standardize it or compare it with the Quin-Coco made at St. Louis?

A. No, sir.

R. D. Q. 120. When did you cease to do that?

A. After we made the first or second batch. There is my vault key, also my dressing room key (producing key).

Recross-examination.

By Mr. Bradford:

R. X Q. 121. You found that the first and second batch compared well with the St. Louis samples, did you?

A. Yes, sir.

R. X Q. 122. Therefore, you thought it was not necessary to make any further comparison?

A. No, sir.

R. X Q. 123. Did anyone ever tell you that the St. Louis product was a pretty close imitation of the Lilly product?

Mr. Rawle: Objected to as irrelevant, immaterial and incompetent and as calling for hearsay, and as altogether improper.

473 A. No, they did not.

R. X Q. 124. What did you think of it yourself?

A. The Quin-Coco as a preparation?

R. X Q. 125. Yes.

A. Very good.

R. X Q. 126. As an imitation of the Lilly product, what did you think of it, from your knowledge of the Lilly product previously made?

A. Ours was superior.

R. X Q. 127. How did you regard it in point of being practically the same thing?

A. We did not compare it in regard to being the same thing at all.

R. X Q. 128. You did not give that phase of the question any consideration?

A. No.

R. X Q. 129. What was the first liquid quinine sulphate preparation which you knew of on the market?

Mr. Rawle: Objected to as irrelevant, immaterial and incompetent, and as calling for hearsay, and as altogether improper.

A. I could not say. I knew of such a preparation as the Lilly, but I did not interest myself very much in it because I never had any occasion to make any. That is really the reason why.

R. X Q. 130. You were chiefly interested in the manufacturing department?

A. Yes, that is my work.

R. X Q. 131. And did not come in contact with the trade?

A. No, sir.

R. X Q. 132. Or know much of the demands?

A. I did not.

R. X Q. 133. You spoke of hearing of an existing chocolate

quinine preparation and the name was Quin-Coco. Didn't you know of Coco-Quinine before you ever heard of Quin-Coco?
474 A. I never heard of Quin-Coco prior to the time that the Pfeiffer Chemical Company came with us.
R. X Q. 134. But you had heard of Coco-Quinine Lilly?
A. I had a sample which I told you I was trying to imitate for William R. Warner & Company.

Deposition closed.

HARRY FRITSCH.

At 4:20 P. M. the hearing was adjourned until Thursday, December 30, 1915, at 10 o'clock A. M.

Thursday, December 30, 1915—10 o'clock a. m.

Present: Parties as before noted.

GEORGE M. BERINGER, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?
A. My name is George M. Beringer; age fifty-five; residence, 414 North 5th Street, Camden, New Jersey; occupation, Pharmacist and Chemist.
Q. 2. Please state when you originally went into the drug business, giving the consecutive history of your connection therewith.
A. I engaged in the drug business in 1876, and have been in it ever since. I graduated from the Philadelphia College of Pharmacy in 1880, and have been working in pharmaceutical and chemical matters ever since. I first went with the Philadelphia firm of Bullock & Crenshaw, wholesale druggists, 528 Arch
475 Street, in the wholesale manufacturing of pharmaceutical lines and chemical lines, in 1876, and I was with them until the 1st of June, 1892.
Q. 3. Then what?
A. Then I purchased my present business in Camden, New Jersey, and located there, and I have been there ever since 1892.
Q. 4. Carrying on the retail business?
A. Retail and manufacturing and physicians' supply business.
Q. 5. Will you state your connection with the Pharmaceutical College here? What is your connection with it, and how long has it been?
A. I am Trustee and Chairman of the Board of Trustees, and Chairman of the Committee on Instruction of the Philadelphia College of Pharmacy of Philadelphia at the present time.
Q. 6. And how long has that been?
A. Became a trustee in 1893 and I have been chairman of this committee of the trustees for about thirteen or fourteen years. Maybe fifteen years.

Q. 7. Chairman of the Board for how long?

A. Chairman of the Board since Mr. Kline's decease, about four years ago.

Q. 8. Have you ever taught there?

A. I taught for two seasons.

Q. 9. Will you take up the pharmaceuti-al associations which led up to the National Formulary and that sort of thing, and how long you have been connected with committees there?

A. I have been active in the work of the American Pharmaceutical Association since 1902, when they celebrated their semi-centennial in Philadelphia. In 1902 they got me actively in the work, and I have not gotten out of the harness yet.

Q. 10. State what work you have done on committees?

A. I have been chairman of the Section on Practical
476 Pharmacy and Dispensing. I was on the Committee of the Association on the United States Pharmacopœia for a number of years. I am a member of the Committee of Revision of the National Formulary that is now revising the book. I am chairman of the Committee on Unofficial Standards, which is preparing the standards for the crude drugs and cheimcals to go into the revision. I was president of the Association for one year.

Q. 11. What year?

A. The year 1913-1914. I am likewise a member of the Committee of Revision of the United States Pharmacopœia.

Q. 12. Have you read in the plaintiff's record in this case the testimony of E. G. Eberhardt?

A. I have.

Q. 13. Mr. Eberhardt, when called as a witness for the plaintiff in this case (Plaintiff's record, page 22) testified that he was a chemist in the employ of the plaintiff. He also testified (Plaintiff's record, page 23) in answer to Q. 3, in substance that "The first attempts" that were made in the Lilly laboratories "were the mere mixture of quinine sulphate with syrup and with yerba-santa as a disguisant for the bitterness," and that "later the idea of adding chocolate" came to him as a means of giving a distinctive color and a characteristic appearance, and, furthermore, to keep in better suspension the material in the preparation."

State what you have to say in regard to this evidence, giving your reasons for any statements that you may make?

A. Yerba-Santa alone does not hold the quinine in suspension. There is always more or less precipitation of quinine separating out. The chocolate combines with the yerba-santa adding to its blend and acceptability as a flavor and disguise, and it likewise gives the preparation *what* is lacking in the yerba-santa alone, the power of suspending or distributing the quinine throughout the liquid prepa-
477 ration. So that in my opinion the chocolate in this formula would serve a dual purpose, that of adding to the flavor and blending the flavor of Yerba-Santa, and likewise supplying a property which is lacking in yerba-santa, of holding the quinine in suspension and distribution throughout the syrup.

Q. 14. Will you state what extent in your opinion the use of choco-

ate is essential in this chocolate quinine preparation to a saisfactory reparation, which can be successfully marketed as a bitterless liquid reparation of quinine?

A. In my opinion the chocolate plays a very important function n the preparation. It is certainly essential to a palatable and satfactory preparation of quinine for a liquid preparation to be successfully marketed.

Q. 15. Mr. Eberhardt appears to testify that in his opinion the hocolate would only be effective as giving a distinctive color and n elegant flavor to such a preparation. What is your opinion on his subject?

A. The chocolate undoubtedly adds to the flavor, and by the flavor" I mean in that case the taste, because it would add practically nothing to the odor. So that the function of flavor, as I nderstand it, in this case would be the sense of taste to the organs. The chocolate undoubtedly there blends with the yerba-santa, and he small amount of vanilla, which is present, making a very aceptable flavor, and one that would be appreciated by the takers of uinine in liquid form.

Q. 16. What do you understand to be the idea contained in the ord "flavor" in this connection?

A. The word "flavor" to my mind there conveys the thought hat it adds something which is pleasant to the sense of taste or to he zest of appreciation of a preparation. In other words, it increases ts pleasantness and palatability.

Q. 17. Mr. Eberhardt, in his answer to X Q. 31, testifies as follows P. R. 30):

78 "A. The chocolate plays no part in disguising the bitterness but it does aid, to some extent, in holding the quinine n suspension, as any other thickening agent would do."

What have you to say as to this, giving your opinion for any statement you may make?

A. I cannot agree with the statement that it plays no part in disuising the bitterness. In my opinion it plays, in this respect, a mewhat minor but still an important factor in blending with the erba-santa and improving the palatability of the preparation. Rearding its suspending value, it supplies a very needed property, hich is lacking in the yerba-santa, and I do not know of any other ibstance that combines in just the way that chocolate does its susending power for quinine and similar chemical drugs.

Q. 18. By reason of what qualities in chocolate is it a successful gent in respect to its power of suspending the quinine sulphate?

A. That, in my opinion, is due to the combination of its ingredits. There is a certain amount of starch and altered starch. There a certain amount of fat, which aids in the suspension and emulnizing, and a certain amount of mucilaginous like substance, all which aid in chocolate and cocoa the peculiar suspending emulnizing power that they possess.

Q. 19. Will you state, then, to what extent, in your opinion, both

yerba-santa and the chocolate in this preparation are essential in order to have a proper combination of ingredients to produce a stable and satisfactory bitterless preparation of chocolate quinine in liquid form?

A. In my opinion both of these materials are essential to a successful formula that will produce a stable satisfactory and marketable preparation.

Q. 20. Mr. J. K. Lilly, of the plaintiff company, testified on page 81 in answer to Q. 17 that the presence of cocoa in the plain-
479 tiff's preparation Coco-Quinine is not essential to its palatability or quinine disguising power. "Its presence is not essential to its palatability or quinine disguising power." Please state what your opinion is as to that statecmnt, giving your reason for your opinion?

A. In my opinion the cocoa present is essential to the disguising power and palatability of the preparation.

Q. 21. Have you ever tasted either Lilly's Coco-Quinine or Quin-Coco made by Searle & Hereth?

A. Yes, sir, I have tasted both.

Q. 22. Will you state what the predominating taste of either of those two preparations is?

A. The predominating taste is rather difficult to determine, which one is the most prominent. The first taste you get, at least the impression that I received, was that of chocolate, and then the peculiar cloying semi-resinous flavor of the aromatic yerba-santa came out, and then there seemed to be a blending of the two, a harmony of the two flavors, and I could detect along with that a little vanilla flavor.

Q. 23. John M. Francis, a witness called for the plaintiff, who said he was chemical superintendent of Parke-Davis & Company of Detroit, stated (Plaintiff's record page 100) in answer to Q. 4, that "The utility of chocolate or cocoa in such a preparation would be that it serves the purpose of imparting to such a preparation a distinctive flavor and a distinctive color." Please state what your opinion is as to that testimony, and give your reason for your opinion?

A. The statement appears to me to be only partially so. The chocolate undoubtedly adds to the color and likewise to the flavor, but it serves to my mind an equally or even more so important function of giving a body or suspending value in the preparation, which is one of the essential functions of a preparation to
480 be dispensed. Unless the quinine is distributed through and suspended in such a way that it will not settle to the bottom, the dispenser could not administer it in a dose that was at all representative of the active constituent quinine nor of the intent of the prescriber. In other words, the dose would be very uncertain. The bulk of the quinine would be at the bottom of the container.

Q. 24. John M. Francis also testified (P. R. 101):

"X Q. 9. Is the quinine dissolved?

A. My belief based upon similar syrups made under my own supervision is that the quinine is in solution."

Please state what your opinion is as to that testimony?

A. Dr. Francis is undoubtedly mistaken, as the bulk of the quinine is in suspension and not in solution.

Q. 25. Can you state whether or not the fact you have stated that the quinine sulphate is in suspension and not in solution is shown by the microscope?

A. Under the miscroscope both of these syrups of quinine with chocolate show the quinine sulphate crystals distributed throughout the syrup and practically the same shape and size, showing that they are simply in suspension and the salt is not there in a solution.

Q. 26. For the benefit of the lay mind, will you state what you mean by the term "salt"?

A. I use it in connection with quinine sulphate as a salt. A salt is a union of some organic or metallic base with an acid to make a distinct chemical combination.

Q. 27. Will you state whether or not if quinine sulphate were in solution in any preparation it would increase the bitterness of the quinine sulphate?

A. I have experimented along that line, and I am fully convinced that any attempt to put the quinine in solution would increase the bitterness of it.

Q. 28. Dr. John M. Francis (Plaintiff's record page 100) testified as follows:

481 "Q. 5. Might or might not other syrups or other colors and other flavors be used in the product without changing its medicinal properties or characteristice?

A. Yes, sir."

Please assume that Dr. Francis in this testimony is referring to chocolate quinine preparations of the kind here involved, and state what your opinion is as to the statement he gave in the words quoted.

A. In answer to query 5, doubtless the medicinal properties would not be altered, but the characteristics of the physical properties would be materially altered by the character of the syrup or flavor added. My own experiments show that all the articles that have been recommended, to my knowledge, for this purpose, do not have the necessary qualifications, either the quinine is put in solution, and the bitterness brought out, or the quinine is not kept in suspension, or the flavoring is not adequate. So that all the various combinations that have been recommended for this purpose, outside of chocolate and Yerba-Santa, have been unsatisfactory.

Q. 29. Will you state whether or not you have experimented on these lines to any extent, and for how long?

A. I have experimented considerably on these lines both because of my own business interests, and likewise because the subject is referred to a sub-committee of the National Formulary, of which I happen to be the Chairman, and necessarily considerable experimentation fell to my lot.

Q. 30. You mean the subject of chocolate quinine liquid preparations?

A. Yes, sir, quinine chocolate liquid preparations.

Q. 31. Have you made up and will you produce mixtures of quinine sulphate with various other vehicles or syrups?

482 A. I have made a number of these experiments with the vehicles that have been proposed for the purpose of disguising quinine when administered in liquid form.

There we have plain syrup. You will notice that the quinine settles almost entirely to the bottom (referring to Defendant's Exhibit, Beringer sample, No. 1).

Here we have a syrup of ginger. You note here the suspension is somewhat better. The ginger content seems to aid in suspension. (Referring to Defendant's Exhibit, Beringer sample, No. 2.)

This one is a syrup of tolu, the same proportion of quinine in each case. There, like the plain syrup of sugar, it is practically entirely precipitated. The quinine is practically entirely precipitated (referring to Defendant's Exhibit, Beringer sample, No. 3.)

This one is with a syrup of orange peel. The suspension there is somewhat better of the quinine than it is with the plain syrup (referring to Defendant's Exhibit, Beringer sample, No. 4).

This one is a syrup of vanilla. Vanilla syrup. Here you have again the quinine practically all precipitated out (referring to Defendant's Exhibit, Beringer sample, No. 5).

This one is with a syrup of wild cherry. The bulk of the quinine is again precipitated out (referring to Defendant's Exhibit, Beringer sample, No. 6).

This one is with a syrup colored with caramel. The addition of caramel seems to aid a little, but not much, in keeping the quinine from precipitation. It is still nearly all precipitated (referring to Defendant's Exhibit, Beringer sample, No. 7).

This is a syrup of coffee. Here we have the quinine precipitated out, showing evidently that there is tannin present in the coffee by the character of precipitate. It goes out, not in the same way the precipitate is in the plain syrups, and other syrups, but as a fine

483 colored precipitate, which indicates evidently some tannin present. (Referring to Defendant's Exhibit, Beringer sample, No. 8.)

Here we have a syrup of licorice. Again, the quinine is separated out. These have been made for about two weeks. The quinine is separated out in a dense sediment, adhering closely to the bottom of the bottle (referring to Defendant's Exhibit, Beringer sample, No. 9).

This is a syrup of yerba-santa. Here it is apparent that the yerba-santa constituent has united with the quinine. There you have your precipitate at the bottom, again in more or less a dense form (referring to Defendant's Exhibit, Beringer sample, No. 10).

This is a compound of elixir of taraxacum, a compound of elixir of dandelion, which has been very much recommended as a vehicle for quinine, as a disguise for quinine. The result, as you see there, is that the quinine is very largely precipitated. There again I imagine the precipitation is due to the tannin from the constituents present in the elixir, wild cherry and other ingredients, dandelion, and so forth. (Referring to Defendant's Exhibit, Beringer sample, No. 11.)

These eleven samples were made by me about two weeks ago.

Q. 32. Will you state whether or no in your opinion and from your experience any of the eleven samples that you have produced marked from one to eleven constitute a satisfactory and marketable pharmaceutical preparation?

A. Not one of them.

Mr. Rawle: The eleven bottles, produced by the witness, marked "Defendant's Exhibits, Beringer samples, Nos. 1 to 11," respectively, are offered in evidence.

By Mr. Rawle:

Q. 33. Will you state whether or not in your opinion there is any ingredient that you could add to each or any of these eleven
484 samples which would improve its value or quality in the respect in which it is now deficient?

A. I do not know of any ingredient that could be added that would make them satisfactory.

Q. 34. Do you know of any ingredient which would be practical?

A. I do not know of anything which would be practicable to add.

Q. 35. I wish to add to both this and the last question "excepting cocoa." I have asked the last two questions with the reservation in my mind, though not expressed, of adding chocolate or cocoa. Will you state whether or not you had that exception in your mind in answering those two questions?

A. I had in my mind that cocoa or chocolate was not included in the query.

Q. 36. Please produce samples of Coco-Quinine, Lilly, and Quin-Coco, Searle & Hereth.

A. I produce two bottles so labelled.

Mr. Rawle: They are offered in evidence and marked "Defendant's Exhibits, Beringer samples, Nos. 12 and 13," respectively.

By Mr. Rawle:

Q. 37. State whether or not in your work and your reading you have come across references to the use of chocolate or cocoa as a vehicle for the administration of drugs, and especially of quinine sulphate?

A. Yes, I have come across several references where chocolate is recommended as a disguise for disagreeable drugs and especially cinchona preparations.

Q. 38. Recite whatever you find.

A. As long ago as 1879 the National Dispensatory stated:

"Chocolate also forms the basis for exhibiting iron and other medicinal substances, and has been proposed as a pleasant vehicle in the preparation of lozenges containing santonin, &c."

485 Chocolate is now recognized as of sufficient importance as a vehicle in pharmaceutical work to be standardized in the

Swiss, Austrian and Swedish pharmacopœias and the British Pharmaceutical Codex contains a description of chocolate under the name of Pasta Theobromatis, and in the National Formulary, which is now in press, we will standardize cacao for pharmaceutical purposes in this country.

In the Druggists' Circular for 1871 appears a formula from a French authority, Dr. Heuze, for preparing an extract of Peruvian bark with chocolate as a disguise. This is at page 27, 1871, January. This is probably one of the earliest, if not the earliest, published suggestion for combining the distinctive flavor of chocolate with quinine, and the title proposed was "Quinine Chocolate."

In Hager's Hand Book, which I have here, "Pharmaceutischen Praxis," there are several formulas given,

One for Pasta Cacao cum Extracto Chinae with a German title of China-Chololade. In this 485 parts out of 1,000 is chocolate.

In the same volume is a formula for Pasta Cacao cum China containing nearly fifty per cent of chocolate.

Also in this book is a formula for Vinum Chinae cum Cacao, being a formula suggested by the French authority, Bugeaud. This formula contains one hundred parts of cacao in two thousand of the product.

This book, from which I have just quoted, bears the imprint on the title page of "Berlin, 1900," and the preface is dated at Berlin, January, 1899.

Q. 39. The formulas you have just read from the German work mention Peruvian bark and cinchona. Will you please state what these names indicate and what relation they bear to quinine sulphate?

A. Cinchona bark is the source from which quinine sulphate is prepared.

486 Q. 40. Peruvian bark?

A. Peruvian bark is the bark of the cinchona. Originally the supplies of cinchona were obtained from South America, largely from Peru; hence the name Peruvian bark was attached to cinchona. Today our sources of supply are largely Ceylon and Java and East India cultivations.

Q. 41. State whether or not you remember during your association with Bullock & Crenshaw in Philadelphia in your early days a quinine chocolate preparation then on the market?

A. We used to sell in quite considerable quantities quinine chocolate lozenges or tablets made by Caswell & Company in New York. In the decade between 1880 and 1890, these were very popular with our customers.

Mr. Bradford: Objected to as immaterial and irrelevant.

By Mr. Rawle:

Q. 42. How were these tablets labelled?

(Objected to as immaterial and irrelevant.)

A. Labelled Quinine Chocolates.
Q. 43. Will you state what the National Formulary is?

(Objected to as immaterial and irrelevant.)

A. The National Formulary is a book of standard formulas that has been prepared and issued by the American Pharmaceutical Association. The American Pharmaceutical Association membership is made up of pharmacists, both wholesale and retail, chemists, teachers, editors and writers, and those engaged in pharmaceutical establishments. Anyone that is at all associated with pharmaceutical work is eligible to membership.
Q. 44. It meets when?

(Objected to as immaterial and irrelevant.)

A. It meets annually in convention, and then the work in
487 the interim is carried on by an executive council that manages the business of the Association and the various committees that carry on the scientific research and publication work and so on of the Association.
Q. 45. How many such committees are there approximately?

(Objected to as immaterial and irrelevant.)

A. Probably a dozen standing committees that carry on the work.
Q. 46. And the Executive Committee consists of what?

(Objected to as immaterial and irrelevant.)

A. The Executive Committee or the council consists of officers of the Association, the editor, the secretary of the council, the reporter on the progress of pharmacy, the chairmen of the different sections, which are really branches or committees of the Association, and the delegates selected from each local section. For instance, here in Philadelphia we have the Philadelphia branch. In New York we have the New York branch. In Indianapolis I think they have a branch. In Detroit they have one. This constitutes the executive council along with three members elected each year for a term of three years. So that there are three members at large elected in addition to the officers.
Q. 47. Will you state whether or not you publish from time to time a volume giving the accepted drug formulas?

(Objected to as immaterial and irrelevant.)

A. You are referring to the National Formulary?
Q. 48. Yes, that is what I mean.

(Objected to as immaterial and irrelevant.)

A. The National Formulary has, up to date, been revised at irregular periods. Whenever in the judgment of the Associa-
488 tion a revision was called for, it would be prepared and published. There have been three editions of the book pub-

lished since, the first in 1887, and the fourth edition, which will be the third revision, is now in press.

Q. 49. Upon what theory do formulas find their way into this National Formulary? That is, what is its scope and fundamental idea?

(Objected to as immaterial and irrelevant.)

A. The idea that led to the issuing of the National Formulary was the purpose of supplying standard formulas for these preparations which were prescribed by physicians, so that no matter in what part of the United States these prescriptions were compounded they would be uniform. In the absence of an official formula for some elixir, we will say, the druggist would be at liberty to compound a prescription calling for such an elixir with any strength or any color or any flavor, and it was to eliminate that evil and source of continual criticism that the National Formulary was prepared and published.

Q. 50. What considerations as to a given drug or preparation is the basis of entry into the National Formulary?

(Objected to as immaterial and irrelevant.)

A. The basis of decision as to the admission into the National Formulary has been the use of the preparation, whether it was sufficiently used either in one location, or in a number of locations to require the preparation of a definite standard formula.

Q. 51. By what machinery of the Association is a decision reached on the admission of any particular drug or preparation to the National Formulary?

(Objected to as immaterial and irrelevant.)

A. Recommendations come to the Committee of Revision of the book from different pharmaceutical associations, from the
489 membership of the Association at large, from the membership of its own committee, and these suggestions are all collected and sifted out, and then a vote is taken among the members of the committee as to the admission or non-admission of the proposed title. If the committee votes in favor of including the title, then it is referred to one of the sub-committees, depending on the character of the preparation, whether it is a syrup or a tincture or a fluid extract or a solid extract, and so on, and it then becomes the duty of the sub-committee to investigate the subject, and, if possible, to prepare a satisfactory formula, and report back the same to the General Committee of Revision of the National Formulary. If the committee then approves of the formula, it is accepted and enters into the publication.

Q. 52. State whether or not the National Formulary is a work of accepted authority in the drug business and among the physicians and whether or not it is a recognized legal authority by the United States Government.

(Objected to as immaterial and irrelevant.)

A. The National Formulary has been accepted by the pharmacists of the country as a book of standard formulas. It has been accepted by very many physicians, who now prescribe its formulas, and it has been adopted as one of the legal standards for medicines by the National Food and Drugs Act of June 30, 1906, and by many acts of the different states since that time.

Q. 53. Please cover substantially the same ground in regard to the United States Pharmacopœia.

(Objected to as immaterial and irrelevant.)

Q. 54. Who makes it up and publishes it and what is its authority?

(Objected to as immaterial and irrelevant.)

A. The United States Pharmacopœia is a standard for medicines. All civilized nations have prepared a pharmacopœia covering
490 the principal medicines used in that country. The United States Pharmacopœia is prepared by a committee of revision which is selected at the Decennial Convention held in Washington. These conventions were held in the even decennial years since 1820. 1910 was the last. The delegates to the convention are composed of delegates from the incorporated medical and pharmaceutical societies, the chemical societies, the various departments of the Government, such as the Marine Hospital Service, and the Department of Agriculture and likewise the Dental Society. The National Dental Society was recognized at the last convention. The convention selects the committee to whom it entrusted the work of revising the book. It likewise elects the trustees who have to do with the business management of the publication and of the convention as an organization. The Committee on Revision that is now at work was composed of fifty members, with the president of the convention, Dr. Wiley, ex-officio. So that it really has now fifty-one members. This committee has been sub-divided into fifteen sub-committees, and the chairmen of these sub-committees, along with the chairman of the general committee, and Dr. Wiley, as president of the convention, constitute the Executive Committee, whose duty it is to pass upon the principal questions and especially to see that the copy is prepared and properly edited and published. The meetings are held decennially, and the book is published as soon after the decennial convention as the revision can be completed.

Q. 55. State what authority this work has?

(Objected to as immaterial and incompetent.)

A. It is now the recognized legal authority of the United States, governing standards of the drugs and medicines, which it describes and defines in inter-state commerce, and in very many of the states it has been made the legal authority so as to cover intra-state dealings in these medicines. The Pharmacopœia is recognized by the
491 Food and Drugs Act of June 30, 1906, as one of the legal authorities for fixing standards and test of identity and purity for drugs.

Q. 56. State whether or not you have served on revision committees who have had to do with the preparation of the National Formulary and of the United States Pharmacopœia, and if so in what capacity, and when?

A. I am a member of the Committee of Revision of the United States Pharmacopœia, chairman of the sub-committee on fluid extracts, solid extracts and tinctures, a member of the sub-committee on liquors and spirits and waters, a member of the sub-committee on elixirs and syrups, a member of the sub-committee on essential oils, volatile oils, and by virtue of being chairman of one committee, I am a member of the Executive Committee. In the National Formulary Revision I am a member of the Committee of Revision, I am chairman of one of its sub-committees, to which has been assigned many of the topics for investigation and report, and I am chairman of the Committee on Unofficial Standards that has prepared for this Committee of Revision standards for the drugs entering into the formulas for which the Pharmacopœia had not fixed standards.

Q. 57. Can you trace the history of preparations from their original production, then when they go into more or less general use, and finally find their way into the United States Pharmacopœia or the National Formulary?

A. As a matter of custom you mean?

Q. 58. Yes, as a matter of custom. What has generally taken place?

(Objected to as immaterial and irrelevant.)

A. The procedure usually is that an article is presented to the medical profession, either through an individual who has experimented on it and made a discovery, or thinks he has, or more
492 frequently through some pharmaceutical establishment or chemical establishment which has investigated and brought out a new chemical product or new pharmaceutical preparation, and proceeds to exploit it to the medical profession. If its use is one that appears to be satisfactory and becomes extensive and general, then it becomes of such importance, that either the Pharmacopœia or the National Formulary is called upon to prepare standards for the product or preparation, so that there will be uniformity throughout the country in its dispensing and use.

Q. 59. State whether or not when a preparation has been originally introduced and has found accepted or found a market, the usual history of such preparations is that they have been made and marketed by other manufacturers. What can you say about this?

(Objected to as immaterial and irrelevant.)

A. It has been, I think, the universal custom, that when a preparation, after marketing, has met with favor and becomes used to any extent, the manufacturers all make it, push its sale energetically, as long as it is a good seller, and help to make it popular.

Q. 60. If a given preparation has been originally marketed by one house, being then perhaps new, and subsequently followed a

marketing by say a dozen other houses, what have you to say as to the nature of standardizing such preparations when marketed by so many different manufacturers?

(Objected to as immaterial and irrelevant and incompetent.)

A. The committee have generally, when these questions have been presented to them, taken up the question as to the general or extensive use of the article, and then they have given consideration to its therapeutic value. If the article is one that they feel sure
493 had no basis for its medical claims, and was a fraud, as sometimes has happened, or was improperly exploited, they have been very careful to exclude it from the legal authorities, but if the preparation is one of merit and is generally used, then it was accepted as the duty and the responsibility of the Pharmacopœia or the National Formulary to prepare the legal standards for the article or preparation. There have come into the Pharmacopœia, in addition, I might explain, some items which, while not in themselves of therapeutic activity or use, were necessitated because of the use pharmaceutically in preparing some other preparation in the book, and were essential ingredients and had to be standardized so that uniformity in the final product would be assured, and that is what we call pharmaceutical necessity, necessitating the introduction of an article in the Pharmacopœia.

Q. 61. In tracing the beginnings of preparations, their growth in use, and their final admittance to the United States Pharmocopœia or the National Formulary, will you state whether or not you include preparations which are of the kind that are spoken of as "open formulas," as "proprietaries" and as "specialties"?

(Objected to as immaterial, irrelevant and incompetent.)

A. There has never been a question about the availability of open formulas for Pharmacopœia or Formulary purposes. Regarding the specialties, the various pharmacopœias have not hesitated, when the specialties were of merit and were generally used, to prepare standard formulas that simulated or took the place of unstandardized formulas. The history of many of the drugs that are now in the Pharmacopœia is in some respects very interesting. Among the older ones some were actually secret formulas. Some were patented articles. Yet their use was so extensive that they have come down, some of them for many years, into our present standard formularies
494 and pharmacopœias. Regarding "proprietaries," they were considered the same way as we considered what I referred to as specialties. I used the word "specialties" really with the idea of designating the articles that were not patented, which are commonly spoken of as specialties or proprietaries. The rule has been up to the present time that articles protected by patent were not standardized by the Pharmacopœia unless those patents have expired and the articles had become common property. Then they were admitted and standardized if they were of sufficient use or value to require it.

Q. 62. Can you produce a list of proprietary medicines or special-

ties which have been introduced by the original houses, have been extensively marketed, and have subsequently found their way into the United States Pharmacopœia?

(Objected to as immaterial, irrelevant and incompetent.)

A. There are quite a few items which have been specially advertised as proprietaries, and that have eventually found recognition under official titles in the pharmacopœias. For example, to illustrate what I mean, Anti Kamnia was exploited by a St. Louis firm as the name of a compounded powder. The Pharmacopœia has introduced a formula for a Compound Acetanlid Powder, containing caffeine acetanlide and sodium bi-carbnate, which we presume to be the same, essentially and therapeutically. Cataplasm Kaolin in the present Pharmacopœia is another good example. Antiphlogisti-n, popularly called Denver Mud, and other preparations were advertised, and used to such an extent by the physicians that it was deemed advisable to standardize a formula for antiphlogisti-n and similar compositions, and so the Pharmacopœia introduced Cataplasm Kaolin containing Kaolin clay or earth, glycerine, some aromatics of a phenolin character and boric acid.

495 Another example is seen in the Pharmacopœia recognition of Liquor Antisepticus. The exploitation of Listerine, successful, by the Lambert Pharmacal Company of St. Louis. That goes back at least twenty-five years. I cannot give the exact date. They made that type of formula very popular, and the Pharmacopœio introduced a standard formula for an antiseptic solution, so that the doctors could prescribe an official formula in place of a proprietary. I recall some noted examples.

For instance, Fowler's Solution of Arsenic is now not only in our Pharmacopœia, but in, I think, nearly all, if not every, Pharmacopœia that I have consulted, as Liquor Arsenicalis, Fowler. It was originally introduced as a secret remedy by an English druggist, who sold it as Fowler's Metallic Solution. It became a very popular remedy, and finally, when its formula became known, its use was such as to warrant recognition, and, as I stated, it is in all pharmacopœias, and the name "Fowler" is still attached to it.

Compound Powder of Rhubarb and Magnesia is in the Pharmacopœia. For it the common name of Gregory's Powder is still quite frequently used, because it originated with Dr. Gregory of Edinburgh.

Dover's Powder is even still a more noted example. Every Pharmacopœia still uses the name "Dover's Powder" in honor of Dr. Dover, who introduced it as a secret remedy at first, and afterwards it was published.

Those are some of the old formulas which are now present in our Pharmacopœia, and it is a matter of record and history that even such well known chemicals as sodium bi-carbonate and Rochelle salts were originally introduced as patented and proprietary articles, and were used for many years before they were introduced into the pharmacopœias.

Wine of Opium, commonly called Sydenham's Laudanum, was introduced by an English physician by the name of Sydenham, and for quite a time the formula was kept secret, and it is still spoken of as Sydenham's Laudanum. It is present in the Pharmacopœia as "Wine of Opium." The name "laudanum" itself comes down from Paracelsus, who, in some respects, is considered the father of pharmacy. He made a preparation which he called laudanum, in which opium was the principal medicine. It was a secret formula. Yet that name has been continued down for over three centuries, and is still accepted as the proper name for tincture of opium.

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Q. 63. You have given the names of a number of preparations which ultimately found their way into the Pharmacopœia or the Formulary. Will you now please state whether or not these had been introduced by a certain discoverer or doctor or drug house, and were subsequently, and before they found their way into the Pharmacopœia or Formulary, manufactured extensively, and marketed by other drug houses.

(Objected to as immaterial, irrelevant and incompetent.)

A. Very many of them have been, and were, manufactured by many houses, besides the originator. The most noted example of that, probably, is mineral oil. That is now recognized in the Pharmacopœia. It dates back to the investigations and patents issued to Robert A. Chesebrough of New York, who obtained a patent for a purified petroleum product, which he called vaseline, and then, in the course of a few years, he brought out a purified liquid paraffin which he recommended as liquid vaseline, for coughs, colds, and the treatment of tubercular conditions. Later, various petroleum oils were still more highly purified until we got them water-white, and practically odorless and tasteless, and then a few years ago the celebrated English physician, Sir W. Arbuthnot Lane, published a paper and lectured on the subject as well, on the value of mineral oil in the treatment of chronic constipation. While prior to that time few manufacturers had marketed this oil for medicinal use such as, for example, liquid albolene: since that time the use has been very rapidly growing, and I have here a list of I do not know how many different names, showing the different trade names under which purified liquid paraffin oil or mineral oil is on the market and sold by different houses, each name representing the output of a different house, the labelling of the different houses, probably the product from the same factory, with a dozen different names. The list follows:

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Adepsine Oil
Amilee
Atoleine
Atolin
Blandine
Calol
Crysmalin
Deeline
Glyco
Glycoline
Glymol
Heavy Petroleum Oil
Interol
Liquid Albolene
Liquid Cosmoline
Liquid Fossiline
Liquid Geoline
Liquid Paraffin
Liquid Petrolatum
Liquid Saxoline
Liquid Vaseline
Mineral Glycerine
Mineral Oil
Neutralol
Nujol
Olo
Paraffin Oil
Parolin
Petralol
Ptero
Petrolax
Petrolia
Petrolene
Petronol
Petroseol
Rock Oil
Russian Liquid Petrolatum
Russian Mineral Oil
Russian Paraffin Oil
Russol
Saxol
Terraline
Terralbolia
Usoline
Waterwhite-Mineral Oil
White Paraffin Oil

The United States Pharmacopœia has adopted the title of Petrolatum Liquidum for this preparation instead of taking the trade names vaseline, cosmoline, it took the coined name, Petrola-
498 tum, and for this liquid preparation, liquid paraffin oil, it has taken the name of Petrolatum Liquidum. The foreign pharmacopœias have generally adopted the name Paraffinum Liquidum.

Q. 64. Referring to this list of prepartions which you have just given in connection with mineral oil, will you please state whether the various preparations on your list, and the different brands thereof, are practically identical in taste, appearance and in therapeutic action?

A. They are practically identical.

Q. 65. Can you produce a list of proprietary preparations originally put out by a house or firm or person, which have found a market, and finally were put into the United States Pharmacopœia?

(Objected to as immaterial, incompetent and irrelevant.)

Q. 66. And follow this, if you can with a similar list relating to the National Formulary.

(Objected to as immaterial, incompetent and irrelevant.)

A. I have compiled a list of titles which have been introduced into the Pharmacopœia for preparations or chemical products which were formerly controlled either by patents or as proprietaries, and have likewise done the same thing regarding the formulas in the National Formulary.

For instance, Antifebrin was introduced by Kalle as a proprietary. It is named in the Pharmacopœia under the title "Acetanilide."

Phenacetin was patented and introduced by Bayer & Company. It is named in the present Pharmacopœia under the name of "Acetphenetidin," another example of the Pharmacopœia coining a name for a patented article, so as not to use the patented name.

Lanolin was introduced by Liebreich. It is now recognized in our Pharmacopœia as "Adeps Lanae," or the lard of the sheep.

499 Urethane was introduced by Meister Lucius and Breuning, and is now in the Pharmacopœia under the name of "Aethylis Carbonas."

Antipyrine was originally introduced by the German firm of Knorr, I believe. It is now in the Pharmacopœia under the name of "Antipyrina."

Various manufacturers introduced a solution of Hydrogendioxide under proprietary names such as Dioxygen. It is now in the Pharmacopœia under the name of "Aqua Hydrogenii Dioxidi."

Pond's Extract, extract of Witch Hazel, was introduced as a specialty, by Pond as a proprietary, and has sold as such for many years. It is now in the Pharmacopœia as "Aqua Hamamelidis," Water of Witch Hazel.

Saccharin was discovered by Fahlberg, sold in the trade under several names, such as Saccharin and Glusidin. It is now in the Pharmacopœia under the chemical designation of "Benzosulphinidum."

Antiphlogistin and Koalin Cataplasms have found in the Pharmacopœia representation under the name of Cataplasma Kaolini.

Chloralformamide or Chloralamid, introduced by Schering. That is now in the Pharmacopœia under "Chloralformamidum."

Duotal was introduced by Bayer & Company, likewise by the Heyden Chemical Company as a proprietary, and patented. It is now on the market under its chemical name and in the Pharmacopœia under the chemical name of "Guaiacolis Carbonas."

Schering & Company introduced Urotropin, and Merck & Company followed with the name Formin and other houses took the names Cystogen, Uritone, Hexamine and Hexacystine, and the Pharmacopœia took the name of "Hexamethylenamina" for the same article.

Iodol was introduced as a patented chemical by Kalle. It is now in the Parmacopœia under the name of "Iodolum."

To replace Listerine and similar antiseptic solutions the
500 Pharmacopœia has adopted the name of "Liquor Antisepticus."

To replace Lysol and similar proprietary phenol solutions the Pharmocopœia has introduced "Liquor Cresolis Compositus."

To replace Formalin, of Schering, the Pharmacopœia has introduced "Liquor Formaldehydi."

For Fowler's Solution of Arsenic, which I spoke of before, the Pharmacopœia has introduced "Liquor Potassii Arsenitis."

To replace Melachol, which was introduced by the Alta Pharmacal

Company of St. Louis as a proprietary—that has now been replaced by "Liquor Sodii Phosphatis Compositus" in the Pharmacopœia.

To replace such proprietaries as Tanret's Pelleteriene the Pharmacopœia standardized "Pelletierinæ Tannas."

To replace the various petroleum jellies marketed under trade names as Vaseline, Cosmoline, Lucilline, Fossoline, and so on, the Pharmacopœia coined the name "Petrolatum."

Salol was introduced by Sahli. It is now in the Pharmacopœia under the chemical name of "Phenylis Salicylas."

Rochelle Salt was a secret preparation of a French pharmacist and kept secret for more than fifty years. It is now in the Pharmacopœia under the title of "Potassii et Sodii Tartras."

Dover's Powder was a secret formula of Dr. Thomas Dover. It is now in the Pharmacopœia under the name of "Pulvis Ipecacuanhæ et Opii."

Compound Powder of Morphine, a formula of Dr. William Tully, is now in the Pharmacopœia under the title of "Pulvis Morphinæ Compositus."

Trional, a patented chemical introduced by Bayer & Company is now in the Pharmacopœia under the name of "Sulphonethylmethanum."

Sulfonal, also a patented chemical, introduced by Bayer
501 & Company, is in the Pharmacopœia under the title of "Sulphonmethanum."

Easton's Syrup became very popular both in England and America, and is now in the Pharmacopœia under the title of "Syrupus Ferri, Quininæ et Strychninæ Phosphatum."

Various syrups of the Hypophosphites, after the formula of Dr. Churchill, have been replaced by the official formula for "Syrupus Hypophosphitum."

Compound syrups of the Hypophosphites, containing quinine, strychnine and so on, such as Fellows' syrups, have been replaced by the official formula "Syrupus Hypophosphitum Compositus."

Aristol was a patented chemical, introduced by Bayer & Company and is now in the Pharmacopœia under the title of "Thymolis Iodidum."

Turlington's Balsam is one of the old fashioned patented medicines and is now in the Pharmacopœia under the name of "Tinctura Benzoini Composita."

Laudanum, I have already referred to as being a preparation originally originating with Paracelsus, remaining in the Pharmacopœia, and in most of the pharmacopœias, as "Tinctura Opii."

To replace Wister's Lozenges, a formula very, very popular around Philadelphia, the Pharmacopœia has a formula for "Trochisci Glycyrrhizæ et Opii."

To replace Spitta's Lozenges, another old time lozenger, "Trochisci Cubebæ" has been introduced by the Pharmocopœia.

To replace the various bitter wines of iron that were advertised as patent medicines and proprietaries, the Pharmacopœia has a standard bitter wine of iron under the title of "Vinum Ferri Amarum."

Q. 67. Will you please state whether all or most or how many of the original preparations you have referred to as proprietary were originally introduced by a single house or concern as proprietary medicines.

(Objected to as immaterial, incompetent and irrelevant.)

502 A. I could enumerate in this series of titles of Pharmacopœia titles at least twenty-eight that were introduced originally as proprietary or patented articles.

(Mr. Rawle states that the witness produced a type-written list, and testified from that list.)

(Counsel stipulates that the answer to the question giving the names of these articles can take the place of the list, and that the list itself shall not be offered in evidence.)

The Witness: Twenty-eight of these were either distinctly protected by proprietary rights or patent rights.

By Mr. Rawle:

Q. 68. Referring to the twenty-eight proprietary articles or patented articles, which are found among the list you have just put on the record, will you please state whether or not subsequently to their introduction by the originator, they were marketed by some or many other houses or concerns before they went into the United States Pharmacopœia?

(Objected to as immaterial, incompetent and irrelevant.)

A. The pharmaceutical preparations were marketed, as a rule, by a number of pharmaceutical manufacturers, and the use became general before they were taken up and standardized for the Pharmacopœia. The patented chemicals were not, as a rule, made official until after the patents had expired, and the right to manufacture by others than the original patentees became public property.

Q. 69. When drug manufacturers other than the originator began to market these twenty-eight various preparations you have enumerated, will you state whether what they marketed was the same in color, taste, and therapeutical effect as the original?

(Objected to as immaterial, incompetent and irrelevant.)

503 A. Substantially, they were the same.

Q. 70. Will you state whether or not the various concerns who marketed them after they were originally put out, marketed them under the same or under another name?

(Objected to as immaterial, incompetent and irrelevant.)

A. At times the names were very similar, sometimes they were identical by several manufacturers and at other times the names had been coined, and changed a little, so as to give a distinctive type to the individual manufacturer. That is shown, and very plainly, by

the list of titles for mineral oil. It showed the custom and that has to do throughout most of the preparations mentioned.

Q. 71. Will you state whether or not this list you have just given includes both simple preparations and compound mixtures?

(Objected to as immaterial, incompetent and irrelevant.)

A. The list covers both simple chemical products and compound pharmaceutical preparations.

Q. 72. Will you explain the difference between the two terms?

(Objected to as immaterial, incompetent and irrelevant.)

A. The term that I used "simple chemical product" was used to indicate a distinct chemical compound, as, for example, Acetanilide. The term "compound pharmaceutical preparation" was used to designate a preparation composed of several ingredients which are put together to make an acceptable form for administration. For example, we will take the Compound Syrup of Hypophosphites as an illustration of the use of that term.

At 1:15 P. M. a recess was taken until 2:15 P. M.

504 At 2.30 p .m.

Present: Parties as before noted.

GEORGE M. BERINGER.

Direct examination resumed.

By Mr. Rawle:

Q. 73. Can you produce a list of preparations taken from the National Formulary which had originally, when first introduced, been proprietary and which subsequently found their way into the National Formulary; give if you please the original name as introduced, the name of the original introducer, the names, if any, of manufacturers who afterwards marketed the product, and the National Formulary name?

(Objected to as immaterial, irrelevant and incompetent.)

A. The following titles appear in the National Formulary as substitutes for proprietaries previously advertised:

"For S. Celerina introduced by the Rio Chemical Company and advertised, appears in the Formulary a Compound Elixir of Celery Seed under the title of Elixir Apii Graveolentis Compositus.

For Wheeler's Elixir, the proprietary introduced by Wheeler & Company, who I think were Canadian people, and afterwards made by a number of manufacturers containing the constituents of Cinchona Bark, associated with iron and calcium, the National Formulary has introduced the formula under the title of Elixir Cinchonæ, Ferri et Calcii Lactophosphatis.

For the Lacto-Peptine, both in the powder form, and in the form of Elixir, introduced by the old firm of Reed & Carnrick, now the New York Pharmacal Association, and successfully exploited and then made by all the manufacturers, the National Formulary
505 introduced two formulas, the Pulvis Pepsini Compositus and the Elixir Digestivum Compositum.

Gray's Glycerine Tonic was the name of a formula introduced by Purdue, Frederick & Company of New York. It was based upon an old physician's prescription and became very popular, and a similar formula was then made by nearly every pharmaceutical manufacturer and it has been introduced in the National Formulary under the title "Elixir Gentianæ Glycerinatum."

Essence of Pepsin was originated by Fairchild Brothers & Foster of New York, and was then made by nearly every drug firm and manufacturing pharmacist. For this the National Formulary has introduced the formula Essentia Pepsini.

Angier & Company of Boston introduced Emulsion of Petroleum with Hypophosphites, which has become popular, and similar formulas then appeared on most of the manufacturers' lists, and for this the National Formulary has a formula, Emulsum Petrolei, containing Hypophosphites.

Gylco-thymoline, adopted by Cress & Owen, who introduced this under that name, an alkaline antiseptic fluid colored red, has been imitated by nearly all manufacturers and has become very popular. For this the National Formulary has a formula, Liquor Antisepticus Alkalinus.

Under the title of Arsenauro was introduced a solution of gold and bromide of arsenic, then made by several manufacturers, and for this the National Formulary has introduced a formula, Liquor Auri et Arseni Bromidi.

Solutions of Peptonate of iron with Manganese have been introduced largely through the advertisement of Gude's Pepto-Mangan. Originally these formulas were proposed by a German pharmacist, Dietrich, and have been very popular both abroad and in this
506 country. The National Formulary has now introduced this formula under the name of Liquor Ferri Peptonati cum Mangano.

Phillips introduced Milk of Magnesia. It has now become exceedingly popular and is manufactured by many pharmaceutical houses, and for this we have in the National Formulary a formula, Magma Magnesiæ. This is now to be taken over by the Pharmacopœia.

Bromidi was introduced as a proprietary title by a manufacturing company of St. Louis for a hypnotic containing chloral and bromides. Nearly all the manufacturers then manufactured a similar preparation under the title of an elixir, and the National Formulary has introduced the formula under the title of Mistura Chlorali et Potassii Bromidi Composita.

Tasteless syrup of iodide of iron was introduced many years ago by a New York firm, Crews & Company. To replace this the National Formulary has introduced a Syrupus Ferri Citro-Iodidi.

Phillips introduced the Phospho-muriate of Quinine, containing phosphates and a muriate of quinine in a syrup. This was then made by most of the manufacturers as syrups of phosphates with quinine, and the National Formulary has introduced the formula under the name of Syrupus Hydrochlorophosphatum.

Many years ago Parrish & Company of Philadelphia at that time introduced what was known as Parrish's Chemical Food, a preparation containing the phosphates of calcium, sodium, potassium and iron in the form of a syrup. This very soon became popular and has been made by most of the manufacturers, some of whom advertised it as a proprietary or specialty. The National Formulary has a formula under the name of Syrupus Phosphatum Compositus.

Hayden popularized a preparation as Hayden's Viburnum Compound, and similar preparations became very popular and were made by most of the manufacturers. The National Formulary has introduced this under the title of Tinctura Viburni Opuli Composita.

507 Resinol was introduced by the Resinol Chemical Company of Baltimore as a title for an ointment containing Resorcinol. It has been made by most of the pharmaceutical houses and is now in the National Formulary under the title of Unguentum Resorcini Compositum.

That completes the list. I have omitted from that list the old residenters that have come down from the great grandfathers.

Q. 74. Please state whether or not in each instance you have mentioned the original preparation as marketed, the preparations marketed by other houses which you have spoken of, and the preparation put in the National Formulary were alike in taste, color and therapeutic qualities?

Mr. Bradford: Same objection.

A. They closely similated the proprietaries.

Q. 75. To what extent did the subsequent preparations put out by the subsequent houses, in assimilating the product, use the name?

A. In some cases almost exactly they assumed the name and in other cases they modified it.

Q. 76. In giving this list please state whether or not between the original marketing by the original introducer and the incorporation of the formula in the National Formulary, each particular product was more or less extensively marketed by other houses.

Mr. Bradford: Same objection.

A. In each of the cases mentioned that was so.

Q. 77. State whether or not you have had, as a member of the Revision Committee of the National Formulary, anything to do with the proposed placing in the National Formulary a formula for a syrup of chocolate quinine.

Mr. Bradford: Same objection.

508 A. The committee had under consideration a report from one of the sub-committees recommending the introduction

of a formula for a syrup of quinine with chocolate. When a vote was taken, twelve out of the fifteen members of the committee voted, and the vote was unanimously in favor of admitting such a formula. It was referred to a sub-committee, of which I was the chairman, and we tried out a number of formulas that were submitted, and they were not entirely satisfactory, so it remains the one subject on which that committee has not filed a final report and for which a formula has not yet been accepted.

Q. 78. With what committee, if any, is the subject now lodged for further consideration and report?

Mr. Bradford: Same objection.

A. It still remains as an unfinished business with the sub-committee B, of which I was and am chairman.

Q. 79. Have you in connection with this work as chairman experimented on a formula for such a preparation and given it consideration, and to what extent?

A. I have tried a number of formulas and have done considerable experimental work on the matter and probably, if I could have devoted sufficient time, we would have adopted a formula. I have had as you can realize from the number of assignments, a great deal of work to do, both in relation to the Pharmacopœia and the National Formulary, and this is the one subject on which I have not yet filed a final report, and the only one that I recall that I have not filed a report on.

Q. 80. State whether or not the adoption of a formula is or may be anything different from a knowledge of the ingredients; is there anything to be considered in adopting a formula other than to ascertain what ingredients are to go into it?

Mr. Bradford: Same objection.

A. That is only part of the formula. The method of combining those ingredients, the securing of right proportions, the
509 methods of manipulation, are what make the success of the formula. To illustrate, some of the experiments resulted in a syrup which was too rich in chocolate and too rich in the fat of chocolate, and we got a preparation that did not pour, with a separation of fat on the top that clogged it up, and other formulas contemplated placing the quinine in solution, which is an initial error, because the quinine must not be in solution. So we have experimented along the lines, and have not yet arrived at a conclusion that I felt justified in submitting as a formula for adoption.

Q. 81. Will you state whether or not the difficulty you mentioned exists more with regard to some formulas than with regard to others?

Same objection.

A. The difficulty of constructing formulas varies very decidedly in different formulas. Some are very simple, and others require a knowledge of the peculiarities of the constituents and sometimes a rather intricate process of manipulation to get the proper results.

Q. 82. Would you place a syrup of chocolate quinine preparation among the more difficult or more simple formulas?

A. Among the more difficult.

Q. 83. To illustrate the greater or less difficulty in deciding upon a formula, can you name one or two formulas which are now in the National Formulary and which were difficult of ascertainment before they went in?

Mr. Bradford: Same objection.

A. Yes, Elixir Iron Quinine and Strychnine was one of the problems. Compound tincture of Viburnum Opulus has been a matter of experimentation. Syrup of Phosphates of Iron, Quinine and Strychnine has been a matter of experimentation. Some of the fluid extracts have been rather difficult to determine the right menstruum and process to use in manipulation.

510 Q. 84. If there are, as has been testified, a dozen syrup of chocolate and quinine preparations made by different makers, now on the market, will you state why you should not adopt one of those formulas and put it into the National Formulary?

A. I know of no reason provided the formula, when tested out, is satisfactory. I would not give a carte blanche that it would be adopted without testing it out.

Q. 85. Do you know the formula of any of those preparations?

A. I have never seen the formulas of any of the manufactures.

Q. 86. If you had one of those formulas and it was satisfactory, would you use it in the National Formulary?

(Objected to as immaterial, incompetent and irrelevant.)

A. If I had the formula submitted and it was satisfactory and the book was not too far advanced, to have it incorporated, I would endeavor to have it incorporated in the present edition. If not, I would hold it over for the next edition.

Q. 87. And in any case report in favor of its adoption?

(Objected to as immaterial, incompetent and irrelevant.)

A. Yes, if it was satisfactory.

Q. 88. Can you refer to the records and reports in connection with the National Formulary, giving the successive steps that have been taken in regard to the placing of a chocolate syrup of quinine preparation in the National Formulary.

(Objected to as immaterial, incompetent and irrelevant.)

A. I have the records showing the actions taken by the committee regarding this formula, the official correspondence of the

511 committee. I have before me the official correspondence of the Committee on Revision of the National Formulary sent out to the members of committees. In letter No. 20, page 104, is reported the vote on the proposed additions. Syrup of Quinine with chocolate is listed with those that have been approved by all the members voting, twelve in number.

On page 458 is a record of the minutes of a meeting of the Committee held in Boston on August 12th, 1921. There occurs the following statement:

"The following was continued with Committee B: Sterilization, Syrup of Quinine and Chocolate,"—two topics still retained by the Committee.

On page 466 is the report of the Committee of the National Formulary to the American Pharmaceutical Association which contains a list of items which the Committee reported to the Association were to be titles in the revision of the National Formulary. Among the list of agreed titles occurs on page 466 "Syrup of Quinine with Chocolate".

On page 494 is a record of articles accepted and not yet reported on. There occurs under the number 61, "Syrup of Quinine and Chocolate, Committee B", showing to whom it had been assigned.

On page 505 is a list of unfinished work remaining before the Committee. Under the title "A, Additions, accepted for which no formulas have been given", is stated as Number 61, Syrup of Quinine and Chocolate.

Under date of July 26th, 1912, I wrote to Professor C. Louis Diehl, Chairman of the Committee on National Formulary Revision:

"I believe in this report I am completing the assignments that have been made either to me personally or to Sub-Committee B, with one exception, namely, Syrup of Quinine and Chocolate, for which an entirely satisfactory formula has not yet been agreed upon."

Q. 89. State whether or not you were present at a meeting either of your National Formulary Committee or of a joint committee of both bodies, at which there was any reference made to placing this preparation in the National Formulary, and which meeting was presided over by Mr. Eldred?

512

A. I don't recall being present at any such meeting.

Q. 90. Will you state whether or not Mr. Eldred is on any committee which has dealt with this subject?

A. Mr. Eldred is on a committee on standards for unofficials which is preparing the standards for part two of the National Formulary. This will cover the ingredients going into the formulas of the National Formulary which have not yet been standardized by the Pharmacopœia for which we will need necessarily standards to get uniform products. He has seen the discussions of standards in that committee, but has not been a member of the National Formulary Revision Committee.

Q. 91. State what is your opinion as to the newness or novelty of supplying quinine sulphate in a chocolate syrup as compared with supplying quinine sulphate in coated pills, tablets, capsules or elixirs?

A. Those various forms of administering quinine, when they were proposed, were considered quite as much in advance as the introduction of a palatable syrup containing quinine. I recall quite well when compressed pills were first introduced, gelatine coated pills, and we—I say "we", I mean the old firm I was with—were the first manufacturer I guess in this country of sugar coated pills. So

that I recall, as I say, when pills were first introduced, prepared pills, and when tablets were put on the market compressed and finally coated with sugar and with chocolate, and when the filled capsules, as improved forms of dispensing quinine, were introduced upon the market, they were looked upon with quite as much favor and as quite as much in advance as have been some of the later attempts to supply a liquid preparation of quinine.

Q. 92. Will you state whether the Revision Committees
513 of the United States Pharmacopœia and the National Formulary have in their practice and methods considered that it could standardize and place in the United States Pharmacopœia or National Formulary any open formula preparation which had originally been carried by a particular house as a proprietary and had come into quite general use.

(Objected to as immaterial, incompetent and irrelevant.)

A. Both of these committees engaged in the revisions of these works have considered as well within their province to standardize formulas that have been looked upon as open formulas, even proprietary formulas. In the revision of the Pharmocopœia I may add that there has even been some discussion as to the advisability of standardizing patented chemical products which have been frequently used. An example of that was in Aspirin. There was quite a strong sentiment that we should standardize Aspirin, even though the patent is still in existence, because of its general use.

Q. 93. State whether or not the United States Pharmacopœia or National Formulary Committees have ever standardized and placed in their respective publications patented products?

(Objected to as irrelevant, incompetent and immaterial.)

A. Up to the present revision they have not.

Q. 94. You have referred to the practice of standardizing and placing in one or the other of these publications proprietary articles. State whether or not that has been the uniform practice with the Committees in suitable cases?

(Objected to as irrelevant, incompetent and immaterial.)

A. My examination of the works of the previous commit-
514 tees leads me to conclude that they have adopted that as one of their privi*el*ges and rights.

Q. 95. State whether or not in the general history of the drug business in your day, when one drug manufacturer has put out an open formula proprietary preparation which has been successful on the market, other drug manufacturers have put out and marketed a preparation of a similar or like formula, and to what extent this has been common practice among drug manufacturers?

(Objected to as irrelevant, incompetent and im*am*terial.)

A. It has been a custom of the drug trade that when a formula is placed on one of the manufacturers' lists and exploited success-

fully, the other manufacturers very promptly manufacture the same or a similar article and advertise it and share in the profits. I have in mind as illustrating just what I thought of a couple of formulas for pills that are now known all over the country, for example, the Hinkle formula of Pill Cascara, put out by William R. Warner & Company, as a pink coated laxative pill containing extract of cascara. The formula is now I believe on all of the lists of the manufacturers of pills. Another example along the same line is the Compound Sumbul Pill, Professor Goodell's formula originally. Professor Goodel used to come into the store and I made him up those pills by hand when they were first made,—Assafœtida, Iron and Sumbul. Finally we got to making them and keeping them on hand, and when the demand became general we put them on the list and published the formula on the label. To-day they are made by all the manufacturers in pill or tablet form, and it is a very popular formula, an open formula. At the time I wanted the firm I was with to copyright the article, and trade-mark the name, but they would not do it, would not consider it, thought it was un-
515 ethical, would not consider that at all. To-day that pill is sold in millions and millions. The same may be said of the Lapactic Pill of Sharp & Dohme. That was a pill formula containing Aloin, Extract of Belladon-a and Ipecac and Strychnine. That is being made to-day by the different manufacturers of pills, either under that name or under the name of Pill Evacuant.

Q. 96. Will you state how common or universal this practice is in the drug manufacturing business?

(Objected to as incompetent, irrelevant and immaterial.)

A. I would say it is practically a universal custom in the drug trade. It is a fashion, otherwise, of the times.

By Mr. Rawle:

Q. 97. Can you produce a statement showing a list of proprietary preparations with the names of the original introducers, and showing the names of drug manufacturers who have subsequently marketed each preparation, giving the name of the subsequent drug house and the name under which such drug house marketed the same?

(Objected to as immaterial, incompetent and irrelevant.)

A. I have prepared a list of some of the noted examples of that character. For example, Elixir Catnep and Fennel introduced by John Wyeth & Brother. Sharp & Dohme list it now as Elixir of Catnep and Fennel. Eli Lilly & Company have it on their list as Elixir of Catnep and Fennel. H. K. Wampole & Company have it on their list as Carminative Elixir.

Creo-Terpin introduced by H. K. Wampole & Company. The following manufacturers now list similar formulas:

Sharp & Dohme, Elixir Creosote and Terpin Hydrate Compound.

Park, Davis & Company, Elixir Creosote and Terpin Hy-
516 drate Compound.

Eli Lilly & Company, Elixir Creosote and Terpin Hydrate Compound.

H. K. Mulford Company, Elixir Terpin Hydrate and Creosote Compound.

William R. Warner & Company, Elixir Terpin Hydrate and Heroin Compound.

Elixir of Lactopeptine, to which I referred before, owned by the New York Pharmacal Company, is imitated by every one of the manufacturers, listed generally as elixirs of lactated pepsin, compound digestive elixir.

Elixir Salicylic Comp. introduced by William R. Warner & Company. It now appears on the lists of Sharp & Dohme, Parke, Davis & Company, Eli Lilly & Company, H. K. Wampole & Company, John Wyeth & Brother and H. K. Mulford & Company, and the title in nearly every instance is Elixir Silicylic Acid Compound.

Peptonising tubes, introduced by Fairchild Brothers & Foster; on the list of Parke, Davis & Company, John Wyeth & Brother, there appear peptonising powder in tubes. Sharp & Dohme make the same formula as peptonising tablets.

Ichthyoldin, introduced by H. K. Mulford Company, is now on the list of Sharp & Dohme under the name of Iodythol, Parke, Davis & Company has Thiodine, and Eli Lilly & Company has Ichthyol-Iodine Compound.

Aletris Cordial, introduced by the Rio Chemical Company, is now on the list of Sharp & Dohme as Compound Cordial of Unicorn; Parke, Davis & Company as Compound Elixir of Aletris; Eli Lilly & Company as Compound Cordial of Aletris; H. K. Wampole & Company as Compound Elixir of Aletris; John Wyeth & Brother as Elixir of Unicorn Compound; H. K. Mulford & Company, William R. Warner & Company and Sharp & Dohme as Elixir of Aletris Compound.

517 Colchi Sal, introduced by E. Fougera & Company of New York. A similar formula appears on the lists of Sharp & Dohme, as Globules of Colchicine and Methyl Salicylate; Parke, Davis & Company as Globules of Colchine and Methyl Salicylate; Eli Lilly & Company as Globules of Colchicine and Methyl Salicylate; H. K. Wampole & Company as Colchici-Methyl Capsules with the addition of salol to the formula; John Wyeth & Brother, Globules of Colchicine and Methyl Salicylate; H. K. Mulford & Company as capsules of Colchicine and Methyl Salicylate; and William R. Warner & Company as Pearls of Colchicine and Methyl Salicylate.

Glyco Heroin, introduced by Martin H. Smith Company of New York, containing heroin, cannabis and ammonium hypo-phosphite, with glycerine. Now on the list of Sharp & Dohme as Elixir Glycerin and Heroin Compound; Parke, Davis & Company as Glycerinated Heroin Compound; Eli Lilly & Company as Glycerin Heroin Compound (Lilly); John Wyeth & Brother as Syrup Glycerite Heroin Comp.; William R. Warner & Company as Glycerole Heroin Compound.

Gray's Glycerine Tonic introduced by Purdue Frederick Company, appearing on the lists of Sharp & Dohme as Elixir of Gentian and Glycerin Comp.; Parke, Davis & Company as Elixir Gentian Compound Glycerinated; Eli Lilly & Company, Glycero-Tonic Compound (Lilly); John Wyeth & Brother, Elixir Glycerole Tonic Compound; H. K. Mulford Company as Elixir Gentian Glycerinated Compound and William R. Warner & Company as Elixir Glycerole-Gentian Compound.

Lithiated Hydrangea, introduced by Lambert Drug Company of St. Louis, now appears on the list of Sharp & Dohme, Parke, Davis & Company and Eli Lilly & Company as Elixir Lithium & Hydrangea. On the lists of William R. Warner & Company, John Wyeth & Brother and H. K. Wampole & Company it appears as Elixir Hydrangea and Lithia, and on the list of H. K. Mulford Company as Elixir Lithium Hydrangea Compound.

518 Bromidia introduced as a hypnotic preparation by Battle & Company of St. Louis. It appears on the lists of Parke, Davis & Company as Elixir Bromide and Chloral Compound; Eli Lilly & Company as Elixir Bromide Chloral Compound (Lilly); H. K. Wampole & Company, Hypno Bromic Compound with the addition of some Morphine; H. K. Mulford Company, as Elixir Sedative and William R. Warner & Company as Elixir Hypnotic Compound.

Resinal, introduced as a proprietary ointment by the Resinol Chemical Company of Baltimore. A simular formula now appears on the lists of Sharp & Dohme as Res Unguentum; Parke, Davis & Company, as Ointment Resorco; Eli Lilly & Company as Unguentum Resorcinol Compound (Lilly); H. K. Wampole & Company, Unguentum Resorcin Compound; H. K. Mulford & Company, Ointment Resorcin Comp. Improved and Schieffelin & Company as Ointment Resorcin Comp. S. & Co.

Glyco Thymoline introduced by Kress & Owen. On Sharp & Dohme's list there is a similar preparation as Alkaline Antiseptic Solution; Parke, Davis & Company, as Alkathymol; Eli Lilly & Company, Alkaline Antiseptic (Lilly); H. K. Wampole & Company, Solution Thymol Compound; John Wyeth & Brother, Solution Alka Thyptol; H. K. Mulford & Company, Thym-Alka; William R. Warner & Company, Alka-Men-Thym; Schieffelin & Company, Bensolyptus.

H. K. Wampole & Company and Frederick Stearns & Company almost simultaneously advertised and exploited a tasteless extract of cod liver oil containing wild cherry and hypophosphites. Sharp & Dohme now list a Wine of Cod Liver Oil Extract with Wild Cherry and Hypophosphites; Parke, Davis & Company have a Nutritive Cordial; Eli Lilly & Company have a Wine of Cod Liver Oil Extract with Cherry and Hypophosphites; John Wyeth & Brother have a

519 Wine of Cod Liver Oil Extract with Cherry and Hypophosphites; H. K. Mulford & Company have a Wine of Cod Liver Oil Extract with Cherry and Hypophosphites; William R. Warner & Company have a Wine of Cod Liver Oil Extract with Wild Cherry and Hypophosphites.

Vinol was introduced by Chester Kent & Company of Boston, as a vinous preparation of extract of cod liver oil with iron peptonate. Eli Lilly & Company now have on their list a Wine of Cod Liver Oil Extract with Iron; John Wyeth & Brother have a Wine of Cod Liver Oil Extract Ferro-Peptonized; H. K. Mulford & Company have a Wine of Cod Liver Oil Extract with Iron Peptonate and William R. Warner & Company have a Wine of Cod Liver Oil Extract with Peptonate of Iron and Manganese.

Unguentine was adopted by the Norwich Pharmacal Company of Norwich, New York, for an ointment containing alum, ichthyol and aromatic phenols. A very similar formula is now on the list of Parke, Davis & Company under the name of Emollientine; on the list of Eli Lilly & Company as Ointment of Alum Compound. On the list of H. K. Mulford Company as Ointment of Aluminum Hydrate Compound.

Tongaline introduced by the Mellier Drug Company of St. Louis, now appears on the list of Sharp & Dohme as Elixir Tonga and Salicylates; Parke, Davis & Company as Elixir Tonga Compound; Eli Lilly & Company as Elixir Tonga Compound; H. K. Mulford & Company as Tonga Salicyl or Elixir Tonga Compound; H. K. Mulford Company as Elixir Tonga Compound; John Wyeth & Brother as Elixir Tonga Compound and William R. Warner & Company as Elixir Tonga Compound (S. & H.).

Baume Analgesique, marketed by Dr. Bengue of West Hoboken, New Jersey, an ointment in collapsible tubes, containing menthol and methyl salicylate. Now under the title of Analgesic Balm, a similar formula appears on the lists of Sharp & Dohme, Parke, Davis & Company, Eli Lilly & Company, Schieffelin & Company,
520 and on the list of H. K. Mulford Company as Mentholic Balm.

Emulsions of Petroleum associated with hypophosphites introduced by the Angier Company of Boston. Sharp & Dohme now list Petroleum Compound Emulsion with Hypophosphites, Parke, Davis & Company, Petroleum Emulsion with Hypophosphites; Eli Lilly & Company, Emulsion Petroleum Compound with Hypophosphites; H. K. Wampole & Company, Emulsion Petroleum with Hypophosphites, Lime and Soda, and William R. Warner & Company, Emulsion of Petroleum and Hypophosphites.

Q. 98. State whether or not the various preparations you have just referred to as originally marketed by one house and then marketed by the houses you have named were similar in taste and color and of like therapeutic effect?

(Objected to as incompetent, irrelevant and immaterial.)

A. The formulas stated are essentially identical.

Q. 99. State whether or not the drug houses that you have referred to in the enumeration of preparations introduced by one house and then marketed by other houses, are the leading drug manufacturing concerns in the United States?

A. They are looked upon as the leading pharmaceutical manufacturers.

(Mr. Rawle makes the same statement in regard to the list furnished from the National Formulary as he did with regard to the list furnished by the witness as to the United States Pharmacopœia.)

By Mr. Rawle:

Q. 100. I understand that you carry on a retail drug business in Camden, New Jersey?

A. I do, yes, sir.

Q. 101. Will you state whether or not you carry about
521 the average amount of stock or more than the average?

A. My stock is very much in excess of what the average store carries, because of my doing some physicians' supply business and a general jobbing business. So I carry a much more complete variety and a heavier stock than is commonly carried by the druggists.

Q. 102. State whether or not the average drug store usually carries a stock of similar preparations made by different drug manufacturers which are interchangeable in therapeutic effect?

(Objected to as immaterial, irrelevant and incompetent.)

A. A pharmacist to-day is compelled to carry, not infrequently, a number of preparations of identical formulas made by different manufacturers. The doctors, not infrequently, specify on a prescription the make that they want supplied, and we consequently have to carry three or four makes, sometimes half a dozen different makes, of the same formula and article.

Q. 103. Can you approximate the number of preparations in which an average equipped drug-store does carry two or three or four different makes of the same preparation?

(Objected to as immaterial, irrelevant and incompetent.)

A. That would be simply an approximation. I should imagine approximately that there are at least one hundred articles carried by the well equipped drug store which are duplicates of the same articles made by different manufacturers.

Q. 104. And in each case the articles are of similar therapeutic effect?

(Objected to as immaterial, irrelevant and incompetent.)

A. Presumably identical.

522 Q. 105. On a prescription specifying a preparation or drug, but not specifying the maker, what course is open to the druggist?

(Objected to as immaterial, irrelevant and incompetent.)

A. The pharmacist can then use his own discretion as to which manufacture of product he will use.

Q. 106. What, if the prescription specifies the particular make of the drug, is the course open to him.

(Objected to as immaterial, irrelevant and incompetent.)

A. Then he must dispense the article of the manufacturer specified.

Q. 107. If in such case he dispenses another make than the one specified, what is your opinion, and what is the opinion in the pharmacist business, of the propriety of such an act?

A. That is looked upon — unethical. It is a case of substitution.

Q. 108. If a drug store carries one hundred items, and of each item there are the makes of three or four different drug houses, state whether or not the opportunity for such substitution is open to the druggist?

A. If he is dishonest, it is.

Q. 109. Will you state what in your opinion is the training, generally speaking, and the standing of the prescription druggist?

A. The training is along lines very much higher than that of the average tradesman, and the standing of the drug trade is higher than that of the average tradesman.

Q. 110. Will you state whether or not the morals of the business are taught in the colleges?

A. My experience has been that considerable stress is laid on the training of the young pharmacist both at the college and by the preceptors in the stores upon the ethical side of the calling.

523 Q. 111. Will you state how generally in this country the law provides for the examination and the registration of pharmacists?

A. In practically every state we have a state pharmaceutical practice act under which a Board of Examiners is appointed who examine and pass upon the qualifications of each applicant for a license to practice pharmacy within that state. A number of the states have so amended their laws as to require that in addition to passing the examination, the applicant must be a graduate of a reputable school of pharmacy, and nearly every law, as well as in the requirements of the colleges for graduation, is a clause covering not only the qualifications of the applicant from a commercial and educational standpoint, but likewise his qualifications as to his morals and character, requiring a good moral character and not addicted to improper habits.

Q. 112. You have spoken of substitution as a dishonest practice. Will you state whether or not in the retail druggist business it is common?

A. In my experience it is rare that a case of substitution is practiced. That has been my personal experience.

Q. 113. Will you state what in your opinion would be the effect on a manufacturing drug house of having its salesmen go out on the road and suggest substitution to retail druggists whose business they were soliciting if such a thing became generally known?

A. My opinion is that such a thing would discredit the house represented, and would be a serious injury to their standing and to their business.

Q. 114. State whether or not in your opinion it is possible for a retail druggist, if he chooses, to push the sale of a particular article, and, if so, in what direction?

(Objected to as immaterial, incompetent and irrelevant.)

A. A retail druggist has many opportunities of pushing
524 the sale of articles. He is in direct contact with the physicians. In a popular store he gets in touch with the physicians in the neighborhood. He has a personal acquaintance which enables him to get their confidence and to approach them with articles in such a way that he can solicit trade in a proper way.

Q. 115. State whether or not you have ever compounded a chocolate syrup of quinine in your own drug store for your own customers?

A. I have made a syrup of quinine with chocolate. I had one customer, a physician, who asked me to make him a syrup of quinine containing chocolate and two grains of quinine sulphate to every fluid dram. We filled his order with quinine chocolate syrup containing yerba-santa. I think we filled his order a couple of times. He was a dispensing physician.

Mr. Rawle: Direct examination closed.

Cross-examination, without waiving objections, beginning at 4.25 p. m.

By Mr. Bradford:

X Q. 116. What reasons, if any, were given by the dispensing physician for desiring you to make this preparation for him?

A. He was a customer, and he simply asked whether I could make him a quinine syrup of that character, and what the price would be. He was an old customer whom I supplied goods to.

X Q. 117. Did he mention any other chocolate equinine preparations at the time the order was given?

A. No, sir, he did not.

X Q. 118. In the long list of proprietary preparations referred to by you, are they what are commonly termed general line items?

A. You mean the list of proprietary formulas that are now manufactured by different manufacturers?

X Q. 119. Yes.

525 A. I consider them so, yes. They are not listed on most of the lists as special. They are regular line articles.

X Q. 120. And so regarded in the drug trade?

A. Yes, sir, so regarded in the drug trade.

X Q. 121. The names adopted by the different manufacturers are, as a rule, purely descriptive of the articles, are they not?

A. The practice is to adopt a name——

X Q. 122. I am referring now to those particular names that you referred to.

A. —descriptive of the composition or intent of the article. One or the other. You have got to convey to the phyiscian or customer what the article is by its label.

X Q. 123. In the case of articles like Resinol, having a trade name, it is not customary to copy the name, is it?

A. No. That is a proprietary name, a protected name. You could not copy it.

X Q. 124. And the same is true with respect to other coined or special names, is it not?

A. The exact reproduction of the name?

X Q. 125. Yes.

A. You will notice, for instance, in Glyco Thymoline, how they have modified it, and some others, Ichtholdin, how they have modified it. They have modified the names so as not to copy them exactly, not to copy exactly the word, because the name is claimed as a proprietary name, a trade mark name.

X Q. 126. In the case of articles known in the trade by such names, and the prescription being written for the article by that name, what would be the proper practice of the druggist?

A. The proper practice would be to supply the article named on the prescription.

X Q. 127. I am referring now in respect to the manufacturer of the article.

526 A. If the proprietary name was mentioned on the prescription that would be the only thing to dispense, to which that name was attached.

X Q. 128. The manufacturer's product to which that name is attached?

A. Properly applied, yes, sir. That would be the only honorable thing to do.

X Q. 129. Then, it is not always necessary for a physician to specify by naming the maker on his prescription?

A. No. To illustrate what I mean; if I receive a prescription for Tongaline I would have no right to dispense anything else but Tongaline made by Mellier. That is their trade mark name, the accepted name.

X Q. 130. And if you received a prescription for Coco-Quinine, Lilly, what would you furnish?

A. I would furnish Coco-Quinine, Lilly, and do so. I do not know of any other Coco-Quinine.

X Q. 131. What quinine sulphate syrup with chocolate did you first know in the drug trade, in a commercial form?

A. I am under the impression it was Lilly's preparation, that we first had the call for.

X Q. 132. Do you remember about how many years ago?

A. No, I cannot tell the exact date, because with a varied business, that we do, with the thousand items, I cannot keep track when we first purchased that.

X Q. 133. Are there no other substances than chocolate and cocoa, which, in your judgment, might be used in a syrup preparation of quinine which would serve to suspend the quinine sulphate?

A. I do not know of a substance that would be practicable to use in place of the cocoa or chocolate in this preparation.

X Q. 134. Have you examined and analyzed Coco-Quinine, Lilly,

A. I have made a partial examination of Coco-Quinine,
527 Lilly, in connection with my work with the National Formulary. I did not go into it thoroughly, but I did make enough of an examination to acquaint myself with the fact of the active constituents and I confirmed practically the statement on the label.

X Q. 135. Was this the product your Committee was seeking to duplicate?

A. Not necessarily. It was not a question of duplication. It was a question of supplying a satisfactory formula for this class of preparations. That was probably one of the types that we would have to consider.

X Q. 136. Have you examined and analyzed Defendant's product Quin-Coco?

A. I have made a partial examination of that recently—more recently than I did the other.

X Q. 137. How recently?

A. Within the last few weeks I made a partial examination of it. I find that the two are very close.

X Q. 138. Did you notice any material differences in the two products?

A. There is some physical differences in the samples that I have examined.

X Q. 139. Any that would be apparent to the layman user?

A. Yes, I believe it would be apparent to the ordinary user.

X Q. 140. What differences do you have in your mind?

A. There is some little difference in the color which is to me quite distinct.

X Q. 141. In respect to their colors, which is the darker?

A. The S. & H. Quin-Coco is darker. It is distinctly shown.

X Q. 142. Thicker?

A. No, I do not think it is any thicker. I do not think it is any thicker. The samples I have examined seem to be about the same consistency. Theirs seemed to me to be slightly more sweet.

528 X Q. 143. That is, in the sample you examined recently?

A. Yes.

X Q. 144. At the same time did you compare it with the Coco-Quinine, or did you make a comparison from memory of your former analysis of Coco-Quinine?

A. No, I made a comparison with Coco-Quinine at the time, tasting the two consecutively, and reversing the order of tasting.

X Q. 145. Did you think there was such a difference as would distinguish them, one from the other, to the ordinary user?

A. Not in sweetness, not in the taste.

X Q. 146. Or in the appearance?

A. In the appearance, yes, I should say so. There is some difference in the appearance.

X Q. 147. Do you think a customer accustomed to using Coco-Quinine if given a bottle filled with Quin-Coco could tell the difference?

A. A critical customer could.

X Q. 148. From its appearance?

A. My experience has been that customers in drug stores are quite critical today. A little difference in flavor, or a little difference in shade of the color is noticed, and we have very frequently to explain why one tincture is a trifle different in shade from another, which is a matter we cannot control. Even such things as Nux Vomica and Belladonna and Digitalis. They frequently ask us for an explanation.

X Q. 149. Without observing the label, will you tell me which product is in this bottle? (Mr. Bradford took "Defendant's Exhibits, Beringer samples, Nos. 12 and 13," and after shifting them around in his hands, handed witness one of them, label concealed. The witness took the bottle, and holding it in his hand, with label side down, examined it and then answered.)

A. Will you let me see the other, so that I can make a comparison?

529 X Q. 150. No. The customer could not compare them.

A. All right. Then, I am simply judging, without a comparison of the two. I should say this was the S. & H., Quin-Coco.

X Q. 151. Now, will you observe the label, and state what it is?

A. (Witness after looking at the label answers): Coco-Quinine, Lilly. That was without the two together. With the two together, I can tell the difference in shade very quickly.

X Q. 152. In view of your recent experience in answer to the last question, is it not quite possible that a customer in your own store might be fooled if given one of these drugs for the other?

A. A customer might be fooled, but I say a critical customer, who had been taking and handling them, would note, probably, a difference very quickly. You have no idea as a layman how critical your customers are on that very point.

X Q. 153. Is it not also true that the list of items referred to as selected from the United States Pharmacopoeia and those selected from the National Formulary are considered as general line items, or common property, and have been so for a great many years?

A. Not all of them. Some were and some were not.

X Q. 154. I believe you stated, however, they were all manufactured by different houses, and in general use, before they were standardized in these publications?

A. The use warranted them being standardized, yes, sir. The use warranted us taking them up for standardization.

X Q. 155. You said you had not seen the formula of any manufacturer of a chocolate quinine preparation. I assume you referred to the working formula and not merely the formula stating the ingredients?

A. The statement of the ingredients was not the formula.

530 That is not the formula. I stated that the formula, in our usage of the word, means the entire monograph, covering the statement of the articles to be incorporated and the methods of manipulation.

X Q. 156. You spoke of what was your opinion of the rights of your committee to appropriate formulas of proprietary articles or,

perhaps it would be better to state, to make up formulas to duplicate the proprietary articles. On what theory do you base your right to do these things?

A. I have not any theory on the matter. The custom throughout, not only this country, but other countries which have Formularies and Pharmacopœias, is that it is looked upon as a proper method or mode of procedure to standardize formulas that were in common use. It was to give the medical men and the pharmaceutical men and the public alike the benefit of uniformity of standard formulas.

X Q. 157. In reference to the Sumbul Pill, which I understood was originally made by you for Dr. Goodell and put on the market by the house you were then connected with, Bullock & Crenshaw, you suggested to them that they should trade-mark or secure their rights on this preparation. What was your idea in making this suggestion?

A. Simply as a business proposition, that they might be keeping the formula private, and advertising it as a specialty, making it a profitable commercial venture.

X Q. 158. In testifying concerning the proprietary preparations you used a memorandum. Please state where you obtained the information contained on this memorandum?

A. Regarding the proprietaries?

X Q. 159. Yes.

A. Partly from goods in my store, commercial articles, and partly from the lists published, the price lists of the different manufacturing houses.

X Q. 160. On what do you base your statement in reference to the house that originated the several articles referred to?

A. Usually upon my personal knowledge and experience in the business.

X Q. 161. Can you state of your own knowledge that each item credited by you to a certain house as the originator was originated and marketed by that house before it was marketed by anyone else?

A. The names given were those of the original advertisers, introducing the thing to the public, who were presumably, as far as the drug trade knew, the originators of the articles.

X Q. 162. You referred to one item as being brought out simultaneously by the two houses?

A. Wine of Cod Liver Oil. It was advertised by Frederick Stearnes and H. K. Wampole & Company about the same time and for several years both firms advertised and exploited their preparations of Cod Liver Oil. I am rather inclined to think Wampole was the first to put it on the market, but they were advertised about the same time.

X Q. 163. Were not many of such preparations originally physician's prescriptions?

A. Some undoubtedly were, like, for example, Gray's Glycerine Tonic. I doubt if others were. Gray's Glycerine Tonic has always been credited to a physician who prescribed it and others got to using it, I think somewhere in the neighborhood of Utica.

X Q. 164. Was Coco-Quinine a physician's prescription?
A. Not that I know of. I never heard it so stated.
Deposition Closed.

GEORGE M. BERINGER.

Adjourned.

532 *Depositions on Behalf of Defendant, Taken Before George Brodbeck, Esq., Special Examiner, at the Office of Francis Rawle, Esq., 1001 West End Trust Building, Philadelphia, Pa., on Saturday, February 5, 1916, 10 o'clock a. m.*

Present:

Ernest W. Bradford, Esq., counsel for plaintiff.
Francis Rawle, Esq., counsel for defendant.

HARRY E. JAMES, a witness called in behalf of defendant, having been duly sworn, testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.
A. Harry E. James; 41; residence, 6809 York Road; occupation, cashier in the employ of William R. Warner & Company. I have been such for seven and a half years. I am at the Philadelphia office and have charge of the financial records at it. The Philadelphia office is the main office and St. Louis is a branch office. All the financial records are kept at the Philadelphia office.
Q. 2. Please state the net sales by William R. Warner & Company of all its products for the year 1914.
A. The net sales for 1914 were over $2,400,000.
Q. 3. Please state the net sales for 1915.
A. The net sales for 1915 were over $2,600,000.
Q. 4. Please state the net sales in 1914 of Quin-Coco.
A. Why, we have no accurate record of sales of Quin-Coco, but from our manufacturing records of Quin-Coco, Laxative Quin-Coco and Dr. Hobson's Sweet Chocolate Quinine, sales for 1914 would be less than $13,000. I would say that we kept no separate record of these three items.

Q. 5. Give the sales of the same for 1915.
533 A. For 1915 it would be less than $15,000.
Q. 6. How many traveling salesmen have you on an average on the road for 1914 and 1915.
A. From 75 to 80.
Q. 7. Taking 80 salesmen, what would be the average sales of each salesman for 1914 of these articles, per salesman per year?

Mr. Bradford: Objected to as immaterial.

A. About $160.
Q. 8. Give the figures for 1915, per salesman.

Mr. Bradford: same objection.

A. The figures for 1915 would be about $185.00.
Q. 9. Give the figures for each salesman per day for 1914 for these articles.

Mr. Bradford: Same objection.

A. Per day per salesman for 1914, $.50.
Q. 10. Give the figures for 1915 per day per salesman.

Mr. Bradford: Same objection.

A. Per day per salesman for 1916, $.60.
Q. 11. Give the total sales for all the products per salesman for 1914.

Mr. Bradford: Same objection.

A. Per salesman for 1914, per year, $30,000.
Q. 12. Give the figures per salesman for 1915.

Mr. Bradford: Same objection.

A. Per salesman, per year, for 1915, $32,500.
Q. 13. Give the sales per day, per salesman, for 1914, average.

Mr. Bradford: Same objection.

A. 1914, $100 per day, per salesman.
Q. 14. Give the same for 1915.

Mr. Bradford: Same objection.

A. 1915, per day, per salesman, $108.33.
334 Q. 15. Give the mail orders for Quin-Coco alone, received at both offices, direct from the customer, for 1915. I mean the number of individual orders.
A. The number of individual mail orders for Quin-Coco for 1915 was over 332.
Q. 16. What is the approximate value of these goods?
A. Over $2,100.
Q. 17. From what different classes of customers did these mail orders come?
A. From dispensing doctors and wholesale and retail druggists.
Q. 18. What are mail orders?
A. Mail orders are orders received by us from the customer.
Q. 19. Do you mean direct?
A. Direct from the customer.

Cross-examination.

By Mr. Bradford:

X Q. 1. What do you mean by "net sales"?
A. By "net sales" I mean after all deductions have been made for returned goods, trade and jobbing discounts, and allowances of all kinds.

X Q. 2. Do the figures given by you cover the sales of both William R. Warner & Company and the Pfeiffer Chemical Company?

A. Yes, sir.

X Q. 3. Including both offices, the Philadelphia and St. Louis offices?

A. Yes, sir.

X Q. 4. What means have you of knowing the figures determining the amount of sales at the St. Louis office?

A. The St. Louis office makes monthly reports to Philadelphia.

X Q. 5. Respecting this item?

A. Yes, sir.

535 X Q. 6. What were the amount of sales of Quin-Coco by William R. Warner & Company at its Philadelphia office and St. Louis office during the year 1913?

A. I don't know.

X Q. 7. What were the amount of sales of Quin-Coco by William R. Warner & Company and Pfeiffer Chemical Company at both St. Louis and Philadelphia offices in 1912?

A. I don't know.

X Q. 8. Have you any knowledge on this subject concerning years prior to 1914?

A. Well, I have no recollection of what they were.

X Q. 9. Would the records in your office show?

A. Possibly arrived at that on the same basis we arrived at 14 and 15.

X Q. 10. By making the same preparations, and by examining your books and records as to the years, you could answer these questions, I presume, the same as you have respecting the years 1914 and 1915.

A. I think so.

X Q. 11. And is that true of the years 1911, 1910, 1909 and 1908?

A. I don't know how far back I could go.

X Q. 12. Are all the financial records of the affiliataed companies handled by you at the Philadelphia office?

A. Yes, sir.

X Q. 13. Does the St. Louis office report to you each month respecting the amount of sales of each item handled by that office, including those manufactured there?

A. Do you mean each preparation?

X Q. 14. Yes.

A. No, sir.

X Q. 15. For what reasons are the reports made respecting the item Quin-Coco?

A. These we secured from our manufacturing record.

X Q. 16. For the express purpose of this deposition?

A. Well, I secured them for the express purpose of the deposition.

536 Redirect examination.

By Mr. Rawle:

R. D. Q. 1. State whether or not your records keep the account of all your products.

A. We keep no records of our various preparations.

R. D. Q. 2. What I want to ascertain is whether or not your manufacturing department keeps a record of all the preparations made.

A. Well, the manufacturing department keeps a record of preparations manufactured.

R. D. Q. 3. Of all preparations manufactured? Do you keep a record of all articles manufactured, here in Philadelphia?

A. Like of these three preparations, we keep a manufacturing record of the quantity manufactured.

R. D. Q. 4. Which three preparations do you mean?

A. The Quin-Coco, Quin-Coco Laxative and Dr. Hobson's Sweet Chocolate Quinine.

R. D. Q. 5. Then you keep a record of all your products manufactured?

A. Yes, sir.

Recross-examination.

By Mr. Bradford:

R. X Q. 1. On what other items do you receive a monthly report from the St. Louis office respecting their sales?

A. I don't understand that question.

R. X Q. 2. I understood you to testify that you received a monthly report from the St. Louis office respecting the sales of Quin-Coco. On what other items in the Warner line do you receive like reports from the St. Louis office?

A. I did not state we received monthly reports of sales of Quin-Coco.

R. X Q. 3. Then I misunderstood your testimony. What was your statement as to this?

A. Your question was whether we received a report of sales from the St. Louis office. Not sales.

537 R. X Q. 4. My question was directed to the single item Quin-Coco. If you did not so understand it I will ask you to please answer now with that understanding.

A. We do not receive monthly reports of sales of Quin-Coco from St. Louis.

R. X Q. 5. Do you receive monthly reports of the amount of Quin-Coco manufactured at the St. Louis office?

A. We do not receive monthly reports.

R. X Q. 6. What kind of reports do you receive?

A. Well, our reports of sales is the total net sales as shown on the trial balance.

R. X Q. 7. Then how do you arrive at the amount of Quin-Coco sales?

A. I explained that we kept no record of the sales of Quin-Coco, but taking from our manufacturing records which included Quin-Coco, Quin-Coco Laxative and Dr. Hobson's Sweet Chocolate Quinine, the sales of Quin-Coco would be less than $13,000 for 1914.

R. X Q. 8. What I am trying to get at is how you arrive at these figures from your report unless the item is separately mentioned or listed?

A. Our manufacturing records in St. Louis and Philadelphia show the quantity manufactured.

R. X Q. 9. Then, as I understand you, the net selling price of the amount of Quin-Coco manufactured both at St. Louis and Philadelphia for the year 1915 is less than $15,000.

A. Based on the manufacturing records, it would be less than $15,000.

Examination closed.

HARRY E. JAMES.

GEORGE A. HAFFA, a witness called in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

538 A. George A. Haffa; 52; 730 North 20th Street, Philadelphia; druggist. I am in the employ of William R. Warner & Company and have been continuously in their employ since December 15, 1876.

Q. 2. Since 1908, what has been your department of the work of William R. Warner & Company of Philadelphia?

A. I am manager of the Pill Department, Catalogues, Circulars, Labels and Cartons, etc. Anything relating to printing.

Q. 3. Have you had anything to do with the printing and circulation of the "Salesman's Confidential" during that time?

A. Yes, that goes in the catalogue.

Q. 4. Can you produce a copy of the "Salesman's Confidential" for the year 1911-1912, and state when it was completed and issued to the salesmen?

A. June, 1911. I produce a copy of it.

Q. 5. State if this copy contains information as to "What a salesman should know," "The Salesman's Creed," and "Our Policy in Dealing with the Trade briefly stated."

Mr. Bradford: Objected to as incompetent. The book itself is the only competent evidence on this point.

A. Yes, at pages 59 and 60.

Q. 6. State whether or not this information as to "What a Salesman Should Know" and the Creed and the Policy have been contained in all the subsequent issues of the "Salesman's Confidential" circulated amongst your salesmen?

A. It was the first time the Creed appeared in this 1911-1912 issue, and it has appeared in all subsequenut issues.

Q. 7. State whether or not printed copies of the "Salesman's Creed" were previously to June, 1911, circulated among your salesmen, and if so, when?

A. The Fall of 1910.

539 Q. 8. Can you produce a copy?

A. I do.

Q. 9. Do you know whether or not copies of the printed Creed which you have just produced were sent out to your various salesmen in the Fall of 1910?

A. They were sent out in November, 1910.

Mr. Rawle: Counsel for defendant offers in evidence "Salesman's Confidential" of 1911-1912, and the same is marked "Defendant's Exhibit, Salesman's Confidential, 1911-1912."

Counsel for defendant offers in evidence the Printed Creed produced by the witness which is marked "Defendant's Exhibit, Salesman's Creed, 1910."

Q. 10. State whether or not you have knowledge as to whether William R. Warner & Company, during your connection with it, marketed quinine tablets, and if so, produce a box.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. Yes, sir, we did. I produce a box. It is labeled "Tasteless Quinine Tablets of quinine and chocolate. Each tablet contains Tannate of Quinine, one grain prepared for the Medical Profession Specially by William R. Warner & Company. Philadelphia, New York, Chicago, London."

Q. 11. State when this was first marketed, or the earliest date you can remember when it was marketed by your house.

Mr. Bradford: Same objection.

A. 1895, I would say.

Q. 12. Has it been marketed ever since and is it now marketed?

Mr. Bradford: Same objection.

540 A. It is now marketed and has been.

Q. 13. Will you state whether or not these tablets contain chocolate?

Mr. Bradford: Same objection.

A. Yes, sir, they do.

Q. 14. State whether or not these tablets have been continuously listed by your house

Mr. Bradford: Same objection.

A. They have.

Mr. Rawle: The box of quinine tablets produced by the witness is offered in evidence and is marked "Defendant's Exhibit, Warner Quinine Tablets."

Mr. Bradford: Same objection to the offer of the exhibit.

Q. 15. I hand you two preparations produced by E. A. Pfeiffer, when testifying, the first is marked as containing "Simple Syrup, containing 2 gr's of Quinine Sulphate to each 90 min's." The second is marked "Coco Syrup containing 2 gr's of Quinine Sulphate to each 90 minims." Please open and taste the contents of each of these bottles and compare their taste in respect of their bitterness.

Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

(Witness takes the bottles, shakes up the preparations, removes the corks as requested by counsel for defendant, tastes first the white bottle, and then after rinsing out his mouth, tastes the dark bottle and then answers as follows):

A. I would say the one with chocolate tastes the less bitter.

Q. 16. I hand you a bottle marked "Quinitol, Pitman-Moore Co., Chemists, Indianapolis, Indiana," and stated on the label to
541 contain Calisaya Alkaloids, which is the preparation referred to by the plaintiff's witness, Thorborn, in answer to X Q. 20, P. R. (plaintiff's record) p. 52. Please open this bottle and taste it and state whether or not it is bitter.

Mr. Bradford: Same objection.

(Witness shakes preparation, takes cork from bottle and tastes contents and answers as follows):

A. It is bitter, all right.

(The bottle referred to is marked "Quinitol, Calisaya. Pitman-Moore Co.").

Q. 17. State how its degree of bitterness compares with the bitterness of the other two bottles which you have just previously tasted, or either of them.

A. I get it in the back of the throat, the bitterness. It is much more bitter than either.

Mr. Rawle: Counsel for defendant offers in evidence the two bottles previously referred to by the witness which he tasted, the brown bottle marked as containing Coco Syrup is marked "Defendant's Exhibit Pfeiffer Experiment No. 1," and the white bottle marked "Simple Syrup," which he tasted, is marked "Defendant's Exhibit Pfeiffer Experiment No. 2." The bottle of Quinitol produced by the witness and tasted, is offered in evidence and marked "Quinitol, Pitman-Moore Co."

Q. 18. I hand you a bot-le marked "Syrup Choava Comp., C. B. Smith & Co." Please open this bottle, taste the contents and state whether or not you can detect chocolate.

(Witness shakes bottle, opens, tastes and answers as follows):

A. Yes.

Mr. Rawle: Defendant's counsel offers in evidence the
542 bottle just produced and the same is marked "Defendant's Exhibit Syrup Choava Comp."

Mr. Bradford: Exhibit objected to as incompetent, irrelevant and immaterial.

Cross-examination.

By Mr. Bradford:

X Q. 1. Can you tell us who was the author of this Salesman's Creed as appears on the 1910 card?

A. No, except by the information which I find in the "Salesman's Confidential," which is produced by me for 1911-1912, on page 60, I find that it is printed "By courtesy of Sheldon University Press, Libertyville, Ill."

GEORGE A. HAFFA.

THEODORE K. BOESCH, a witness produced in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

A. Theodore K. Boesch; 36 years old; Oak Lane, Philadelphia; druggist.

Q. 2. Are you a registered druggist and how long have you been, and how long have you been at your present place?

A. Yes. I have been registered 16 years and in business in Oak Lane for 6 years.

Q. 3. Is this a suburb of Philadelphia?

A. Yes.

Q. 4. You have a general prescription practice as well as a custom practice over the counter?

A. Yes.

Q. 5. How considerable a stock of medical preparations do you have in stock?

A. A good stock.

543 Q. 6. Please give a list of preparations you have in stock and of which you carry preparations of other manufacturers which are of similar composition and which might be used interchangeably?

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. I have prepared this list from my stock, which I produce, which is as follows:

Name.	Number of other makes.
Malt Ext. & Cod Liver Oil	Two.
Ess. of Pepsin (Fairchild)	One.
Milk of Magnesia (Phillips)	One.
Aromatic Cascara (P. D. & Co.)	Three.
Listerin	Three.
Liquid Peptenzyne (Reed & Carnick)	One.
Hayden's Viburnum Comp.	Two.
Phospho Muriate of Quinine	One.
Lloyd's Hydrastis Colorless	Two.
Elixir Lacto Peptin	One.
Milk of Bismuth (P. D. & Co.)	Two.
Bromidia	One.
Lysol	One.
Cresolin (Pearson)	One.
Petrogen	One.
Taka Diastase	One.
Adrenalin	One.
Elixir Pepsin	Two.
Wine of Cod Liver Oil & Hypo-Phosphites	Two.
Horsford's Acid Phosphate	One.
Elixir Hydrate and Codeine	One.
Glyco Heroin	One.
Antiphlogistine	Two.
Resinol	One.
Peacock's Bromides	One.
Peptomangan Gude	Three.
Fat Free Tinc. of Digitalis	One.
Analgesique (Baume)	One.
Aristol	One.
544 Urotropin	Five.
Argyrol	Two.
Codeine Phosphate	One.
Antikamnia	One.
Phenacetine	One.
Iron Peptonized (Merck)	One.
Heroin	One.
Protargol	One.
Sulphonal	One.
Trional	One.
Dionin	One.
Sugar of Milk	Two.
Sodium Bicarbonate	Two.
Apiloine (Chapateaut)	One.
Urotropin	Two.
Bulgaria Tablets	Three.
Colchi Sal	One.
Kunkle's Cascara Cathartic	One.
Aloin Belladonna & Strychnine (Sharp & Dohme)	Two.
Alophen	Two.
Quinine Zinc & Iron Valerianate	Two.
Blaud Pills	Three.

In the first column of this list *is* the names of the preparations, in the second column those of other makes, the number of other makes, in addition to the make that is noted in the first column.

Q. 7. That is you have in any given case a preparation of the name noted in the first column and the word "Two" in the second column means you have a similar preparation to the one in the first column made by two other different houses.

A. Yes, sir.

Q. 8. Has this list been corrected as to spelling?

A. Yes, sir; it is complete.

Q. 9. State whether or not a druggist can successfully push
545 the sale of any medicinal preparation he may choose, if it is a good article, and if so, by what methods can he create a market for such preparation?

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. He would create a market through his physicians as well as through the patrons who come into the store.

Q. 10. Have you ever done that yourself?

Mr. Bradford: Same objection.

A. Yes.

Q. 11. With what success in some instances?

Mr. Bradford: Same objection.

A. Generally successful.

Q. 12. Is that common in the retail drug trade?

Mr. Bradford: Same objection.

A. Generally advocated.

Q. 13. Generally done by retail druggists?

Mr. Bradford: Same objection.

A. Yes.

Cross-examination.

By Mr. Bradford:

X Q. 1. In this list of preparations which you have given, what does the name in the first column signify?

A. I have used that name because it is one that has been copyrighted or in which the proprietor has a proprietary right.

X Q. 2. Is this true in respect, for example, of Arromatic Cascara?

A. Well, not in which the legal rights are defined. The moral rights, or rather the general thought, is that one manufacturer in the case of Cascara, introduced it to the general market.

X Q. 3. The name then in the first column is the name by which the preparation was originally introduced, so far as you know?

A. Yes.

546 X Q. 4. Do you carry in your stock Coco-Quinine?

A. Yes.

X Q. 5. How long have you known of this preparation?

A. Well, six years, I would say.

Redirect examination.

By Mr. Rawle:

R. D. Q. 1. Have you had any experience in your store of prescriptions calling for quinine sulphate and chocolate in powdered form?

Mr. Bradford: Objected to as immaterial, irrelevant, incompetent and not redirect examination.

A. My answer would be, yes.

R. D. Q. 2. Please explain what these prescriptions write.

Mr. Bradford: Same objection.

A. Quinine Sulphate, specific quantities; chocolate powdered, sugar, those of specific quantities.

R. D. Q. 3. For how many years have you known of such prescriptions?

Mr. Bradford: Same objection.

A. About 17 years.

R. D. Q. 4. What is the purpose of chocolate in these prescriptions?

Mr. Bradford: Same objection.

A. To disguise.

R. D. Q. 5. How long have you been in the drug business?

A. 22 years, of which I have been registered 16.

Recross-examination.

By Mr. Bradford:

R. X Q. 1. Did you ever take any quinine sulphate in chocolate without other taste-disguising agents?

547 A. No.

R. X Q. 2. Did you ever taste it?

A. Yes.

R. X Q. 3. What can you say in reference to its taste?

A. Well, if I may ask, I would like you to qualify as to whether it is in a powdered or liquid form.

R. X Q. 4. In either.

A. Well, the taste in liquid form is much more pleasant than powdered. I don't think there is much disguise in the powdered form. It is a question of taste, however. We use it frequently.

THEODORE KARL BOESCH.

Mr. Rawle: Defendant's counsel offers in evidence a bottle marked "Cocoa and Quinine, Masengill Bros., Bristol, Tenn." and asks that the same be marked "Defendant's Exhibit, Cocoa Quinine, Masengill."

Mr. Bradford: The exhibit and any evidence based thereon is objected to as incompetent, immaterial and irrelevant.

Mr. Rawle: Defendant's counsel also offers in evidence a bottle marked "Kwin Koko, Sutliff and Case Co., Peoria, Ill."

Mr. Bradford: Same objection.

Mr. Rawle: Defendant's counsel also offers in evidence bottle marked "Palatable Syrup, Cocoa and Quinine," manufactured by American Druggists Syndicate of Greater New York.

Mr. Bradford: Same objection.

Mr. Rawle: Defendant's counsel also offers in evidence a paper box containing tablets marked as follows: "Quinine Chocolates,
548 manufactured by Caswell-Massey & Company, Ltd., marked "Defendant's Exhibit, Quinine Chocolates, Caswell."

Mr. Bradford: Same objection.

Mr. Rawle: Counsel refers in respect to the last offer to the testimony of G. M. Beringer, in relation to Chocolate Quinine Tablets.

Mr. Rawle, desiring to prove the date at which the preparations of the four houses he is about to mention were first put out by them, samples of which preparations were offered in evidence while G. A. Pfeiffer was on the stand, and in order to save expense, has obtained a letter from G. F. Harvey & Company, of Saratoga Springs, New York, stating that his house had first put out their preparation in December, 1909, and offers this evid-nce as proof of that fact.

Also letter from the First Texas Chemical Manufacturing Company stating that their preparation was first made in 1910 and had been supplied regularly since.

Also a letter from Masengill Bros. Company, stating that they had been making and supplying their preparations since January 7, 1911, and had continually supplied it since.

Also letter from Henry S. Wampole & Co., of Baltimore, stating that they had first put out their preparation on the market about January 1, 1912, and had been supplying it regularly since.

Mr. Bradford: Counsel for plaintiff, without questioning the correctness of the dates thus sought to be proven, objects to the evidence as he has heretofore objected to the exhibits, as having no value to prove any issue in this case and as incompetent, irrelevant and immaterial.

Mr. Rawle: Defendant's counsel offers in evidence a periodical called "The N. A. R. D. Journal," stated to be "The Official
549 Organ of the National Association of Retail Druggists," being the number of January 20, 1916, and specifically a formula for "Syrup of Quinine," appearing on page 763 thereof. The article is as follows:

"Syrup of Quinine.

It has long been a mystery to many pharmacists how a palatable syrup of quinine may be prepared. The following formula makes this extremely simple and produces an elegant preparation, and is one that every physician should be told about:

Quinine, alkaloid	480 grains.
Chloroform water	4 drams.
Mucilage of acacia	1 ounce.
Chocolate syrup	enough to make 32 ounces.

The quinine is triturated with a mixture containing the chloroform water, mucilage of acacia (fresh), and four ounces of chocolate syrup; then the balance of the chocolate syrup is added.

This preparation must be well shaken before it is dispensed, and bottles containing it should have a 'shake' label attached. It keeps well, but as a proper precaution, the quantity required should be anticipated for only about one month. As it is readily prepared, it may as a rule, be prepared extemporaneously. Some physicians have shown a liking for quinine tannate in this preparation, in place of the alkaloid, as the tannate being less soluble is more palatable, yet the great majority favor the above formula and seem to get better results from its administration than they do from a preparation containing the tannate. The use of 8 ounces of aromatic syrup of yerba santa to replace some of the chocolate syrup, is sometimes advisable.

The chocolate syrup for the syrup of quinine is prepared as follows, the amounts given making one gallon of the syrup:

550	Chocolate	8 ounces.
	Sugar	6 pounds.
Water, hot		3½ pints.
Tincture of Vanilla		1 ounce.

Rub the chocolate to a smooth paste with eight ounces of hot water; then gradually add the balance of the water, place on a "slow" fire and allow to simmer for five minutes; then add the sugar, bring to a boil, and allow to simmer for at least thirty minutes; then remove from the fire. Strain while still hot through a well wetted muslin strainer, and when cold, add the tincture of vanilla, and mix thoroughly by agitation.

It is essential that chocolate syrup be allowed to remain at the boiling point (simmering) for at least thirty minutes, that the full flavor of the chocolate may be developed. Neglect of this precaution will result in a poorly flavored chocolate syrup and is probably the reason why some pharmacists dispense an unsatisfactory chocolate beverage at the fountain."

Mr. Bradford: The introduction of the exhibit and all evidence based thereon is objected to as wholly without value to prove any issue in this case and as immaterial, irrelevant and incompetent.

Mr. Rawle: Counsel for defendant calls upon counsel for plaintiff to produce a copy of a letter from J. K. Lilly to G. A. Pfeiffer, or William R. Warner & Company, dated September 16, 1912. Also the original of a letter, a copy of which counsel holds in his hand, from G. A. Pfeiffer to J. K. Lilly, dated September 30, 1912. Mr. Rawle states that the original letter of September 16, 1912, was received by Mr. Pfeiffer when he was out of town and temporarily residing in Chicago, and has been mislaid and cannot be found after diligent search.

551 Mr. Bradford: Counsel for plaintiff responds that so far as the copy of the letter dated September 30, 1912, to J. K. Lilly and admitted by counsel for defendant to have been written by G. A. Pfeiffer, although unsigned, is concerned, he makes no objection. As to the letter alleged to have been written by J. K. Lilly to G. A. Pfeiffer, dated September 16, 1912, copy of same is not in his possession and a search for the same in the office of Eli Lilly & Company has failed to discover it, it evidently having gone the same way as the original.

Mr. Rawle: Defendant's counsel offers in evidence the copy of the letter from G. A. Pfeiffer to J. K. Lilly, dated September 30, 1912, which is as follows:

"9-30-12.

Mr. J. K. Lilly,
c-o Eli Lilly & Co.

DEAR MR. LILLY:

Your letter of the 16th, was forwarded to the writer in Chicago, for attention, in reply we appreciate your letter very much, as it enables us to correct the wrong impression which you hold, as we supply no goods under the name of Gobson, Howell Co. This is a name used by H. K. Wampole & Co., to market a line of products they manufacture. The party advising you that Wm. R. Warner & Co. marketed this line, evidently desired to poison your mind, for he did or should have known that this name has been used for years by H. K. Wampole & Co., and nearly everyone familiar in the trade knows this fact.

Regarding the Homilia spirit, I will advise frankly that while my firm are non-members they have endeavored and I believe, (not without success) to avoid all unfair competition, not only in
552 their products, but in the management of their business, and the hiring of their salesmen. The only controversy we have any record of was with your firm regarding marketing of a preparation similar to your Coco-Quinine. This preparation was marketed not only before we were members of the Homilia Club, but before the Homilia Club was organized, and under the rules adopted at the organization was like all preparations on the market prior to such organization specifically exempted. Your principal objections are the name and price of this product. Neither of which we felt justified in changing.

By referring to your catalogue #35, page 153, you will note your list on Elixir of Salicylic Acid, Lilly is higher than Elixir

Salicylic Acid Compound. Formerly this was not the case, b
when prices were revised several years ago, your cost departme
evidently found it necessary to advance the price of Elixir Salicyl
Acid, Lilly. Surely the cost of Elixir Salicylic Acid Compou
also justified an advance. However this preparation was either n
at all or only slightly advanced. To us there seems only one reas
for not advancing the list, now that Elixir Salicylic Acid Compoun
is your replacer for Wm. R. Warner Co.'s Elixir Salicylic Compoun
Regarding the name, we believe an Impartial Jury would adm
that the name Elixir Salicylic Acid Compound is as near or near
to Elixir Salicylic Compound than is the name of Quin-Coco to Co
Quinine.

Further records prove your sales department has not without su
cess approached salesmen of ours and our affiliated companies,
much so that in Philadelphia we have called Eli Lilly & Co
Salesmen Department Bureau, and investigation on your part wi
prove that your firm have hired salesmen of ours from the Atlant
to the Pacific. We mention this not to criticise your action
553 (for we give you the right to be arbiter of your business
but for the reason that you have brought up the subject, an
because in our opinion the Homilia spirit lacks the essence and do
not influence a member to do right and avoid unfair competitio
because it is right and it is unfair, but because it happens to be th
selfish interest of that member or all the members to act accordingl
I have take the liberty of writing you frankly, believing tha
you would prefer such a statement of our position.

Truly yours,"

MC. —— ——.

Defendant's counsel further calls upon plaintiff's counsel to inst
tute a further search for a copy of the letter from J. K. Lilly to G.
Pfeiffer or Wm. R. Warner & Company of September 16, 1912, an
reserves the right to offer the same in evidence if produced.

Mr. Bradford: Counsel for plaintiff agrees that he will have such
search instituted for the copy of the letter stated and calls upo
counsel for defendant to have a further careful search instituted fo
the original letter, being entirely willing to have the same made
part of the record in this case.

Mr. Rawle: Defendant's counsel asks plaintiff's counsel if he
willing to furnish to defendant's counsel, to be introduced as evi
dence in this case, a statement showing the territory of each of th
Lilly salesmen within the general line comprehended between Sagi
naw, Michigan, on the north, and the Gulf of Mexico, extendin
east to cover Virginia and the States south, and extending west t
cover the States of Texas and Arkansas, together with the name of th
particular salesman employed in each of said territories during th
last two years.

554 Mr. Bradford: Counsel for plaintiff replies that withou
knowing the purpose for which this information is desire
or what possible value it can have in this case, he is not willing t
make such an agreement. If counsel for defendant will make an

good reason for this information appear on the record, it will be cheerfully given.

Mr. Rawle: Defendant's counsel wishes to avail himself of the information asked for in order to make full and complete the testimony of various salesmen hitherto called as witnesses for plaintiff, in the section of the United States referred to, desiring to have the complete statement instead of the partial statement that has already appeared on the record as the succeeding salesmen were called as witnesses and stated their names and territories.

Mr. Bradford: Counsel for plaintiff replies that as to the plaintiff's salesmen who have appeared as witnesses, the territory served by each is already on record in this case and at this time he cannot see that the names of other salesmen and the territories covered by them is of any materiality in this case.

HENRY C. BLAIR, a witness produced in behalf of defendant, having been duly sworn, was examined and testified as follows:

Q. 1. State your name, age, residence and occupation.

A. Henry C. Blair; 46; residence 800 Walnut St., Philadelphia; retail druggist. I have been in the retail druggist business at that place since 1887, and my father was there before me. I have been a registered pharmacist since 1892. I graduated from the Philadelphia College of Pharmacy in 1892.

Q. 2. State whether or not you carry in stock in your drug
555 store any medicinal preparations as to the items of which you have a similar preparation made by more than a single manufacturer?

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. Yes, sir.

Q. 3. Can you give an approximate amount of the number of such items which you carry in duplicate or triplicate or quadruplicate?

Mr. Bradford: Same objection.

A. We probably have a hundred such preparations, and we have twelve or more which we are using constantly.

Q. 4. Will you state whether or not any of these are what are known as proprietary preparations or specialities?

Mr. Bradford: Same objection.

A. That is what I had reference to. Special preparations.

Q. 5. Can you state approximately how many standard drugs or preparations are put out by two or more houses?

Mr. Bradford: Same objection.

A. Including the galenicals and tablets and such things as that, there are probably a thousand. I mean such things as the druggist would prepare himself of an ethical kind. I think the word galen-

ical is derived from the name of Galen, but I am not positive of that.

Q. 6. Will you state whether or not these drugs you said were similar can be said to be interchangeable, and if so, in what sense.

Mr. Bradford: Same objection.

A. Nearly all of these would be interchangeable providing the pharmacist is not a man of integrity. If he is, they are not interchangeable.

Q. 7. Are there drugs or preparations one of which could
556 be used for the other without the patient or the prescribing physician finding it out?

Mr. Bradford: Same objection.

A. Yes, that is true of nearly all of these preparations. A druggist who is in business simply for profit and has no conscience could substitute one of these things for the other without the patient or the doctor knowing of the substitution. That is probable, not positive.

Q. 8. Upon whom then does the use of the proper things depend?

Mr. Bradford: Same objection.

A. Upon the retail pharmacists.

Q. 9. Is there an authoritative code of ethics in the retail pharmacy business?

A. Yes, sir; there is a code of ethics made by the American Pharmaceutical Association. I don't think that is generally known to pharmacists, though. It was made over 50 years ago. I wouldn't say how long. I think it was in 1850, somewhere along there.

Q. 10. Have you seen it?

A. Yes, sir.

Q. 11. Will you state whether or not it is of a high standard?

A. Very high; yes, sir.

Q. 12. Do you know to what extent it has been circulated?

A. No, sir; I do not. I can say that every member of that Association is supposed to live up to the ethical code.

Q. 13. State whether or not your drug store has sold tablets called "Yerba-Chocolates," and if so, when, and produce a box.

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. We have sold these "Yerba-Chocolates" since the Cen-
557 tennial Exposition here in 1876, and I cannot say how much before that time.

Q. 14. State whether or not you have continuously offered them for sale.

Mr. Bradford: Same objection.

A. We have continuously offered them for sale ever since and are offering them now.

Q. 15. State whether or not these tablets contain some form of quinine, also chocolate and Yerba Santa.

Mr. Bradford: Same objection.

A. Yes, sir.

Mr. Rawle: The box produced by the witness is offered in evidence and marked "Defendant's Exhibit, Blair Tablets."
Mr. Bradford: Exhibit and offer objected to.

Q. 16. State whether or not you have ever had occasion to prepare or see prepared in your store a liquid preparation of chocolate and quinine, and if so when and for whom?
A. I remember shortly after the time of my graduation from Philadelphia College of Pharmacy, making up such a preparation for Dr. Samuel K. Ashton, who had his office just below our store and who got his suggestion about such things from us.
Q. 17. State whether or not you compounded this mixture on Dr. Ashton's prescription.
A. Yes, sir.
Q. 18. What did you put in?
A. Chocolate and Yerba Santa and quinine in a syrupy mixture.
Q. 19. Will you state whether the preparation was liquid?
A. Yes, sir.
Q. 20. Give the date, if you please.
A. I cannot give the date, but I will say prior to 1895.
558 Q. 21. State whether or not a retail druggist can, if he so chooses, push a medicinal article, if it is a good one, and create a demand or market for it?

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. Yes.
Q. 22. Referring to the code of ethics, or your own code, will you state whether or not doing so is considered ethical in the druggist business?
A. Yes, providing it is done in an ethical way.
Q. 23. Can it be done in an ethical way?

Mr. Bradford: Same objection.

A. I can't answer that question by saying "Yes" or "No." If the preparation is an ethical preparation, then it can be pushed in an ethical way.

Cross-examination.

By Mr. Bradford:

X Q. 1. Did Dr. Ashton's order for this preparation come in the form of a prescription?
A. That I cannot say. I should think that it did not.
X Q. 2. Was it used by a patient?
A. That I cannot say.

X Q. 3. How much of it did you make up?
A. As I remember, about four ounces.

HENRY C. BLAIR.

Examination closed.

Mr. Rawle: It is stipulated by counsel for the respective parties that C. B. Smith, of the firm of C. B. Smith & Co., 863 Broad Street, Newark, New Jersey, would, if called as a witness, testify in behalf of defendant that his house had manufactured and marketed
559 for some years prior to 1900 a preparation called "Syrup Choava Comp.", a bottle of which has been offered in evidence today on behalf of defendant. That this preparation contains, among other ingredients, chocolate or cocoa, and is intended to be used as a vehicle for the administration of doses of quinine for the purpose of disguising the bitter taste of the quinine, and the same way with other bitter drugs. It contains no quinine itself.

Counsel for defendant states that the information as to the period at which this preparation was first put out was communicated to his client in writing by Mr. Smith.

(Here follow defendant's exhibits marked pages 560 and 561.)

DEFENDANT'S EXHIBIT, G. A. PFEIFFER'S LIST OF LILLY PRODUCTS.

(Offered page 21 of D. R.)

List of preparations listed in Eli Lilly's 1913-14 Catalogue which are similar to those of other manufacturers and marketed by Eli Lilly & Co. subsequent to introduction of original product.

Original	Manufacturer	Cat. p. No.	Lilly's Product's Name.
Albolene	McKesson & Robbins	218	Petronol, Lilly
Analgesine	H. K. Mulford & Co.	192	Analgesic Balm
Angiers Emulsion	Angier Chem. Co.	203	Emulsion Petroleum Hypophosphites
Antiphlogistine	Denver Chemical Co.	217	Osmosum, Lilly
Arsenauro	Parmele Pharmacal Co.		Gold & Arsenic Bromides
Bromidia	Battle & Co.	225	Sol. Bromides Comp.
Calenduline	Calenduline Co.	206	Glycerole Calendula
Calolactose	Searle & Hereth	221	Calomel & Bismuth Powder
Campho Phenique	Campho Phenique Chem Co.	218	Phenolated Camphor
Creo Terpin	H. K. Wampole Co.	152	Elix. Creosote & Terpin Hydrate Comp.
Castoria	Centaur Co.	167	Laxative Carminative
Comp. Digestive Powd.	Searle & Hereth	221	Digestive Comp. Lilly Pd.
Eczemacide	Searle & Hereth	199	Eczema Lotion, Lilly
Elix. Femella	Searle & Hereth	204	Femagen, Lilly
Elix. Salicylic Comp.	Wm. R. Warner & Co.	161	Elix. Salicylic Acid Comp.

turers and marketed by Eli Lilly & Co. subsequent to introduction of original product.

Original	Manufacturer	Cat. p. No.	Lilly's Product's Name.
Albolene	McKesson & Robbins	218	Petronol, Lilly
Analgesine	H. K. Mulford & Co.	192	Analgesic Balm
Angiers Emulsion	Angier Chem. Co.	203	Emulsion Petroleum Hypophosphites
Antiphlogistine	Denver Chemical Co.	217	Osmosum, Lilly
Arsenauro	Parmele Pharmacal Co.		Gold & Arsenic Bromides
Bromidia	Battle & Co.	225	Sol. Bromides Comp.
Calenduline	Calenduline Co.	206	Glycerole Calendula
Calolactose	Searle & Hereth	221	Calomel & Bismuth Powder
Campho Phenique	Campho Phenique Chem Co.	218	Phenolated Camphor
Creo Terpin	H. K. Wampole Co.	152	Elix. Creosote & Terpin Hydrate Comp.
Castoria	Centaur Co.	167	Laxative Carminative
Comp. Digestive Powd.	Searle & Hereth	221	Digestive Comp. Lilly Pd.
Eczemacide	Searle & Hereth	199	Eczema Lotion, Lilly
Elix. Femella	Searle & Hereth	204	Femagen, Lilly
Elix. Salicylic Comp. Warner	Wm. R. Warner & Co.	161	Elix. Salicylic Acid Comp.
Ess. Pepsin, Fairchild	Fairchild Bros. & Foster	203	Ess. Pepsin, Lilly
Glyco-Heroin (Smith)	Martin H. Smith & Co.	206	Glycerole Heroin Comp.
Glyco-Thymoline	Kress & Owen Co.	210	Alkaline Antisep Lilly
Grays Glycerine Tonic	Purdue Frederick Co.	207	Glycero-Tonic Comp. Lilly
Guaiatonic	Searle & Hereth	207	Guaiacol Comp. Lilly
Fellows Hypophosphites	Fellows & Co.	166	Syr. Hypophos. Comp. Cloudy
Hires Root Beer Ext.	Chas E. Hires Co.	224	Root Beer Extract
Lactopeptine	N. Y. Pharm. Asso.	202	Lactated Pepsin Elix.
Listerine	Lambert Pharm. Co.	204	Eucalyptus Thymol
Liq. Peptonoids	Arlington Chem. Co.	211	Peptones Formulas
Liq. Peptonoids with Creosote & Guaiacol	Arlington Chem. Co.	211	Peptones with Creosote
Maltine Combinations		213	Malt Ext. Preps.
Milk of Magnesia	Phillips	214	Milk of Magnesia, Lilly
Passifloria	Jno. B. Daniel	217	Passolaria, Lilly
Pepto Mangan "Gude"	G. M. J. Breitenbach Co.	226	Sol. Iron Pep & Mang Comp.
Pil Casc. Cath. Hinkle	Wm. R. Warner & Co.	39	Pil Casc. Hinkle
Resinol	Resinol Chem. Co.	215	Resinol Co., Lilly
Syr. Tolu & Heroin Co.	Wm. R. Warner & Co.	168	Syr. Tolu Comp.
Taka Diastase Liq.	Parke Davis & Co.	210	Liq. Diastase, Lilly
Tr. Digitalis Fat Free	Searle & Hereth	235	Tr. Digitalis Fat Free, Lilly
Tritica S & H	Searle & Hereth	212	Tritici, Lilly
Wine of Ext. of Cod Liver Oil w/ Malt & Hypophos.	H. K. Wampole Co.	195	Cloetonic

DEFENDANT'S EXHIBIT "SALESMAN'S CREED 1910".

(Offered page 539 of D. R.)

The Salesman's Creed

To respect my profession, my company, and myself. To be honest and fair with my company, as I expect my company to be honest and fair with me; to think of it with loyalty, speak of it with praise, and act always as a trustworthy custodian of its good name. To be a man whose word carries weight at my home office; to be a booster, not a knocker; a pusher not a kicker; a motor, not a clog.

To base my expectations of reward on a solid foundation of service rendered; to be willing to pay the price of success in honest effort. To look upon my work as opportunity, to be seized with joy and made most of, and not as painful drudgery to be reluctantly endured.

To remember that success lies within myself, in my own brain, my own ambition, my own courage and determination. To expect difficulties and force my way through them; to turn hard experience into capital for future struggles.

To believe in my proposition heart and soul; to carry an air of optimism into the presence of possible customers; to dispel ill temper with cheerfulness, kill doubts with strong convictions, and reduce active friction with an agreeable personality.

To make a study of my business or line; to know my profession in every detail from the ground up; to mix brains with my efforts and use system and method in my work. To find time to do everything needful by never letting time find me doing nothing. To hoard days as a miser hoards dollars; to make every hour bring me dividends in commissions, increased knowledge or healthful recreation.

To keep my future unmortgaged with debt; to save money as well as earn it; to cut out expensive amusements until I can afford them; to steer clear of dissipation and guard my health of body and peace of mind as my most precious stock in trade.

FINALLY, to take a good grip on the joy of life; to play the game like a gentleman; to fight against nothing so hard as my own weakness, and to endeavor to grow as a salesman and as a man with the passage of every day of time.

THIS IS MY CREED

There is so much good in the worst of us
And so much bad in the best of us;
That it behooves each one of us
To say naught about the rest of us.

Wm. R. Warner & Co., Philadelphia and St. Louis

562 In the District Court of the United States, Eastern District of Pennsylvania, December Term, 1914.

In Equity.

No. 1355.

THE ELI LILLY COMPANY

vs.

WM. R. WARNER & COMPANY.

Amendments to Answer.

Filed May 10, 1916.

And now, this tenth day of May, 1916, Francis Rawle, Esq., for defendant, moves for leave to file as of August 20, 1915, the following amendments to the answer and the following answer to the amendment of the bill of complaint, paragraph 9.

Cancel paragraph 2 of the answer and substitute the following in lieu thereof:

2. Defendant has no exact knowledge as to when the plaintiff began the manufacture and sale of "Coco-Quinine." It denies that at the time when the plaintiff became such manufacturer, no similar product was known either to the drug trade or to the medical profession; it avers that at that time there were on the market preparations intended to be used as vehicles for administering quinine and dis-

guising its bitter taste containing chocolate or cocoa and quinine, and that for many years before 1899 the mixing of chocolate or cocoa with
563 quinine for the purpose of disguising the bitter taste of quinine and making a palatable medicine, in liquid, tablet or powdered form, had been known to many druggists and physicians and had been set forth in various pharmaceutical and medical journals and works, and that long before 1899 chocolate and cocoa were often used to mask the taste of drugs and to make a palatable preparation.

Cancel the last paragraph of clause 12 of the Answer to the Bill, and substitute the following:

And the defendant, for a further defense to the Bill of Complaint, says that it has since about January 1st, 1909, and that The Searle & Hereth Company has from some time in the year 1906 to about January 1st, 1909, openly sold the produce "Quin-Coco" to the trade, and that this has been at all times substantially known to the plaintiff from those dates until the filing of the Bill of Complaint and that the plaintiff by its conduct in the matter has been guilty of laches and has thereby forfeited any equitable rights which it may have had in the premises.

Answer to the Amendment of Paragraph 9 of the Bill of Complain

9. It is admitted that the parties owning the Pfeiffer Chemic Company took over the capital stock of The Searle & Hereth Co pany and the two companies then passed under the same manag ment in the fall of 1906, and that the laboratories of the latt Company were moved to the laboratories of the former compan at St. Louis. But it averred that the defendant had no conne tion of any kind with these transactions. It is denied that th Pfeiffer Chemical Company, before its connection with The Sear & Hereth Company, had carried on experiments for the purpose duplicating or imitating plaintiff's Coco-Quinine or had endeavore to make any product in imitation of plaintiff's Coco-Quinine, e cept as its right was. It is denied that Quin-Coco as distribute by defendant to its trade is or ever has been inferior to plain
564 tiff's product Coco-Quinine in stability or in any other re spect. It is admitted that Quin-Coco was at one time sol by Pfeiffer Chemical Company as distributing agents under the labe of The Searle & Hereth Company, but the defendant says that a averments contained in this paragraph of the bill in reference t any acts of The Searle & Hereth Company or Pfeiffer Chemic Company prior to August, 1908, in any way affect the rights of th defendant company which, until the time above to be referred t had no connection of any kind with either of the other above men tioned companies.

It is admitted that in the summer of 1908, certain persons owning the Pfeiffer Chemical Company bought the capital stock of Wi liam R. Warner & Company, defendant, and that the same officers practically manage and have since managed the affairs of all o these companies.

It is denied that the officers of any of these companies undertook the manufacture of any product; it is admitted that the defendant has been since the summer of 1908 the sole distributor of Quin-Coco It is denied that any manufacture as undertaken in defendant laboratories to put out a substitute for plaintiff's Coco-Quinine and that any experiments were made by defendant that were unsuc cessful.

It is averred that after these three companies became associated Quin-Coco was made at the Philadelphia laboratories of The Searle & Hereth Company, and was distributed to the trade by defendant under Searle & Hereth labels.

It is denied that renewed or any efforts were then made or have been made by defendant to push Quin-Coco in the drug trade and medical profession as a substitute for plaintiff's Coco-Quinine except in a fair and lawful competitive sence as defendant's right was and is.

It is denied that The Searle & Hereth Company is no
565 longer an active manufacturing company and is merged into the business of the Pfeiffer Chemical Company. It is denied that Quin-Coco is manufactured by Pfeiffer Chemical Company

by defendant; it is manufactured by The Searle & Hereth Company at its St. Louis and Philadelphia laboratories. It is admitted that the three corporations are largely owned by the same persons and are practically managed, and have been since August, 1908, by the same officers. It is admitted that defendant is the distributor of Quin-Coco and that it is labelled Quin-Coco with the name of The Searle & Hereth Company as the manufacturer, in accordance with the fact.

It is denied that the defendant, since the time averred in the bill or at any other time, by many and divers ways and schemes or otherwise, in placing its said product on the market, has represented through its agents and salesmen or otherwise in any manner to purchasing druggists and physicians or to any person or persons that its said product could be furnished in lieu of, or for, plaintiff's product Coco-Quinine when called for by customers or by physicians' prescriptions.

It is denied that druggists have, or that any druggist has, as averred in this paragraph, received any instructions from defendant as to selling 'Quin-Coco" for plaintiff's "Coco-Quinine," when the latter is called for. The defendant has no knowledge or information that druggists have sold and are now selling its Quin-Coco for plaintiff's Coco-Quinine; but it avers that if any druggist has done so it has been without the instruction, suggestion or knowledge of the defendant. The defendant is advised, and here avers that the acts of druggists not authorized by defendant do not affect defendant's right or liability in the premises.

The defendant has no knowledge or information that customers have frequently or ever received Quin-Coco with the druggists' own label bearing the name of Coco-Quinine, but avers that if such has ever been the case, it has been without the knowledge, instruction,
reresentation or suggestion of the defendant, and has been
966 done of such druggists' own unaided volition, and defendant is advised and here avers that such unauthorized act of any druggist does not affect defendant's right of liability in the premises. The defendant denies that any act on its part has ever unlawfully or wrongfully deprived or is now depriving the plaintiff of sales of its said product, or has resulted in deceiving or defrauding purchasers and users who intend to buy and expect to receive plaintiff's Coco-Quinine. The defendant denies that it has by any unlawful or wrongful method whatever pushed the sale and distribution of Quin-Coco to the trade. The defendant has no knowledge that Quin-Coco has been largely or ever retailed as plaintiff's Coco-Quinine, but it avers that it has never authorized any person whatever to retail or sell Quin-Coco to the trade as plaintiff's Coco-Quinine. The defendant is advised and here avers that it is not bound by the acts of retail druggists not authorized by it.

WM. R. WARNER & CO.

FRANCIS RAWLE,
Solicitor for Defendant.

Notice of he above motion with a copy thereof is accepted. No objection is made to granting the same, it being expressly understood that this acceptance and waiver of objection in no manner or degree acknowledges or admits the truth of allegations or statements thus inserted in defendant's Answer.

May 8, 1916.

E. W. BRADFORD,
Counsel for Plaintiff.

Before Thompson, J.

Defendant's motion to amend the answer and to file an answer to plaintiff's amendment of the bill is allowed.

May 10, 1916.

By the Court,

Attest, GEORGE BRODERICK,
Deputy Clerk.

567 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY & COMPANY, Plaintiff,

vs.

WM. R. WARNER & COMPANY, Defendant.

Depositions in the Above-entitled Cause, Taken at Room No. 1004, West End Trust Building, Philadelphia, Pa., on June 8th, 1917, in Accordance With the Order of the Court on the 7th Day of May, 1917; Such Depositions Being in Surrebuttal.

Present:

E. W. Bradford, Esq., for Plaintiff.
Roger S. Baldwin, Esq.,
Francis Rawle, Esq., for Defendant.

CHARLES E. MCNULTY, a witness already called and sworn in the cause, is recalled for further examination, and testified as follows:

By Mr. Rawle:

Q. 1. Have you already been sworn and testified as a witness in this case?

568 A. I have.

Q. 2. Does your business continue to be the same as it was when you were a witness?

A. Yes.

Q. 3. Have you known Earl R. Peabody, the witness who testified in this case on behalf of the defendant?

A. I have.

Q. 4. When did you first have anything to do with him, in the business of the defendant?

A. In June, 1911, in Boston.

Q. 5. At what hotel there?

A. At the Essex Hotel, in Boston.

Q. 6. State how you happened to meet, and where the interview was held?

A. I met Mr. Peabody on instructions from William R. Warner & Company, at the Essex Hotel, in Boston.

Q. 7. Where did the interview take place?

A. It took place in my room, at that hotel.

Q. 8. What did you talk to him about, stating it broadly?

A. I talked to him, in general, about our line, the various products, and the methods used in presenting and selling to the trade.

Q. 9. State whether or not he was a new salesman, and you were instructing him as to his duties?

A. He was a salesman who had been with the firm a short time, and the purpose of my business there was to acquaint him better with the line, and the policies of the house; also to give him any information that he might be desirous of obtaining.

Q. 10. Earl R. Peabody, when testifying as a witness on behalf of the plaintiff, in rebuttal, testified as follows (page 675):

"Q. 20. What were the instructions he gave you?

A. When Mr. McNulty called me to the Essex Hotel in 569 Boston, his first instructions to me were to send me to a Riker-Hegeman drug store, to purchase two bottles of Fletcher's Castoria. I did so and returned the two bottles to him. He immediately took them and poured their contents into the Dr. Hobson's Castoria bottle and stated that, 'I guess they can't tell any difference now between the Dr. Hobson's and the Fletcher's.' This bottle of Dr. Hobson's containing the Fletcher's Castoria he used in making the sales during the time he was with me. In selling other preparations in the Hobson line I have repeatedly heard him mention competitors' names."

Will you state whether or not these statements are true?

A. They are absolutely untrue. They are not true.

Q. 11. Please take up what I have read, reading it from the record, which I hand you, and refer to each of the statements there made, and say what you have to say as to each statement?

A. The first statement that my first instructions were to send him to Riker-Hegeman drug store to purchase two bottles of Castoria is not so. That is not true.

Q. 12. State whether or not you sent him any place to purchase one or more bottles of Fletcher's Castoria?

A. I did not.

Q. 13. State whether or not he had then in his possession any

bottles of Fletcher's Castoria, at this interview in your room at the Essex Hotel?

A. I had none in my possession, and if he had them, I did not see them.

Q. 14. State whether or not it is true that at that meeting between you and Peabody you took bottles of Fletcher's Castoria and poured their contents into a Warner Castoria bottle of any brand or name, and made the statement that Peabody attributes to you, in the answer read to you?

570 A. That is not true, that I did this.

Q. 15. After this interview did you go with Peabody to solicit the trade of any druggists?

A. I did.

Q. 16. During how many days did you work the business together?

A. About three days.

Q. 17. Will you state whether or not you had during such working, in your possession any bottle of any kind containing Fletcher's Castoria?

A. I did not.

Q. 18. Will you state whether or not at that time, or any occasion with Earl Peabody, you did any of the things which he there attributes to you, in answer to Q. 20.

A. I will say positively that I did not do any of the things which Mr. Peabody claims I did, in his answer to Q. 20.

Q. 19. Were you then engaged in soliciting sales of Dr. Hobson's Castoria?

A. No. We had no such drug as Dr. Hobson's Castoria.

Q. 20. What was the name of your Castoria product?

A. It was "Pitcher's Baby Brand Castoria."

Q. 21. The last sentence in Peabody's answer to Q. 20 is:

"In selling other preparations in the Hobson line I have repeatedly heard him mention competitors' names."

What have you to say about this?

A. It is very customary, in showing a varied line, like ours, that a dealer may mention a competitor's name. There is no doubt but what at times I have mentioned a competitor's name. But in so doing, it was, no doubt, in answer to something that the druggist would ask, as questions would at various times come up, which would be impossible to answer.

571 Q. 22. Have you an established practice during the ten years of salesmanship, in regard to mentioning competitors' names?

A. Yes, sir.

Q. 23. Is there any practice inculcated by your house?

A. Yes, I have a regular custom that I follow, and there is a rule regarding this, that was taught me by the house.

Q. 24. What is that custom, and what is the rule?

A. The custom is to mention the competitors' names as little as possible, and only at times when it is necessary to make a clear answer to some question asked by the druggist.

Q. 25. And what is the rule of the house?

A. The rule of the house is not to mention competitors' names at all.

Q. 26. Earl Peabody further testified as follows (page 675):

"Q. 1. Describe his methods of using the bottle of Castoria referred to in your last answer.

A. He would ask the prospective buyer to compare the contents of Dr. Hobson's Castoria, with one of the original Fletcher's and ask him if he could detect any difference in taste or color of the two preparations and that the Dr. Hobson's contained more than the original Fletcher's, and that the margin of profit was greater."

State whether or not, in connection with Peabody, you used such methods as he has there testified to?

A. I cannot recall that I did, although it is customary to show my bottle of Pitcher's Baby Brand Castoria to convince the dealer of its being a pleasant preparation. I have often featured its comparative size, as a selling point, and the margin of profit, as a reason for the dealer's buying.

Q. 27. The bottle referred to by Peabody, in his answer
572 to Q. 21, which has just been read to you, was a Warner bottle, emptied of its original contents, and labelled with Fletcher's Castoria. That is what Peabody claims in his answer. Will you state whether or not you had, during your work with him, any Warner bottle, filled with Fletcher's Castoria, which you used in soliciting the trade of the druggists?

A. I did not have a bottle of Pitcher's Baby Brand of Castoria, filled with Fletcher's Castoria. If Mr. Peabody had such a bottle, I did not know it. There was none of that character used, to my knowledge, while working with Mr. Peabody.

Q. 28. How is the Warner Baby Brand Castoria sold, in cartons, or how?

A. Yes, the Pitcher's Baby Brand Castoria is sold in bottles, enclosed in a carton.

Q. 29. How is Fletcher's Castoria sold?

A. That is in bottles, wrapped and sealed on both ends, top and bottom.

Q. 30. Was there any difference in the difficulty of opening the two different articles, for examination?

A. There would be, if it was done.

Q. 31. Well, explain?

A. Because, in order to get into the Pitcher's Baby Brand package, all you had to do was to open the top flap of the carton, whereas, to examine the Fletcher product, it would be necessary to break the seal.

Q. 32. And spoil the package?

A. No, not necessary to spoil the package, but put it in such a condition as it would not be acceptable to all purchasers.

Q. 33. Was there any way, therefore, of comparing the taste of the two products, as a matter of practice?

A. Not without opening the packages, as I have previously stated
Q. 34. Will you state whether or not the formulas are printed on the Baby Brand package, and on the Fletcher's Castoria package anywhere?
573 A. The ingredients are listed. The ingredients are printed on there, and the quantitative analysis not shown.
Q. 35. Will you state whether or not these ingredients, as expressed on the two different packages are the same?
A. They were different.

Mr. Bradford: This line of questioning is objected to as outside of the authority granted by the order of the Court; and also is calling for evidence that is immaterial, irrelevant and incompetent.

Q. 35. Will you state whether or not the Castoria made by different houses is extremely common, and likely to be found in drug stores?

Same objection as before.

A. There are various brands of Castoria manufactured and marketed.
Q. 36. Will you state whether or not it is commonly found in every drug store?
A. Castoria is commonly found in every drug store.

Same objection as before.

Q. 37. Will you state whether or not it is an extremely well-known product among druggists?
A. It is.
Q. 38. Earl R. Peabody further testified as follows (page 677):

"Q. 31. What was the chief requisite of salesmanship impressed upon your mind by Mr. Hagaman, if any?
A. There was no chief requisite that Mr. Hagaman impressed upon my mind any more than to make all the sales that I could.
Q. 32. Was this likewise impressed upon your mind by Mr. McNulty?
A. It was."

574 What have you to say as to this statement by Mr. Peabody?
A. It is unlikely that I tried to impress upon Mr. Peabody that the chief requisite was only to make all the sales that he could, as I went over our rules for salesmen, with every man I called on.
Q. 39. How long did this interview in your bedroom, with Peabody, last?
A. About an hour.
Q. 40. What did you discuss with him?
A. I discussed the line, in general.
Q. 41. What do you mean by "the line?"
A. The various products that we manufactured.
Q. 42. And that he was to sell?
A. Yes, that he was to sell.

Q. 43. State how far you explained the qualities of these various articles to him?

A. I explained as far as time would permit.

Q. 44. State how far you inculcated the rules of the house, or the rules of salesmanship, upon Peabody's mind; I mean, to what extent you did so?

A. I went over the rules thoroughly.

Q. 45. Will you state whether or not the rules that you went over with him on this occasion were those found in the "Salesmen's Confidential?"

A. They were.

Q. 46. Earl R. Peabody further testified as follows (page 685):

"X Q. 75. Did you have on your list a preparation of iron, quinine and strychnine?

A. Please state what list you mean. I had several lists.

X Q. 76. Were you selling a preparation of that kind for Wm. R. Warner & Co.?

A. Yes, I attempted to sell his preparation, but with instructions that it could be used when another manufacturer's brand is specified."

575 Will you state whether or not you ever gave such instructions to Earl R. Peabody?

A. I positively did not.

Q. 47. Jesse E. Greene, a witness called on behalf of the plaintiff, in rebuttal, testified that he had been a retail druggist at Spartansburg, South Carolina, and he further testified as follows (page 732):

"Q. 8. Explain more fully, giving the facts covering any incident, such as suggested in my former question, either by Mr. Hardy, or any other representative of Wm. R. Warner & Co.?

A. On one occasion Mr. Hardy called with another gentleman, whom he introduced as Mr. McNulty. He introduced Mr. McNulty as sales manager or assistant sales manager, and I went through the line with Mr. McNulty, who did the talking. In the course of that interview he showed me two items and suggested that they could be used for other preparations.

Q. 9. What were the items referred to in your last answer?

A. One was a pill containing Aloin, Belladonna, Strychnine, and Ipecac, the same formula as Lapactic pills manufactured by Sharp & Dohme, and the other was a chocolate syrup of Quinine which he said was the same thing as Lilly's Coco-Quinine."

Will you state whether you remember having such an interview with the druggist named Greene, at Spartansburg, South Carolina?

A. I do not remember of having an interview with Druggist Greene.

Q. 48. Did you ever know a druggist of that name at Spartansburg?

A. If I did, I cannot recall him.

Q. 49. It may refresh your recollection as to this witness, Greene, to read the answer on page 739, to R. D. Q. 60, which I will
576 ask you to read for the record, and not spread it out on the notes.

A. (Witness reading.) There is nothing in that answer that would recall to my mind the fact of having that interview with Druggist Greene.

Q. 50. Now, referring back to the answer of Greene at Q. 8, in which he testified that you had showed him two items, and suggested that they could be used as substitute for other preparations; and the witness further testified that one was a pill of A. B. S. and I. and the other a chocolate syrup of quinine product. What have you to say as to this statement?

A. As regards his claim of my saying that the two products could be used as substitutes for other preparations I will deny this, and will add that the word "Substitute" is a word that I never use. As regards the formula of our pill Aloin, Belladonna, Strychnine and Ipecac having the same formula as the Lapactic pill, of Sharp and Dohme, it is possible that I might have admitted this, because the formulas are on both packages. As regards their size and shape and color, I would also say this, that it would be very apparent.

Q. 51. This similarity would be apparent by comparison?

A. Yes, sir; and as regards our chocolate quinine syrup, being the same as Lilly's Coco-Quinine, I would not make this assertion, because I do not know the formula of Lilly's Coco-Quinine, as it was not on the package.

Q. 52. If you had desired to express similarity, in what words would you have expressed it?

A. If the question was asked me, whether or not I considered the product the same, I would say that I considered them therapeutically the same.

Q. 53. Will you state whether or not you have ever in your salesmanship stated that the product of your house could be used
577 as a "Substitute" for a similar product of another house, or any substantially same expression?

Mr. Bradford: Objected to as not within the authority of the order of the court for the examination of this witness.

A. I have never suggested that a product of our house should be used as a substitute for another specified preparation.

Q. 54. (Last question re-read.)

A. I have not.

Cross-examination.

By Mr. Bradford:

X Q. 55. What edition of Warner's "Salesman's Confidential" did you have during your interview with Mr. Peabody in Boston, respecting which you have just testified?

A. Well, I have no way of identifying the edition.

X Q. 56. Can you say that it was the edition of 1911?
A. I could not say positively.
X Q. 57. Did I understand you to testify that William R. Warner & Company only sold what you have termed as "Pitcher's Castoria Baby Brand"?
A. We had another product.
X Q. 58. What was the other product?
A. It was "New Life Brand Castoria."
X Q. 59. Was not Pitcher's Castoria Baby Grand sold under the label of the "New Life Remedy Company," of St. Louis, Missouri?
A. Yes.
X Q. 60. Didn't the Pfeiffer Chemical Company sell a package of Pitcher's Castoria under their own label?
A. Yes.
X Q. 61. Separate and distinct from the so-called Baby Brand?
A. Yes.
X Q. 62. And a different size?
A. Yes.
X Q. 63. Different in price?
A. Yes.
X Q. 64. Was the New Life Remedy Company another one of the concerns, the products of which were included in the Warner line?
A I think so.
X Q. 65. How many interviews did you ever have with Mr. Peabody in Boston while he was working for the William R. Warner Company?
A. That question is not just clear to me.
X Q. 66. On how many different visits to Boston did you meet with and have interviews with Mr. Peabody while he was employed by William R. Warner & Company?
A. Just one.
X Q. 67. You had not, then, met Mr. Peabody in Boston prior to the interview you have referred to, in your direct-examination?
A. No.
X Q. 68. And didn't see him at any subsequent time?
A. Not that I recall.
X Q. 69. Do you recall the names of any drug stores in Boston where you solicited business in company with Mr. Peabody, during the three days that you traveled with him at that time?
A. I do not.
X Q. 70. You probably called on quite a number?
A. Yes.
X Q. 71. How often have you called on the drug trade in Boston?
A. I have never called on all of them.
X Q. 72. How many times have you called on any of the druggists in Boston, to solicit trade, since you have been working for William R. Warner & Company, or the Pfeiffer Chemical Company?
A. I would say four times.
X Q. 73. You usually called on the same druggists, or substantially the same, each time?
A. No.

X Q. 74. Did you call upon some of the same ones each time?

A. I could not say that I did.

X Q. 75. You stated in your direct-examination, as I understood you, that the Pitcher's Castoria Baby Brand bottle does contain more of the product than the Fletcher's Castoria bottle. About what is the difference in the size of the two bottles, and in making your answer state the contents in ounces, or fractions of ounces.

A. The present size of the Pitcher's Baby Brand Castoria package is three ounces, approximately; that of the Fletcher's is one ounce and seven drams.

X Q. 76. Was this true at the time of your interview with Peabody, respecting which you have testified?

A. I can't say that it was exactly the same.

X Q. 77. Do you recall whether or not the size of your Baby Brand Castoria bottle has been increased since that time, and, if so, when?

A. It has been increased, but I cannot tell you just when.

X Q. 78. Approximately, when?

A. Possibly four or five years ago.

X Q. 79. Which is the larger, the Baby Brand bottle, or the Pfeiffer Chemical Company Castoria bottle?

A. We have two sizes of the Baby Brand castoria, and have only that product now.

X Q. 80. What is the difference in the two sizes?

A. It is three ounces.

X Q. 81. What is the contents of the larger sized bottle?

A. It is six ounces.

X Q. 82. How long has this package been on the market?

580 A. I can't tell you.

X Q. 83. Approximately how long?

A. I have no way of approximating it.

X Q. 84. Was it on the market at the time you had your interview with Mr. Peabody in Boston?

A. I do not think it was.

X Q. 85. Would the contents of the two Fletcher Castoria bottles more than fill one of the Pitcher Castoria Baby Brand bottles?

A. Yes, the smaller size.

X Q. 86. What do you mean by going over the rules of the house "thoroughly" with Mr. Peabody? I mean to inquire what particular rules, and how much time did you devote to inculcating these rules at this interview?

A. By going over the rules "thoroughly" I mean, by reading and explaining the rules. The amount of time consumed in so doing, I would say, approximately, was from twenty to thirty minutes.

X Q. 87. You have visited Spartansburg, South Carolina, in the coure of your work soliciting trade, have you not?

A. Yes.

X Q. 88. And called on the drug stores there?

A. I have called on some of them.

X Q. 89. It is not a very large city, is it?

A. I really don't know. I do not think it is very large.

Redirect examination.

By Mr. Rawle:

R. D. Q. 90. When you did call on the drug stores at Spartansburg, was that in your territory, or were you simply going with Hardy, whose territory it was?

A. It was not my territory. I was simply going with Hardy, whose territory it was.

R. D. Q. 90*a*. You have been asked about the New Life Company, and you have been asked about the Baby Brand Castoria. Please state whether or not the Baby Brand Castoria was the Pfeiffer product, which came to the Warner Company when the Pfeiffer Company came to Philadelphia in 1908?

581

A. Well, that was my first knowledge of the product.

R. D. Q. 91. You were originally in the employ of the William R. Warner Company, before 1908, were you not?

A. Yes, sir.

R. D. Q. 92. When the present company was formed in 1908, you passed into its employ?

A. Yes.

R. D. Q. 93. Now, at that time, will you state whether or not the Baby Brand Castoria was a Pfeiffer product, as to which the Warner Company then became the selling agents?

A. Yes.

R. D. Q. 94. Under cross-examination reference has been made to other Castoria products than the Baby Brand, as to which you have testified, when you were testifying in relation to what passed between you and Peabody. Please state whether at the time you were instructing Peabody in his duties, at the Essex Hotel, you had on your list for sale any other Castoria than the Pitcher's Baby Brand Castoria?

A. The product which I remember more distinctly about is the Pitcher Brand, as its title differentiated it from other castorias.

R. D. Q. 95. Mr. Peabody testified that you had Fletcher's Castoria at the Essex Hotel, and that you poured some of it in a Hobson's Castoria bottle, and you testified that what you were selling then was Baby Brand Castoria, and that you did not have any Fletcher's Castoria, or pour any of it into the Baby Brand bottle. Please state whether or not the same thing is true as to any other Warner Castoria product that you might have been selling at that time?

582

A. It is true. I did not pour, or see anyone else pour any Fletcher's Castoria into any bottle that formed a part of our sales or sample outfit.

Recross-examination.

By Mr. Bradford:

R. X Q. 96. What was your position with the house when traveling with Hardy in South Carolina?

A. My position was that of special salesman.

R. X Q. 97. And your duties?

A. Were to secure new salesmen, and working with them, and the others, the older ones.

R. X Q. 98. Do you still hold such a position with the company?

A. I do not.

R. X Q. 99. What is your present business?

A. A regular salesman.

R. X Q. 100. When was that change made from the position you then held, to the position you now hold?

A. I think it was in the Fall of 1912.

R. X Q. 101. Have you been in your position continuously since the Fall of 1912?

A. No.

R. X Q. 102. What territory did you take in October of 1912?

A. I didn't take any territory.

R. X Q. 103. What position were you given at that time?

A. I was given a position with the Dr. Earl S. Sloan Company. I was given the position of working for Dr. Earl S. Sloan Company of Boston.

R. X Q. 104. This was the time when the Sloan Company was acquired by the William R. Warner Company?

A. No, it was not that time.

R. X Q. 105. Was the Earl S. Sloan Company owned by the William R. Warner and Company at that time?

583 A. Yes. That is, they were affiliated. I cannot say about the ownership.

R. X Q. 106. Was there any change, so far as your superiors were concerned?

A. No.

R. X Q. 107. How long did this employment last?

A. I think, to the latter part of April, of the following year.

R. X Q. 108. What position were you then given?

A. A position with the Sutherland Medicine Company.

R. X Q. 109. Was this another company connected with William R. Warner & Company, in the same manner as the Sloan Company?

A. I believe it was.

R. X Q. 110. Your employers were virtually the same?

A. Yes.

R. X Q. 111. How long did this position last?

A. Until July 31st of the same year.

R. X Q. 112. What position were you then given?

A. I was returned to the position of special salesman.

R. X Q. 113. For William R. Warner & Company?

A. Yes.

R. X Q. 114. How long did this position last?

A. Until January of the following year.

R. X Q. 114½. What position were you then given?

A. Regular salesman.

R. X Q. 115. What territory?

A. Central New York.

R. X Q. 116. How long did you hold this position?

A. I am holding it at present.

R. X Q. 117. Were you holding a position as a regular salesman, with the territory in Central New York, when you travelled with Mr. Rawle, during the taking of the depositions for the plaintiff in this case?

A. Yes.

384 R. X Q. 118. You have been employed by your present employers, then, in different capacities, in connection with different companies that they controlled, or which are affiliated with William R. Warner & Company, for how many years?

A. Since April 1, 1907.

R. X Q. 119. And your employment with them has been continuous from then to now?

A. Yes.

R. X Q. 120. Was or is Castoria sold to the druggists in bulk? I mean, in packages larger than the three and six ounce bottles, by your house?

A. Yes.

R. X Q. 121. In what other packages?

A. Pint bottles, and gallon bottles.

R. X Q. 122. And five gallons?

A. Yes.

— Q. —. And also five pints?

A. Yes.

R. X Q. 124. How do the retail druggists dispense the castoria purchased by them in these bulk packages?

A. I can't say.

R. X Q. 125. Do you know how they offer it?

A. I do not.

R. X Q. 126. How do you, as a salesman, offer it to the druggists?

A. I don't offer it.

STONEWALL JACKSON NOTTINGHAM, a witness formerly examined on behalf of plaintiff, was recalled and further examined under the order of the Court and testified as follows:

By Mr. Rawle:

Q. 1. Have you already been sworn and have you testified in this case?

A. I have; yes, sir.

385 Q. 2. In whose employ are you now?

A. Richard Hudnut, of New York.

Q. 3. Perfumers?

A. Yes, sir.

Q. 4. You passed from the employ of William R. Warner & Company to the employ of Richard Hudnut?

A. Yes, sir.

Q. 5. Richard Hudnut, a corporation, is now affiliated with the business of William R. Warner & Company, or, in a business sense, amalgamated with them; is that correct?

A. Yes, sir.

Q. 6. Francis M. King, a witness called on behalf of the plaintiff, in rebuttal, has testified that he was at the time a salesman for Eli Lilly & Company, and that he had been in the employ of various drug stores for some years, and for two years worked for himself, and on January 29, 1916, had gone into the employ of Eli Lilly & Company as a travelling salesman, covering the North Georgia territory, except Atlanta, &c., which position he then held. Do you know Francis M. King, and how long have you known him?

A. I have known him six or seven years. I knew him as a clerk, and then, later on, as the proprietor of King's Drug Company in Dalton, Georgia, and later as salesman for Eli Lilly & Company.

Q. 7. Francis M. King testified (page 710) in answer to Q. 7:

"A. On one occasion I remember his suggesting that I buy a pill from him as a substitute for Park Davis & Company's Alophin and an Elixir to replace Battle & Co.'s Papine, both of which items I bought at Mr. Nottingham's suggestion."

Please state whether or not this statement of King is true?

A. It is not true that I offered any substitute for Alophin
586 of Park Davis & Company's Papine. That statement is not true. I have never offered any preparation as a substitute for another.

Q. 8. You have in your hand the printed record of the testimony of King. Please read the long answer to Q. 8, and say what you have to say about the statement there made by King?

A. (Reading:) I did not offer him a pill as a substitute for Alophin Pill, I did not offer him a substitute for Papine. I have no recollection of betting him a cigar.

Q. 9. Will you state whether or not you at that interview suggested to him that he buy your pill "To replace Alophin Pills?"

A. I never did.

Q. 10. Francis M. King testified (Page 710):

"Q. 11. Did Mr. Nottingham ever solicit your order for a preparation called Quin-Coco? If so, what representations did he make respecting this item?

A. He offered Quin-Coco as a substitute for Coco-Quinine on several occasions, once in particular insisting that I try it, but I never did."

Please state whether or not that is true, and whether or not you ever offered King your product, Quin-Coco, as a substitute for Coco-Quinine?

A. King is absolutely untrue in his statement, because I never offered him, or anyone else, Quin-Coco, as a substitute for Coco-Quinine.

Q. 11. King testified (page 711):

"Q. 12. What did he say to you with respect to the two preparations, Coco-Quinine, and Quin-Coco?

A. That they were the same thing; that Quin-Coco could be used for Coco-Quinine; and that I would make more money."

587 What have you to say to these statements? Take them up, one by one?

A. Well, I deny this in every particular. I never suggested to him the substitution, or that Quin-Coco could be used for Coco-Quinine.

Q. 12. What about the stating that they were the same thing?

A. Why, I have never said that they were the same thing. I have always said Coco-Quinine is a smoother, thinner preparation than any other preparation of Chocolate Quinine on the market.

Q. 13. Did you know, or do you now know, the formula and all the ingredients of Coco-Quinine?

A. I did not know the formula of Coco-Quinine, only as it states it—I do not know. I know it contains Sulphate Quinine, and with a chocolate base.

Q. 14. King testified as follows (page 711):

"Q. 13. Mr. Nottingham as a witness for defendant testified in answer to Q. 31, page 399, of defendant's record, that he never suggested to anyone replacing Coco-Quinine with Quin-Coco. Your last answer would seem to indicate that Mr. Nottingham erred in this statement. What have you to say to this?

A. He did offer Quin-Coco to me as a substitute for Coco-Quinine."

State whether or not you ever offered King Quin-Coco as a substitute for Coco-Quinine, as he there states?

A. I never offered King Quin-Coco as a substitute for Coco-Quinine. It seems very peculiar to me that he had so many opportunities to state this at other times, but that he never did before he became an employee of the Eli Lilly & Company.

Q. 15. King testified (page 712) in answer to Q. 20:

"A. I recall once on Nottingham's asking for business of his picking up my stock bottle of Coco-Quinine and asking 'How about sending you a gallon of this at a price?' I turned him down so
588 flat that he didn't worry me about Quin-Coco any more."

What have you to say about this statement by King?

A. I have not the least recollection of picking up a Coco-Quinine bottle and asking King "How about sending you a gallon of that." I deny that I did. I was not selling Coco-Quinine, and therefore, I could not have picked up a Coco-Quinine bottle and suggested that to him, as I never have. I do not remember that at all. I do not remember that incident.

Q. 16. King testified (page 713):

"Q. 21. At any time did Nottingham ever introduce the subject with you by asking you 'How is your stock of Quin-Coco?'

A. No, sir."

Do you remember how you introduced this item to King, or how you were in the habit of introducing it?

A. I don't think that I ever suggested any preparation of Chocolate Quine to King, for the reason that he was, in a sense, was in a section that used practically no Quinine, and there was very little malaria, and therefore, I would not ask him how his Quin-Coco was. I do not remember at all, in Dalton, of saying anything to him about Quin-Coco.

Q. 17. King further testified (page 713) in answer to Q. 22:

"Q. 22. Did he ever introduce the subject with the question 'How is the Chocolate Quinine?'

A. He did not."

What do you remember about this?

A. The same as before.

Q. 18. King testified as follows, in reference to Quin-Coco (Page 714):

"Q. 29. Do you know whose product it is?

589 A. My recollection is that it has a Searle & Hereth label on it.

X Q. 30. Do you know whether it is known in the trade as their product?

A. Quin-Coco is known to the trade generally as Warner's substitute for Coco-Quinine."

Is that true?

A. I never heard of it as that, no, sir.

Q. 19. King testified as follows (page 721), in answer to X Q. 56:

"A. I am sorry to say that I bought the two products at Mr. Nottingham's suggestion, as a substitute for the two items in question and used them as such, not only on one occasion, but to my certain recollection twice. And I consider that I violated the ethics of my profession in allowing Mr. Nottingham to persuade me to do this."

Will you state whether or not you ever suggested to this witness, King, that he should buy any of your products as a substitute for he products of another house?

A. I never suggested to King that he use these two products in question, as a substitute. I never suggested to him or anyone else. I never tried to persuade him. In fact, I never have suggested substitution. I consider it not good salesmanship, but a reflection on the druggist's honesty. I would not know how to go about calling on a retail druggist and suggest to him that he substitute one article for another on a call for that article.

Q. 20. The same witness, King, testified about your having picked up from his counter a stock bottle of Coco-Quinine, and he was asked the following question (page 723):

"X Q. 67. When he picked up your stock bottle of Coco-Quinine and made the remark that you have stated, did you understand him to offer to sell you specifically some Coco-Quinine, or a product similar to it?

590 A. I understand that he was offering me a substitute for Coco-Quinine."

Will you state whether or not you said anything whatever to King on that occasion, or on any other occasion, which would justify him in understanding that you were offering him a substitute for Coco-Quinine?

A. I never suggested to King, or any other witness, that he use Quin-Coco as a substitute for Coco-Quinine.

Q. 21. Do you recollect picking up a bottle of Coco-Quinine from King's counter?

A. I do not recollect doing so.

Cross-examination.

By Mr. Bradford:

X Q. 22. When did you begin your employment with Richard Hudnut?

A. January 1, 1917.

X Q. 23. When did you cease your employment with William R. Warner and Company?

A. December 31, 1916.

X Q. 23. Were you employed continually by William R. Warner & Company prior to December 31st, 1916, and since your previous testimony in this case?

A. No, sir.

X Q. 24. How long were you out of employment with William R. Warner & Company?

A. For three months.

X Q. 25. What period?

A. I would say about April, somewhere in April. It may have been a little over three months, but not long. It was less than four months.

X Q. 26. From April, 1916?

591 A. July, but I do not remember just the date. It was possibly a little over three months, but not much.

X Q. 27. Approximately, then, from April, 1916, until July, 1916?

A. Until July, 1916, yes, sir.

X Q. 28. By whom were you employed during that time?

A. Frederick Stearns & Company.

X Q. 29. When were you re-employed by William R. Warner & Company?

A. July 1, 1916.

X Q. 30. What were your duties?

A. Salesman.

X Q. 31. What territory?

A. A part of Georgia and Florida.

X Q. 32. The same territory that you had previously?

A. Different territory.

X Q. 33. What territory were you serving prior to April, 1916, as salesman for William R. Warner & Company?

A. Part of Georgia.

X Q. 34. Please state what part?

A. I did not go practically any place north of Atlanta. You may say, Atlanta, Savannah, Columbus, and intermediate territory; that would cover it.

X Q. 35. How long had you been in this particular territory?

A. About seven years.

X Q. 36. As a salesman of William R. Warner & Company all of this period?

A. Up to the time I left them.

X Q. 37. Who succeeded you in this territory?

A. The territory was divided. Mr. Wilson has part of it,—Mr. J. F. Wilson, and F. E. Mize has the other part of it.

X Q. 38. When you returned to their employ in July, 1916, you did not work in this old territory?

592 A. It was different territory entirely that I took.

X Q. 39. Has there been any change in your employers or superiors since you started working for Richard Hudnut?

A. Why, I am working under—it is a different proposition altogether.

X Q. 40. Who employed you to work for Richard Hudnut?

A. Mr. Pfeiffer.

X Q. 41. Which Mr. Pfeiffer?

A. Why, I wrote to both of them. Mr. G. A. Pfeiffer. He has charge of Richard Hudnut.

X Q. 42. Do you confine yourself to the work of selling goods?

A. Yes, sir.

X Q. 43. At the present time?

A. Yes, sir.

X Q. 44. And handle the Richard Hudnut line exclusively?

A. Yes, sir.

X Q. 45. In your direct examination you said that Mr. King had plenty of opportunities to state this at other times, but did not do so until he was employed by Eli Lilly & Company. What do you mean by that?

A. I state just exactly the statement that he made there, the one that I was answering.

X Q. 46. What opportunities had he had to make such a statement previously?

A. What I mean by that, that Lilly has told them or told all their men, to get all the evidence they could against Warner salesmen showing that they suggested substituting Quin-Coco for Coco-Quinine; and the fact came to me that it is so peculiar, out of all the territory that I mention, in that big territory, that the only

person in the whole territory was, you may say, a little boy, under age. I do not think that he was over eighteen and a half years, when he gave that testimony.

X Q. 47. To whom do you refer?

593 A. To Mr. Jolly, of Marshalltown. It seems like, in all that territory, if I was going to offer, or suggest the substituting of this article for Coco-Quinine, it seems that someone would have known of it besides Mr. Jolly. I do not count Mr. King. He didn't know anything until he was employed by Lilly.

X Q. 48. Do you mean to suggest that because Mr. Jolly, who was a young man, that he is not capable of telling the truth?

A. I say that he did not tell the truth, and I say that he is under age. I would not say that a man eighteen or nineteen years —I would not class him with a man of 25—he is not matured.

X Q. 49. What is there to keep him from telling the truth? Is it not true, that some men, who are most mature, are the most skillful in telling untruths?

A. Well, I say that Jolly did not speak the truth in his statements.

X Q. 50. Is not maturity in men, mature judgment, quite as useful in evading the truth, and in telling untruths, as in telling the truth?

A. I say that he is under oath, and it looks like I should pick a man——

X Q. 51. Answer my question. (Last question repeated.)

A. I mean that as a man—after he grows up, he has had more of a chance to learn to tell the truth. He has had more experience. He looks on life more seriously, the older that he gets, than when he was a kid.

X Q. 52. You say that you never heard anyone say or suggest that Warner's Quin-Coco is known in the trade as a substitute for Coco-Quinine?

A. I never have, and I have been over considerable territory, too.

X Q. 53. And you never said to King, or to any other druggist, that they might sell Quin-Coco to be used as a substitute for

594 Coco-Quinine; or offer any other product, representing it as a substitute for any other product?

A. No, sir, I never suggested to King that he use Qin-Coco as a substitute for Coco-Quinine. In fact, I have called on druggists for many years, and I have never suggested substitution. To begin with, I think it would reflect on a man's honesty at once, if I were to go to a man and suggest that he substitute.

Redirect examination.

By Mr. Rawle:

R. D. Q. 54. When I examined you, I was not aware that there had been a break of three or four months in your employment. Why did you leave Warner in 1916?

A. I had an illogical territory from the standpoint of the house. I understood that fully, but I did not want to give up my old territory, and the trade. I had been working continuously and had it established. I did like a lot of people do, and make foolish movements, sometimes.

R. D. Q. 55. You left of your own volition, did you?

A. Yes, sir.

R. D. Q. 56. There was no trouble?

A. No trouble whatever. The only trouble was the change of territory, and that was on account of being illogical, and to begin with, on account of the death of the man, that made a territory vacancy.

R. D. Q. 57. How long since you began to sell drugs for Warner & Company, or any of their concerns?

A. About seven years.

Recess until 2.45 p. m.

595 At 2.45 p. m.

Present: Parties as before noted.

GEORGE M. BERINGER, a witness recalled on behalf of the defendant for further examination under the orders of the Court, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. Are you the Dr. George M. Beringer who has previously testified as an expert witness?

A. I am.

Q. 2. Did you receive from me in December, 1916, a copy of the testimony of Francis E. Bibbins, taken on behalf of the plaintiff in this case on rebuttal, and ten specimens in 2-ounce bottles all sealed?

A. Yes.

Q. 3. What are the facts in regard to that?

A. In December, 1916, Mr. Rawle handed me the specimens of syrups and the testimony of Mr. Bibbins. At his request I have examined one set of the samples. There were two sets of samples, each having a duplicate sample of the same number. Of the ten samples I took one bottle of each for my examination. In each case, with the exception of No. 9, I took the vial that contained the smaller amount of liquid. In No. 9 I was compelled to take the one containing the larger amount, because the other contained too small an amount for examination.

Counsel for defendant states that at the examination of the witness Bibbins in Indianapolis, Mr. G. A. Pfeiffer, with the consent of plaintiff's counsel, poured from each of the ten Bibbins sample bottles a certain amount of the contents thereof into two different two-ounce

bottles, making 20 bottles in all, 2 specimens of each sample.
596 Mr. Pfeiffer sealed these with sealing wax and took them from Indianapolis. A few days later he sent them to defendant's counsel, by whom they were received in precisely the same condition in which they had left Mr. Bradford's office at Indianapolis.

After making a suitable arrangement with Mr. Beringer to examine these specimens of the Bibbins samples, counsel for defendant sent all the 20 bottles in their sealed condition to Dr. Beringer.

Dr. Beringer now returns 10 of these 2-ounce bottles, being one of each sample, in their original sealed condition. The sealed bottles have merely been in the possession of Mr. G. A. Pfeiffer, of counsel for defendant, and of Dr. Beringer. When Dr. Beringer completed his investigation he returned 10 of these bottles in their original sealed condition to defendant's counsel, who now produces them.

Q. 4. Then I understand tha you opened ten of these specimens and left ten unopened?

A. I opened one of each; ten samples opened and ten remained unopened.

Q. 5. As to the 10 remaining unopened, do you now find them here in this room in the same sealed condition in which you received them from me?

A. They are in the same condition with the corks tight, and sealed as they were when I first saw them.

Q. 6. What about the ten which you opened?

A. The ten which I had opened I returned to Mr. Rawle with the remnants of the contents therein.

Q. 7. When you opened the 10 bottles for investigation, breaking the seal, please state whether or not they were in the same sealed condition in which the other ten now are which remain sealed?

A. They were in identically the same condition so far as tying and sealing.

597 Q. 8. I will ask you what tests you applied to these 10 specimens, beginning with the acidity test?

A. First I examined them as to their physical appearance. Then after opening the package, the vial, the content was examined as to acidity. The test for acidity that I adopted was to take 5 cubic centimeters of the specimen, shake this up with 10 cubic centimeters of distilled water. After allowing the sediment to subside, the supernatant liquid was tested with litmus paper.

At that time, another portion of the sample was taken and tested for flavoring by taking 10 cubic centimeters, mixing it with about 20 cubic centimeters of distilled water, acidifying with hydrochloric acid and extracting with ether. The ether solution was separated, the ether allowed to evaporate off, and this separated out the flavoring, and the yerba santa and the saccharine. These tests were applied to all of the specimens, the whole ten being examined in the same uniform way. Microscopic examinations were likewise made as to the appearance of the contents.

Q. 9. Will you consider the subject of suspension of the quinine sulphate in the preparation and give your opinion as to Mr. Bibbins' selection of the ingredients for his experiments?

A. Do I understand your question relates to the suspending m terial—material selected for suspension?

Q. 10. Yes.

A. The materials selected for these 10 experiments were such are commonly selected for their mechanical power of suspending emulsionizing oils or fats or suspending powders. In some of the he used quince-seed mucilage; in some, he used acacia, some de trine, some gelatine, some tragacanth, some Irish moss and quinc seed mucilage, and others some mixtures *or* two or more.

Q. 11. How did he get at the necessary viscosity?

598 A. That is not stated, how he got at the necessary viscosit I do not see that stated on the labels or in the evidenc They are not of the same viscosity.

Q. 12. Does he appear to have used any additional thickenin material?

A. He has used thickening material and the suspending materi which he reports in his evidence in each case, for instance in No. he reported, according to the evidence, that the thickening w quince-seed mucilage and tragacanth.

Q. 13. Have you any criticism to make on Mr. Bibbins' point view of the problem of suspension in these specimens?

A. From his testimony I was impressed that he was looking upo it as rather a mechanical problem, of simply finding a suspensio agent, a mechanically suspending agent, for the quinine, and so w trying the commonly used suspending materials.

Q. 14. Was there any aspect of the problem which he did n seem to give attention to?

A. The fact that quinine suspension is entirely different fro purely a mechanical problem of distributing an oil or a fat, or su pending an inert powder in suspension. In other words, in ha dling a chemical like quinine, it is especially important to bear mind the changes which may occur in the suspending material which may be present originally in the suspending material, whic would work some change in the condition of the quinine itself.

Q. 15. Do you consider he overlooked the chemical aspect of h problem?

A. That is what I mean. I think he has overlooked the peculi chemical problem presented by quinine in suspension.

Q. 16. What do you consider the requirements of the suspendin material in this preparation?

A. In a quinine preparation?

Q. 17. In a chocolate-quinine preparation?

599 A. That the suspending material must produce a uniform homogeneous liquid that does not separate out, that does n undergo subsequent change, that is not acid when first prepared an does not become acid on keeping, and that remains permanently a uniform, homogeneous, suspending liquid, even after keeping f some time, as necessarily would be done in a package offered in th trade.

Q. 18. What can you say as to the necessity of using ingredien by the use of which the chemical or physical character of a quini

salt will not be affected either immediately or during the keeping of the finished preparation?

A. It is essential that the condition of the quinine salt as quinine sulphate should not be changed in the preparation.

Q. 19. Either at the time of making or thereafter?

A. Either at the time of making or in keeping.

Q. 20. State whether or not you have examined the quinine crystals in each of these specimens and what you found?

A. Under the microscope the powdered crystalline structure of the quinine was examined, in each one of these specimens, and likewise in some of the commercial samples of the chocolate-quinine syrups. In the chocolate-quinine syrups, Quin-Coco and Coco-Quinine, the crystalline structure of the quinine-sulphate was very evident, quite apparent. In a number of specimens examined of these 10 samples, the crystals were more or less attacked, what you might call eroded surfaces, showing that the crystals had been acted on by the suspending liquid and had partly undergone solution. In one specimen the quinine was practically entirely dissolved; in the others more or less so.

Q. 21. What preparation, as you found it, would account for the eroding and the solution, more or less, of the quinine crystals?

A. It is readily accounted for by the acidity. The acid
600 test as described show that each of these ten specimens was acid, and in varying proportions.

Q. 22. Having examined these 10 specimens, what is your opinion as a trained pharmacist, as to whether any of them are pharmaceutically identical with Coco-Quinine Lilly?

A. In my opinion none of them are pharmaceutically identical with Coco-Quinine Lilly.

Q. 23. Will you please take up the specimens in numerical order and state what you found on investigating each of them?

A. In No. 1, said in the testimony of Mr. Bibbins to be flavored with ginger and to contain yerba santa, mucilage of quince and tragacanth as suspending agents, around the top of the liquid, especially around the neck of the bottle, there appeared to be separated nodule-like separations of tragacanth. The odor was that of yerba santa and ginger. The taste was first the pungency of ginger followed by yerba santa, and it soon became distinctly bitter. The glass now shows some separation of the suspending material, tragacanth, and under the microscope it showed some crystals of quinine sulphate; separated portions of tragacanth mucilage and the quince-seed mucilage were unequally distributed throughout the field. The preparation likewise did not pour homogeneously, showing it was not a smooth homogeneous fluid. There is always the tendency in tragacanth emulsions to a separation, because tragacanth does not form a solution, but simply continues to swell and swell and make an uneven mucilage and not a perfect solution. To litmus paper, in the acid test, it gave a distinct acid reaction. The acidity here I think is due to the rapidity with which mucilage of quince-seed deteriorates. That breaks down very readily. I think the acidity in this particular formula was largely due to the decomposi-

tion which takes place so readily in mucilage of quince-seed.

601 Q. 24. What effect has the acidity developed in the specimen upon the bitter taste of quinine?

A. It brings out the bitterness of the quinine perceptibly.

Q. 25. Please state your opinion as a pharmacist as to whether or not the preparation shown in specimen No. 1 is a satisfactory, palatable and marketable pharmaceutical preparation?

A. In my opinion, No. 1 would not yield a satisfactory, palatable and marketable quinine preparation.

Q. 26. Will you please look at the sealed specimen No. 1 and state whether you see any change in that since you saw it last in January?

A. In this specimen I note further separation and unevenness of preparation, indicating some additional decomposition or changes.

Q. 27. Please take specimen No. 2 and state what you found?

A. Specimen No. 2, stated in the testimony of Mr. Bibbins to contain tolu flavoring, with gelatine and mucilage of quince-seed as the suspending agents, there was a marked separation in this specimen, a thin upper layer and a thicker lower layer, and a separation of the tolu in resinous masses on the sides of the bottle. The gelatinous mass is undoubtedly due to the gelatine separating out of the suspending material. This specimen was examined for acid and gave a distinct acid reaction. Under the microscope the mucilage was generally separated in small, separated gelatinous masses and the gelatine in larger globules which were not evenly distributed throughout the field, the gelatine showing in yellow, globular masses; not a homogeneous mixture.

Q. 28. How about the taste?

A. The taste was decidedly bitter.

Q. 29. What about the appearance?

A. The appearance is not that of a homogeneous or satisfactory pharmaceutical preparation.

602 Q. 30. Will you state whether or not in your opinion as a pharmacist the preparation in Specimen No. 2 constitutes a pharmaceutically satisfactory, palatable and marketable preparation?

A. In my opinion the preparation would not be pharmaceutically satisfactory, palatable, perfect or marketable.

Q. 31. Please look at the sealed specimen before you, marked No. 2, before you, and state if you observe any changes in that since you saw it last?

A. I notice some slight further separation, a lighter upper liquid.

Q. 32. Take Specimen No. 3 and state what you found in it upon your investigation?

A. Specimen No. 3 was stated in the testimony of Mr. Bibbins to be flavored with syrup of orange and to contain yerba santa and gum acacia as the suspending agent. There was a heavy deposit on the vial as still shows in this specimen. The liquid was sticky and stringy like mucilage. The taste was quite bitter. Under the microscope the crystals of quinine were shown to be distinctly eroded or eaten away. This specimen gave very marked acid reaction.

Q. 33. Please state how acacia acts when made as mucilage with water?

A. Acacia when mixed with water to form a mucilage is acid. This is a well known fact, that solutions of acacia are distinctly acid in the action and is so stated in the pharmacopœia in describing acacia.

Q. 34. How far has acacia a tendency to fermentation, and is that the same thing as becoming acid?

A. Acacia is very prone to undergo fermentation and in this fermentation, an increased amount of acidity is produced.

Q. 35. What is the effect of this acid on the quinine sulphate content of the preparation?

A. The effect of the acidity would be to dissolve the quinine and bring out the bitterness.

603 Q. 36. What effect would it have on the solution of quinine in the preparation?

A. Increase the amount of quinine in solution and consequently increase the bitterness.

Q. 37. Will you examine the sealed Specimen No. 3 before you and say whether you observe therein any change from its condition when you saw it in January?

A. Still further precipitation is evidenced from simply an examination of the sealed specimen.

Q. 38. Will you state your opinion as a trained pharmacist as to whether the preparation in Specimen No. 3 constitutes a stable, palatable and acceptable product pharmaceutically that could be satisfactorily marketed?

A. In my opinion this preparation would be an unstable one, would not be an acceptable formula or a marketable preparation.

Q. 39. Is it palatable?

A. It is far from palatable.

Q. 40. Please take up Specimen No. 4 and state what you found during your investigations with regard to this preparation?

A. Specimen No. 4 was stated in Mr. Bibbins' testimony to be flavored with syrup of coffee and yerba santa and dextrine used as the suspending agent. This showed some precipitation on the bottle, still evidenced on the sides of the bottle and bottom, poured like mucilage, having the flavor and characteristics of dextrine. The slight flavor of coffee which was first perceptible was soon drowned out by the extreme bitterness of the quinine. Under the microscope the quinine crystals were shown to be broken down and eroded. There was likewise in the microscopic field, starch grains partly altered and distributed unevenly throughout the field. The solution gave a distinct reaction with litmus paper, a distinct acid reaction.

Q. 41. Was it palatable?

A. It was not palatable. There was still another change 604 which takes place in the presence of coffee which was not shown in the other samples presented. Coffee contains caffetannic acid, which precipitates out part of the quinine, and I have no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate, so that the quinine is subject

to reactions in two different directions by this preparation. I am now speaking of Specimen No. 4.

Q. 42. Please look at the sealed Specimen No. 4, and say whether it has changed in any respect since you saw it in January last?

A. There appears to be some additional precipitation taken place, which is evidenced on the sides of the bottle.

Q. 43. Will you give your opinion as a pharmacist as to whether the preparation shown in Bibbins' Specimen No. 4 is a pharmaceutically stable and palatable preparation and one which could be successfully marketed?

A. In my opinion this specimen is not pharmaceutically perfect, but is unstable, not satisfactory, is not palatable and could not be successfully marketed.

Q. 44. Take up Bibbins' Specimen No. 5 and state what you found in your examination of this preparation?

A. No. 5, stated in Mr. Bibbins' testimony to be flavored with peppermint and colored green with artificial coloring and suspended in quince-seed mucilage, was less viscous than some of the other specimens. There was decided evidence of precipitation on the sides of the bottle, still showing. The taste was decidedly bitter and it gave a decided acid reaction with litmus paper and the crystals of quinine sulphate, when examined under the microscope, were distinctly eroded and attacked, and there was likewise separation of quince-seed mucilage, showing as I have sketched here the characters of quince mucilage as separated in these specimens (referring
605 to sketch in the witness' hand).

Q. 45. What is the sketch that you have just mentioned?

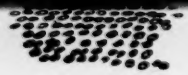
A. The sketch is a pen and ink sketch showing the appearance of quince mucilage under the microscope as separated out in these syrups containing quince mucilage.

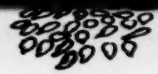
Q. 46. In which specimen number?

A. Nos. 5 and 6 were selected for a sketch as showing the typical separation.

Mr. Rawle: The sheet produced by the witness is offered in evidence and marked "Defendant's Exhibit, Beringer Sketch of Microscopic Appearance."

(Here follows "Defendant's Exhibit Beringer Sketch of Microscopic Appearance," marked page 604*a*.)





Irish Moss

Jelly
in No 6.

Quince Mucilage
in { No 1
No 6.

Jelly w/ pressure

Berpinger Sketch
of
Microscopic Appearance

June 8/17 Jew

Eroded Crystals of Quinine Sulphate
in No 7.

Peculiar Bone shaped Eroded Crystals
of Quinine Sulphate ?
in No 8 –

604a

Q. 47. You spoke of precipitation on the sides of the bottle; precipitation of what?

A. The part of the quinine is separated out as well as part of the mucilaginous material separated out.

Q. 48. Have you anything to say about the color of this preparation in No. 5 as a pharmaceutical color?

A. It does not appeal to me as a suitable color for a pharmaceutical preparation. It is a sort of what I would call a coppery green.

Q. 49. Not a true peppermint green?

A. Not a true peppermint green.

Q. 50. Please examine the sealed Bibbins' specimen before you and state whether you observe any changes since you saw it last January?

A. There appears to be some additional precipitation.

Q. 51. Give your opinion as to whether the preparation in Bibbins' Specimen No. 5 would constitute a satisfactory, stable and palatable pharmaceutical and one which could be successfully marketed?

A. In my opinion it would not yield a satisfactory, pharmaceutical preparation nor a stable, palatable preparation that could be successfully marketed.

606 Q. 52. You have said that something is less viscous than something else; please explain?

A. I used the word "viscous" there to show that it was not of the same degree of thickness or body. It was a thinner preparation, more fluid, more liquid preparation, than the other preparations that we had examined prior.

Q. 53. What would be the effect of its being less viscous as a preparation?

A. It would not hold the quinine in suspension satisfactorily. A proper degree of viscosity or mucilaginous quality is necessary to hold the quinine up in proper suspension.

Q. 54. As I am only a layman, please explain what you mean by a precipitation on the sides or bottom of the bottle?

A. A sedimentation or separation of an insoluble portion.

Q. 55. What is the effect of that on the preparation?

A. It shows a lack of homogeneity, through miscibility.

Q. 56. Why is that objectionable?

A. In the administering of a preparation of this kind, unless the medicinal ingredient is equally and thoroughly distributed, as the dose is poured out of a bottle or a portion is dispensed on a prescription, you would not get uniform distribution of the medicinal agent.

Q. 57. You spoke of the quinine sulphate crystals being eroded in some of these specimens and of being attacked; what did you mean?

A. The word "attacked" there I used in the same sense as I might have used the words "acted upon" by the acidity of the fluid, acted upon, eaten away. I used the word attacked because the action was apparently uneven, as I will show you in some of these cases.

Q. 58. My question uses the word "eroded;" will you explain that?

607 A. Eroded is a phrase that is used in chemical and microscopic technology to indicate an action of some chemical

upon a body or a surface by which you have indentations or roughened surfaces.

Q. 59. Please take up Bibbins' Specimen No. 6 and state what your investigations disclose?

A. Bibbins' Specimen No. 6 was said to be flavored, according to the testimony, with benzaldehyde; the suspending materials, Irish moss and quince-seed mucilage. This specimen of the sample was of uneven thickness and showed the separation of gelatinous-like masses. It was decidedly acid and quite bitter to taste. Under the microscope the crystals of quinine sulphate showed that they were acted upon, eroded, and there were separated, the Irish moss, Jelly and the quince-seed mucilage, in different masses. This was apparent even on the surface of the glass bottle as well as under the microscope. In the sketch I have shown, "Beringer Sketch," the typical separation of the Irish moss jelly as occurred in this Specimen No. 6, and likewise the mucilage of quince-seed has separated. These separations were unequally distributed throughout the field, showing the lack of homogeneous suspension.

Q. 60. Please look at the sealed specimen of Bibbins' sample and state whether that has changed since you saw it last January?

A. It shows decidedly the separation of the Irish moss, gelatinous masses on the surface of the glass, glairy, gelatinous masses of the Irish moss jelly.

Q. 61. Will you state whether in your opinion the preparation in Specimen of Bibbins' Sample No. 6 is a pharmaceutically satisfactory, stable and palatable preparation and one that could be successfully marketed?

A. In my opinion this preparation has so many defects that it would not be pharmaceutically satisfactory, would not be stable, would not be palatable and could not be successfully mar-
608 keted. Not the least objectionable feature is the use of Benzaldehyde as a flavoring.

Q. 62. Take up Specimen of Bibbins' Sample No. 7 and state what you found with respect to the preparation therein?

A. Specimen No. 7 is stated by Mr. Bibbins to be flavored with peppermint or wintergreen as a mixture and to contain mucilage of tragacanth and gum acacia as suspending agents and to be colored brown artificially. This showed a separation of brown material on the bottle. It was decidedly bitter as soon as it touched the tongue, acid in reaction and under the microscope there were comparatively few crystals of quinine remaining, and this showed, as shown by the sketch here from No. 7, that they had been acted upon, eaten away, in the liquid. Out of five slides, carefully examined, only six small crystals of quinine, and these all eroded, could be found, but not a single, well-defined, sharp crystal of quinine remaining in these five slides. The field showed the swollen cells of the tragacanth gum and oil flavoring distributed throughout, but there was not a uniform, homogeneous mixture shown. It was quite thick, more mucilaginous, more viscous than most of the other specimens.

Q. 63. What effect had the acacia on the acidity.

A. I am of the opinion that the acidity of this preparation was due largely to the acacia present as one of the suspending ingredients.

Q. 64. Please look at the sealed specimen of Bibbins' Sample No. 7 and state whether it has changed since you saw it in January?

A. I cannot detect from this specimen any additional change. There was the same precipitation which was noted in the other specimen, shown on the glass of this specimen, and the same apparent thickness of fluid.

Q. 65. What is your opinion of this specimen of Bibbins' Sample No. 7 as a pharmaceutical preparation?

609 A. In my opinion it is a very unsatisfactory pharmaceutical preparation, its extreme bitterness and unpalatability rendering it unserviceable as a marketable preparation.

Q. 66. Any other dis-serving qualities?

A. The thickness with which it would pour is not entirely satisfactory, but that is possibly merely minor, but the great acidity and bitterness are the principal objections making it so unsatisfactory.

Q. 67. Please examine Specimen No. 8 of Bibbins' Sample No. 8 and tell what investigation of this specimen disclosed?

A. Sample No. 8 was stated in the testimony to be flavored with compound spirit of orange and to contain starch and mucilage of tragacanth as the suspending agent, and colored artificially. This specimen was unevenly thick and on shaking there was a glairy separation of bubbles, like air bubbles, and a deposit of coloring and gummy matter on the sides of the glass, which still shows very distinctly on this specimen. The odor had become terebinthinate, was decidedly acid to litmus, and the taste was distinctly bitter, the bitterness being apparent as soon as it touched the tongue. By terebinthinate I mean turpentine-like. This was caused by the oxidation of the orange oil; oils of the orange and lemon type are very prone to oxidation, a turpentine odor developing.

Q. 68. What effect does this have on the preparation?

A. It makes it disagreeable as to palatability. Under the microscope were shown starch grains, some of them more or less broken down, swollen cells of the tragacanth and the remnants of crystals of the quinine. These had assumed a very peculiar shape. In this specimen the crystals were eroded, with knob-like or bone-like shaped points, as I have attempted to show in the sketch, "Beringer Sketch," made of typical crystals seen in the specimen. To

610 the litmus test it was decidedly acid.

Q. 69. Look at the exhibit, specimen of Bibbins' Sample No. 8, and state whether you see any changes since you saw it last January?

A. There appears to be a rather increased deposit on the glass containing some of the coloring matter associated with the deposit.

Q. 70. Will you give your opinion as to whether the preparation in this specimen would be a satisfactory pharmaceutical preparation and what its qualities are or are not?

A. I would not consider this formula pharmaceutically a satisfactory one. Starch is not a good suspending material. If it is

used in the dry state it separates out. When it is used in the mucilaginous form it is very prone to decomposition and hydrolysis and fermentation setting in quickly. A starch paste separates into more or less liquid and more or less solid particles, yielding a non-homogeneous medium. The preparation as shown was in my opinion far from palatable and would not be acceptable as a marketable preparation.

Q. 71. Please take up Specimen No. 9 of Bibbins' Sample No. 9 and state what you discovered in this preparation?

A. Sample No. 9 was stated in the testimony to be flavored with a combination of cassia, peppermint and wintergreen, and to contain as the suspending agents gelatine and tragacanth and to be colored yellow with naphthol yellow S 3. This preparation, although quite thick, showed some sedimentation on the glass. It looked very slimy and poured very thick, like an emulsion of cod liver oil. Its color and appearance were not at all inviting. It gave a decided acid reaction with litmus paper and its taste was bitter immediately, drowning out all the flavor of the aromatics promptly. Under the microscope the separated yellow grains of the gelatine jelly,
611 the swollen grains of the tragacanth were shown and likewise a few eroded crystals of quinine sulphate.

Q. 72. Look at the sealed Specimen No. 9 and state whether it has undergone any changes since you saw it last January?

A. There appears to be more developed glueyness of the gelatine.

Q. 73. What is your opinion of this preparation in Specimen No. 9 pharmaceutically?

A. As a pharmaceutical preparation it would be very unsatisfactory. The suspending medium selected here, gelatine and of course in this case mixed with tragacanth, is objectionable. Gelatine, if in an insufficient amount, will make a rather thin watery paste, insufficiently strong to suspend. If made strong enough, it will separate out in jelly-like masses, not being homogeneous and not making a satisfactory pharmaceutical preparation, and that shows in the sample I have examined of No. 9 and likewise shows in the sealed specimen here. The preparation is not only unsightly and pharmaceutically imperfect, but is bitter and unpalatable, and I could not conceive that it would make a marketable preparation.

Q. 74. Please take Specimen No. 10 of Bibbins' Sample No. 10 and state what your examination of that preparation disclosed?

A. Sample No. 10 was stated in the testimony to be flavored with peppermint, sassafras and wintergreen as a flavoring and gum acacia and quince-seed mucilage as a suspending agent. It appears to have been colored, but the coloring is not stated in the testimony. The sample, while more fluid than some of the other preparations, yet poured with a strong mucilage-like tendency, and there was a dusty deposit on the sides of the bottle. It gave a distinct acid reaction to litmus paper and was very bitter to the taste. Under the microscope it showed the broken-down quince mucilage,
612 some globules of oil of the flavoring, but I was unable to detect any crystals of the quinine sulphate, showing that the acidity had been sufficient to dissolve the quinine entirely.

Q. 75. Please look at the sealed Specimen No. 10 and state whether or not you detect any changes since you saw this last January?

A. There appears to be further separation of the mucilage in this specimen and some deposit of what I suspect is the coloring matter. There is certainly a deposit of redness or coloring matter on the glass of the container.

Q. 76. Give your opinion of this preparation, Specimen No. 10 of Sample No. 10, pharmaceutically speaking?

A. I would consider this pharmaceutically as a very unsatisfactory preparation and would not consider it as having any possibility of successful marketing.

Q. 77. Can you summarize your opinion of all 10 of these specimens of the 10 samples as pharmaceutically successful and marketable or otherwise?

Mr. Bradford: Objected to as calling for unnecessary repetition.

The Witness: In my opinion not one of these 10 formulas and samples submitted yields a preparation pharmaceutically satisfactory, palatable, stable, or possibility for marketing successfully.

Q. 78. State whether or not in your opinion the presence of acidity which you have detected in each of these 10 specimens deprives them of pharmaceutical value?

A. In my opinion the presence of any acidity is incompatible with a satisfactory, tasteless quinine or syrup of quinine in suspension.

Q. 79. Give your reason for this opinion?

A. As the acidity increases or develops, there is a cor-
613 responding increase in the amount of quinine which enters into solution, and as the quinine increases in solution, its bitterness becomes more and more perceptible and objectionable in such a remedial agent.

Q. 80. To make the point clear, will you please state whether you mean by "in solution" and "being dissolved," the same thing in this connection?

A. By the use of the word "solution" I mean that the quinine was dissolved and not simply in a powdered form in suspension, actually in solution or dissolved.

Q. 81. To clear up another point, please state what you mean by holding quinine sulphate crystals in suspension?

A. The term "in suspension" I have used to designate quinine in the form of powdered sulphate being distributed evenly throughout the liquid in its natural or powdered state, not being changed chemically or physically, but remaining in its unaltered chemical condition evenly distributed throughout the medium.

Q. 82. State whether or not that condition is necessary in order to constitute a successful and stable pharmaceutical preparation of a syrup of quinine?

A. The homogeneous suspension of the quinine is essential to the preparation of a pharmaceutically perfect, tasteless quinine syrup.

Q. 83. I understand that you are familiar with Quin-Coco and Coco-Quinine; do you find in those two preparations the presence

of the qualities which you have said are necessary for a tasteless syrup of quinine preparation?

A. They are neutral, that is free from acidity, and the quinine is in suspension—a homogeneous preparation.

Q. 84. Are they free from the deficiencies which you have pointed out and which you have discovered in some one or the other of these ten specimens?

A. Those two preparations as I have examined them have
614 always proved to be free from these deficiencies that have been apparent in these ten specimens.

Q. 85. Please consider the ingredients which were present in these 10 specimens and state what you have to say with regard to each in the matter of the flavoring, the coloring and the suspending mediums?

A. As to flavoring, as a general statement my opinion is that to disquise any drug, or any type of drug, an individual or distinctive flavoring must be selected. There seems to be one or more flavorings that answer the purpose of disguising the various types of drugs better than any other, so that we have what I should term a selection, necessary selection, for each drug or type of drugs to be disguised. In these ten specimens submitted the various flavorings used were ginger, which is probably one of the best that was suggested, but the sample shows that this was far from sufficient to disguise the bitterness of quinine. The tolu used in No. 2 is too mild and too bland a flavoring to be sufficient for quinine. It is more like a blend such as used, for example, when you use vanilla, along with chocolate as a blending of a flavoring. Orange was not satisfactory. In non-alcoholic solutions it is prone to oxidation, and if sufficient alcohol be introduced to prevent oxidation, then you are going to introduce the action of the alcohol on the quinine, bringing out likewise the bitterness, which is objectionable. As to coffee, I have stated the objections to its constituents, the caffeine-tannic acid acting as a precipitant of course on the quinine. The flavor of coffee is not universally liked and is objectionable to quite a few people. Peppermint has not proved satisfactory as a disguise for quinine preparations, but proves quite acceptable for stomachics such as soda and rhubarb, mixtures, for instance, where we use peppermint, but for bitter preparations, such as quinine, it has not proved at all efficient. The almond flavoring, such as the benzaldehyde, which I may ex-
plain is the chemical name for the artificial almond oil and
615 for the constituent which exists in almond oil normally to the greatest extent, is subject to the very serious objection that it is apt to be oxidized, being reduced to benzoic acid and losing its flavor entirely, so this is accepted as a satisfactory flavoring for very few preparations indeed. The various combinations suggested of peppermint, wintergreen, cinnamon and so on, while distinctly different from the chocolate flavorings, do not appear to me as being suitable for the flavoring for quinine, and the specimens of the samples show that they are not sufficient in strength or palatability to serve this purpose.

Q. 86. If you have finished with flavoring, will you proceed with the colorings under the original question?

A. The colorings,—in selecting a coloring for pharmaceutical preparations our rule almost universally has been to select inert vegetable materials. This is shown in our selection in pharmaceutical preparations of the peppermint leaf or the spearmint leaf to get the green for the preparations of peppermint and spearmint, or such colorings as cudbear, red sandalwood, to produce the red or occasionally carmine or cochineal has been used, which is a harmless animal coloring, producing a red coloring.

Coal tar dyes as a rule are not directed for medicinal preparations. While it is true that the Agricultural Department has specified a line of certified colors which they would for the time being permit to be used as coloring for foods, they have not been certified to as recommended for use in drugs, and it has been the custom rather to avoid the use of coal tar or synthetic colors that might be called coal tar derivatives, for use in medicinal products. Some of these colorings are susceptible to change and precipitation, and I suspect that in some of those specimens which show precipitation,—this is due in a measure to the artificial coloring, that has been used in the specimen.

Q. 87. Can you quote any living authority as unfavorable to the use of coal tar dyes in this connection?

616 A. There is some uncertainty as to the therapeutic action of some of these dyes and Allen, in his Commercial Analyses, Alfred H. Allen, one of the celebrated English authorities, cautions against the use of at least one of these dyes, namely, napthalene yellow or napthol yellow, which is sometimes used for coloring food articles yellow, because of its marked poisonous character, which makes it very unfit. He states "that comparatively small doses of naphthalene yellow are said to cause asthmatic breathing, a considerable rise of temperature, convulsions and ultimate death." These are among the reasons which I think have rather deterred pharmacists from using coal tar dyes to any extent in medicinal preparations.

The suspending agents reported in these ten specimens submitted: Mucilage of quince-seed is very prone to fermentation, soon becoming mouldy and acid.

The evils resulting from acidity I have already pointed out.

Tragacanth gum is peculiar in that it will not make a clear solution except under conditions which preclude its use here as a suspending agent. The gum simply continues to swell and swell and will not yield a uniform preparation but one that is characterized by small masses of swollen cells and nodular-like separations.

Gelatine which has been mentioned, is objectionable as a suspending medium because, if used in sufficient quantity to exert a proper suspending value, it is prone to gelatinize and separate out as a jelly-like separation or gelatinize the preparation into a jelly-like mass. If in insufficient amount to produce a jelly, then it is apt to separate out in small gelatinous masses which are not only unsightly, but render the preparation non-homogeneous and of uneven thickness

in pouring. Gelatine is likewise over prone to undergo a decomposition with the development of disagreeable, gluey odor and taste.

Gum acaca, as I have already stated, is normally acid, so
617 that we at once introduce an acid in our suspending medium. It is very prone to undergo further acid fermentation with increase of acidity, which would dissolve more of the quinine, and make a preparation containing acacia in the presence of quinine more bitter as the acid fermentation develops and the amount of quinine in solution increases, so that acacia cannot be looked upon in my opinion as a proper suspending medium for quinine sulphate.

Dextrine, which has likewise been mentioned, is likewise prone to undergo acid fermentation, is objectionable because of its stickiness, yielding a preparation that pours like stationery mucilage, and a taste which is far from agreeable.

Starch, which is one of the mediums reported, yields with water a paste which will not remain homogeneous. It very soon becomes unevenly liquified, oxidation appearing to quickly take place, with some portions becoming liquid, and other portions remaining in a semi-pasty condition. As this oxidation continues in starch paste, there is developed an acidity and likewise a tendency to a mouldy, sour taste, so that the taste becomes objectionable, and the acid would dissolve the quinine, and make a preparation containing such a starch paste decidely bitter.

Irish moss mucilage, which has been mentioned, is subject to a very serious objection in that it would separate out and into an uneven, jelly-like mass, as shown in this sketch, and the preparation would consequently be far from homogeneous or an evenly distributed or pouring preparation.

Q. 88. Will you explain why quinine sulphate when in solution becomes more bitter in taste than when in crystal form?

A. When in solution it is in such a physical condition that it is very readily absorbed by the mucous surfaces and then brought in contact immediately with the gustatory nerves in the mouth and throat.

618 Q. 89. What happens when it is in crystalline form and in suspension?

A. Then it is not in the form of solution where it is readily brought in contact with the mucous surfaces and the act of swallowing occurs before solution can be effected in the mouth, and consequently there is no bitter taste produced.

Q. 90. Does it pass to the stomach in crystal form?

A. Practically reaches the stomach in a crystalline form.

Q. 91. State whether or not you found yerba santa in each and every one of these 10 Bibbins' specimens?

A. There was yerba santa in each of these 10 specimens that I examined.

Q. 92. And yet all of these specimens were bitter to the taste when you tasted them?

A. They all showed bitterness to the taste.

Q. 93. Mr. Bibbins testified as follows:

"Q. 8. As I understand these samples are in all respects the same as Coco-Quinine except that another syrup has been substituted as the coloring and flavoring medium in place of the chocolate syrup; is that correct?

A. That is right."

Have you anything to say in regard to that question and answer?

A. I would not consider them as pharmaceutically and therapeutically the same as Coco-Quinine.

Q. 94. In answer to X Q. 24 Mr. Bibbins testified that the ingredients he had put into his 10 respective samples played the part of a chocolate or coco as the suspending agents; what have you to say as to that, how successfully did they play that part?

A. As I have pointed out in my testimony, regarding each one of these specimens, I have shown that the suspending medium
619 in every case was deficient, did not serve the same purpose as the chocolate itself in the quinine-chocolate serves.

Q. 95. Is there anything to be said about the use of three ingredients in any preparation when one would be equally good by itself; is the multiplication of ingredients considered undesirable in pharmaceuticals, I mean for suspending or coloring or anything else?

A. As a rule we look upon the use of two or more articles where one will answer the purpose as objectionable, because it is prone to introduce two articles of different composition which may start decomposition per se between themselves or render one or the other subject to a change. As an example, I may cite that it is well known that mixtures of oils become rancid much more quickly than the pure oils themselves. That is a typical example of a change that is apt to take place in two perfectly stable articles when they are mixed, which are perfectly stable when kept by themselves in a pure state.

Q. 96. Mr. Bibbins has testified that in the Bibbins sample No. 9 there was present cassia, peppermint, wintergreen, gelatine, tragacanth and naphthol yellow 3, making six ingredients, and the ingredients in Quin-Coco take the place of those six?

A. Cassia, peppermint, wintergreen, gelatine and tragacanth—chocolate takes the place of those ingredients mentioned as being constituents in No. 9. Yerba santa is found both in No. 9 and in Quin-Coco and Coco-Quinine.

Q. 97. You have given your opinion as a pharmacist as to the value of these Bibbins samples in a commercial sense and pharmaceutically; I understand that you have been a manufacturing druggist as well, have you not?

A. I have had some experience in that line and am having some experience in that line.

Q. 98. You are a manufacturing druggist?

A. Yes.

620 Q. 99. And have been always?

A. Always engaged more or less in manufacturing pharmaceutical work.

Q. 100. How far would your opinion based on your experience as

a manufacturer confirm your opinion based on your opinion as a pharmacist, as to the value of these 10 Bibbins specimens?

A. In my opinion as a manufacturing pharmacist, none of these formulas would be acceptable as a marketable product.

Q. 101. What power has your microscope with which you made your examination?

A. The magnification was about five hundred times.

Mr. Rawle: Counsel for defendant offers in evidence the 10 sealed specimens, numbered from 1 to 10, taken from Bibbins' samples numbered 1 to 10, and also the 10 open bottles of specimens, the contents of which the witness testified that he examined.

Marked respectively "Defendant's Exhibits, Bibbins' specimens, 1 to 10, sealed," and "1 to 10 unsealed."

Direct examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 102. I note that during your direct examination you have had before you a typewritten document and that counsel for defendant has also had before him what is apparently a copy of said document; will you please state what the document is?

A. The document is a copy of my study of the samples that were presented to me for examination.

X Q. 103. Your report?

621 A. Not exactly a report. It is a copy of my study of these 10 specimens of the 10 Bibbins samples. I would not trust my memory six or eight months after making the examination, made in January, to testify in June as to the result, and as I examined each one, I made a notation and typewrote it up as a record of the examination, as my record of the examination made of these specimens of the samples.

X Q. 104. When was this examination made?

A. The specimens were handed me in December and the examinations were made during the month of January.

X Q. 105. When was this memorandum made?

A. The memorandums were made in January, 1917.

X Q. 106. Have you observed the specimens from that time to the present?

A. These specimens were returned to Mr. Rawle and had been out of my possession until today.

X Q. 107. I note that in nearly all of the samples or specimens of the Bibbins samples, you have found that there has been more or less precipitation; by this do you mean precipitation of the quinine or the suspending medium, or both?

A. The precipitation does not appear to be in one uniform substance throughout. In some cases it is the resinous matter of the flavoring, in others it is a separation of the coloring, in others it is a separation of the suspending material, like the Irish moss or

gelatine or starch, in other cases, it is some separation of the quinine, as in the one where the coffee is used, so that there is no uniformity in the character of the separation.

X Q. 108. Is it not true that the bitterness found in these specimens is due to the fact that the quinine crystals have to a more or less extent gone into solution?

A. Undoubtedly the bitterness is due to the quinine having been changed from crystal into more or less a state of solution.

662 X Q. 109. Where the solution has been least, the bitterness is likewise the least perceptible?

A. Yes, that is axiomatic almost.

X Q. 110. Then in using the phrase, as you did in your answer to the question respecting specimen No. 3, "increasing the bitterness," you merely meant increase the solution or the extent of the solution of the quinine crystal?

A. I don't recall just how I used that word in connection with No. 3, but if I understand you right, there is no question that as acidity increases, the amount of quinine in solution increases, then consequently the bitterness increases. They go together.

X Q. 111. The forming of sediment in the bottom of the bottle, or on the side of the bottle, or the precipitation, as I understand you, is an objectionable feature to these Bibbins samples as shown by your examination of the specimens?

A. Pharmaceutically that is a strong objection.

X Q. 112. Is it not true that many pharmaceuticals show a precipitation in the containers or a sediment in the bottom or on the sides of the bottle, and is this not true both of Quin-Coco and Coco-Quinine?

A. Your reference to many pharmaceutical preparations I will answer this way, that it is true that some pharmaceutical preparations precipitate some of the fluid extracts, some of the tinctures, but those are preparations in which the precipitation is usually inert material, which we allow to settle and then decant the preparation off or filter off before the preparation is used as a medicinal agent, so that the process of filtration or clarification comes in there before the product enters the market or enters consumption. Your suggestion regarding Coco-Quinine and Quin-Coco,—a separation there is not a distinct precipitation, and there may be a little thickening along the sides or around the mouth of the bottle where the cork has been taken out, and so on, but there is not a distinct precipi-

663 tation such as we understand precipitation to mean in fluid extracts and tinctures and in the preparations that I have pointed out here.

X Q. 113. Referring for example to your specimens of samples No. 2 and No. 5, in comparing these with Coco-Quinine and Quin-Coco, which of the preparations would show the greater sedimentation on the container?

A. Both of these show a different character of sedimentation separation. The consistency is not identical and there is a different character of separation.

X Q. 114. Compare them with Quin-Coco and Coco-Quinine?

A. They are so distinctly different in viscosity and everything else that it is hard to make a comparison, but in the Coco-Quinine you do not get the separation such as you get here.

X Q. 115. I have noticed on many pharmaceutical preparations, a label, "Shake well before using"; what is the purpose of this label or caution on the outside of the bottle?

A. On prescription bottles that is a common thing to do where there is danger of any change taking place or a precipitation. In some of the articles where there is a liquid and a suspended insoluble powder, we have to do that and always do it so as to get a thorough distribution of the medicinal agent before it is either dispensed or administered.

X Q. 116. Would it not be quite feasible to use preparations such as the samples I have just shown you by having them "shaken well before using"?

A. It might be done, but in my opinion it would be very objectionable in a quinine preparation.

X Q. 117. Why is it done in the case of Coco-Quinine and Quin-Coco?

A. I don't know, excepting that as I said, there is apt to be a thickening around the top of the bottle from opening and closing, but there is not a precipitation such as we have in these preparations here, there is not the separation of the suspending media.

624 X Q. 118. Would there not be the same therapeutic effect, for example, from administering this medicine or medicine like these samples, and in administering Coco-Quinine and Quin-Coco?

A. Simply the effect that the quinine produces would be the same, no matter how it was administered, whether you administered it in the chocolate syrup or in this syrup, the effect of the two grains of quinine therapeutically would be the same in any way it was administered.

X Q. 119. Is it not true that possibly, notwithstanding your objection to the green color of Specimen No. 5, it might appeal to the taste of others and perhaps the flavor as well?

A. In my experience I would say no. In my opinion it would not appeal to the taste of other people.

X Q. 120. Personally I think the green is very pretty, you think it very bad, and I was surprised when you objected to the color of this specimen, because since I saw it I thought it was the most attractive of all. Is it not posible that what is true of the color might also be true of the flavor, and as tastes of people differ, that popularity might depend upon the tastes of the majority?

A. In my opinion the majority would not select that preparation, artificially colored, bitter, and suspended in mucilage of quince-seed, which is undergoing change continuously.

X Q. 121. The bitterness in that preparation, as you have already stated, is caused by the quinine crystals passing into solution. Suppose the ingredient which attacks the quinine crystals and caused them to dissolve in that solution were omitted and something sub-

stituted which would not have that effect; would it not then be a good preparation?

A. I only know of one preparation or one article that appears to serve the purpose. If you omit your suspending ingredient there you have no preparation.

625 X Q. 122. But there are other suspending mediums that might be used, are there not?

A. We have examined all those that have been suggested, and there is nothing before me to change the opinion I gave in my direct testimony, that chocolate was the only suspending medium that seems to answer the purpose. There is a colloidal nature about chocolate and its constituents that seems to serve this purpose in a way that nothing else, so far suggested, does.

X Q. 123. Is it not true that acacia and tragacanth are commonly used in pharmaceutical preparations?

A. Why yes, it is true that they are commonly used in pharmaceutical preparations.

X Q. 124. And acceptable?

A. For some preparations, not for all.

X Q. 125. Please define more exactly the meaning you intend to convey by the phrase "homogeneous suspension"?

A. The phrase "homogeneous suspensien" as I had in mind, referred to a liquid preparation which was uniform throughout, held, uniformly distributed throughout that liquid, some material, a medicinal preparation or medicinal agent, uniformly distributed or suspended throughout this liquid. If it is not even, it cannot be homogeneous. If it is not uniform, it cannot be homogeneous.

X Q. 126. Such preparations then would not require what is termed a "shake label"?

A. As a matter of precaution you might do it anyhow; as a matter of precaution you might do it.

X Q. 127. Did I understand from your testimony that you are now contending that the flavoring mediums are the disguising agents for the quinine?

A. Only to a certain extent, not solely.

X Q. 128. But notwithstanding the presence of yerba santa in these specimens of the Bibbins samples, you still found bitterness; I gathered from this and the answers to the previous ques-

626 tions, that these flavoring extracts or mediums were regarded by you as a disguising agent; and that yerba santa does not serve as a disguising agent?

A. I did not testify that at all. My understanding is that the yerba santa and the flavorings associated with the yerba santa were there alike as disguising agents jointly for that purpose.

X Q. 129. Are there no coal tar derivatives that are regarded as safe for medicinal purposes?

A. There are lots of them that are used medicinally.

X Q. 130. Are there any coal tar dyes that are used as medicinal agents or for medicinal purposes?

A. Yes, there are one or two coal tar dyes that are used as reme-

dial agents, but I believe largely, if not commonly, external applications.

X Q. 131. Can you name any?

A. Yes. The scarlet red is a commonly used medicinal agent used in the form of ointment or oily base for external application. Some of the various methylene blues have been used for certain kidney troubles. That has been used occasionally internally. There have been some of the other dyes used largely for diagnostic purposes, but the use of coal tar dyes, as I testified, used by the pharmacist, is not encouraged, and we select other agents, vegetable or inert animal, for coloring our pharmaceutical preparations.

X Q. 132. Respecting the specimens you have examined, their bitterness has been caused by deterioration, is not that true, since they were prepared?

A. Not in all cases. If I am permitted to explain, those that contain acacia, were started with an acid medium which would bring out the bitterness at once. In the others probably the deterioration of the suspending medium would account for the acidity.

X Q. 133. May it not be that the flavoring medium used as well as the suspending medium, would cause this deterioration?

627 A. In my opinion not. The flavoring was not there in sufficient quantity to cause an acid reaction, and the aromatic oils, the aromatics like ginger, all prevent acidic fermentation rather than encourage it, so that in my opinion the bitterness present could not be traced to the flavorings.

Deposition Closed.

The meeting adjourned until Saturday, June 9th, 1917, at 9 o'clock a. m.

June 9, 1917, Same Place.

Present: As before.

CHARLES S. ROGERS, recalled for further examination on behalf of defendant in sur-rebuttal, under the order of the Court.

By Mr. Rawle:

Q. 1. Are you the Charles S. Rogers who has previously been sworn and testified in this case?

A. Yes, sir.

Q. 2. What is your present home and territory?

A. Grand Rapids, Michigan, home; territory the same, Michigan.

Q. 3. All of Michigan?

A. A part of Michigan. Of course, my territory has been changed. I formerly had Saginaw in my territory. I left that territory which included Saginaw in June, 1914; was about my last trip in Saginaw.

Q. 4. Did you deal with Martin A. Kessel, a druggist of Saginaw?

A. Yes, sir.

Q. 5. How many calls did you make on him?

A. I was there not to exceed three or four times. He was
628 not in business when I made the territory first. He was a new druggist.

Q. 6. Martin A. Kessel, when testifying as a witness on behalf of plaintiff, testified as follows (p. 961):

"Q. 4. Among other items, did Mr. Rogers solicit your order for an item called Quin-Coco, and if he did, what did he say to you about its preparation?

A. Yes, he did. He said it was very similar to Coco-Quinine and had the same amount of quinine in it, two grains to the teaspoonful, and that it could be sold as Coco-Quinine; that the price of it being much lower than Coco-Quinine it would be more profitable to use it.

Q. 5. About when was this, or if the same representations were made at different interviews, how many were there and when did they occur, approximately?

A. The first time about three years ago and at intervals of four months. On each occasion he would make the same remarks about Coco-Quinine and Quin-Coco."

Please state whether or not these statements of Kessel are true or otherwise, and testify as to each one of them.

A. Yes, I did solicit his order for Quin-Coco. I said that it was a similar preparation to Coco-Quinine, had the same amount of quinine in it, two grains to the teaspoonful, but I did not say that it could be sold as Coco-Quinine, because this man had already used the preparation before and it was not necessary to say that. I sold this man, I remember very distinctly, five assorted gallons, and I had four gallons of specialties down, that is, four Warner specialties, and we had gone by the Quin-Coco, because he told me, he said "I am
629 buying everything that I can of my brother, Otto Kessel, that travels for the Michigan Drug Company," and I passed the Quin-Coco and we had the four gallons and could not find another gallon, and he voluntarily says, "Put me in a gallon of the Quin-Coco." That was the incident. His brother was financially interested in the store, in fact started him in business, and he was under obligations to him, of course.

Q. 7. What is the significance in respect to Coco-Quinine or Quin-Coco of the fact that his brother was a salesman for the Michigan Drug Company? What bearing had that on the situation?

A. It was a similar preparation and he could buy it of the Michigan Drug Company instead of us. He voluntarily gave me the order.

Q. 8. Why do you say you knew that he could buy a similar preparation from his brother, who represented the Michigan Drug Company? What is the significance of that?

A. I do not quite get you there.

Mr. Bradford: In order to save time, Mr. Rawle, all that you want to appear is that the Michigan Drug Company is a jobbing house and that, among other things, they handled the Lilly goods, and that

Otto Kessel, in traveling for the Michigan Drug Company, solicited orders for Lilly's line and not the Warner line; is that it?

Mr. Rawle: Yes.

By Mr. Rawle:

Q. 9. That is the fact, is it not?

A. Yes, sir.

Q. 10. I think you said that, knowing that, you passed by the item Quin-Coco in going over your Warner line?

A. I did, yes, sir.

Q. 11. Had Kessel, or any drug store in which he was employed, known of that Quin-Coco, or had he worked in a drug store where it was handled?

630 A. Yes. Richter handled it before and I think Fowley, of Bay City. Those were two places he worked before he started in business.

Q. 12. Please explain what you mean by a five-gallon order of Warner specialties?

A. When a man buys five gallons of Warner's specialties, we give the five-gallon price on each item. The only way that he could get that price of the ordinary house, our price, would be to buy twenty-five gallons. We give the five-gallon price when he buys five assorted gallons. With us five assorted gallons give the five-gallon price on each item.

Q. 13. When you reached the item Quin-Coco in going over your line, do you remember how much you dwelt on that item?

A. Nothing more than to explain the price, because this man already was acquainted with the preparation.

Q. 14. Please take up Kessel's answer to Q. 4 and see whether you have covered it all. I call your attention to what he said about price.

A. I explained to him that the price of our preparation would be $3.60 and the other $4.80. The matter did not come up as to how he should use it, because this man already knew the goods. The matter did not come up how he should use it. In fact, I am not a druggist. I am not in position to tell them what they are to do with it.

Q. 15. I now call attention to Kessel's answer to Q. 5 and ask whether Kessel's statement there is true or not?

A. I do not ever remember of selling him Quin-Coco more than once, because he had but little trade when he started out, was not doing a whole lot.

Q. 16. Had he just gone into business?

A. Yes. I sold him either the first or second time I called this gallon of Quin-Coco; either the first or second time that I called.

Q. 17. Will you state whether or not you have a clear and distinct memory of that particular interview?

631 A. Yes, sir, I do, of when I sold him the Quin-Coco.

Q. 18. I think you said that you had made two or three calls on him altogether after that first one. Do you remember what you said to him at any of those subsequent calls on the subject of Quin-Coco?

A. I do not think I said a word. He carried his gallons right along where you could see them, and if a bottle was very nearly full it was not necessary to say anything about it.

Q. 19. You mean on the shelves?

A. Yes, on the shelves.

Q. 20. Kessel testified specifically that you said to him that your Quin-Coco could be sold as Coco-Quinine. State whether or not you ever said that to him?

A. I did not.

Q. 21. Kessel, after testifying, in answer to Q. 97 and Q. 98, that he had been selling Quin-Coco over the counter and also by prescriptions with a Coco-Quinine label, further testified as follows (p. 966):

"R. D. Q. 46. In selling Quin-Coco as Coco-Quinine, and labeled Coco-Quinine, were you or were you not following the teachings and instructions of Mr Rogers in this respect?

A. I might say yes."

State what you have to say in regard to that testimony of Kessel?

A. I say that I never instructed him how to sell it or anything about it. The matter never came up as to how he was to dispose of the goods. He simply bought the goods along with the rest of our offer or order.

Q. 22. State whether or not you ever said to Kessel that he could sell your Quin-Coco to customers, or on prescriptions, labeled Coco-Quinine?

A. I did not. We have 14,000 items that we are offering
632 to the retail druggist, and we haven't time to spend on any one item going through our line.

Q. 23. Will you state whether or not you ever suggested to any retail druggist that he could sell any of your preparations for the product of another house?

A. No, sir, I have not. I do not consider it salesmanship. In fact, I never found it necessary in order to do business.

(No cross-examination.)

HENRY E. STARRING, recalled for further examination on behalf of plaintiff in sur-rebuttal, under the order of the Court.

By Mr. Rawle:

Q. 1. Are you the Henry E. Starring who has already been sworn and testified in this case?

A. Yes.

Q. 2. Is Saginaw in your territory, and if so, how long has it been?

A. Saginaw has been in my territory since the summer of 1914. I succeeded Mr. Rogers in this territory.

Q. 3. Did you know a retail druggist in Saginaw named William Heim?

A. Yes.

Q. 4. Did you solicit his business?

A. Yes.

Q. 5. Is Saginaw a good market for the quinine preparations an chocolate quinine preparations?

A. It is.

Q. 6. Have you called on all the druggists in Saginaw at differen times?

A. I call on the druggists in Saginaw on an average of three time a year. I have called on every druggist in Saginaw.

633 Q. 7. Do you know whether they stock Quin-Coco, som or most of them?

A. Most of them carry Quin-Coco in stock.

Q. 8. William Heim, a witness called on behalf of the plaintiff o rebuttal, testified (p. 957):

"Q. 4. What representations did Mr. Starring make about thi item (Quin-Coco) in soliciting your order for the same?

A. He stated that it was the same as Coco-Quinine; that the pric was less; that it flowed better, being a slightly thinner liquid, an that most of the boys were buying it and selling it in place of Coc Quinine."

Please state whether or not you told him that your Quin-Coco wa the same as Coco-Quinine?

A. I did not tell Mr. Heim that our Quin-Coco was the same a Coco-Quinine.

Q. 9. Please state whether or not you mentioned that the pric was less?

A. I showed Mr. Heim a number of liquid preparations whic we were selling and quoted the prices on them all.

Q. 10. State whether or not you told Mr. Heim that your Quin Coco flowed better than Coco-Quinine?

A. I did not tell Mr. Heim that our Quin-Coco flowed better tha Coco-Quinine.

Q. 11. Please state whether or not you told him "that most of th boys were buying it and selling it in place of Coco-Quinine"?

A. I did not tell Mr. Heim that the boys were selling it in plac of Coco-Quinine.

Q. 12. What did you tell him?

A. I told Mr. Heim that the druggists in Saginaw had a fin market for Quin-Coco and most of them were buying it.

Q. 13. State whether or not in your talk with Heim you referre to Coco-Quinine, Lilly?

634 A. I did not mention Lilly's Coco-Quinine in my talk wit Mr. Heim.

Q. 14. State whether or not you mentioned the "boys"?

A. I did not mention the word "boys." That is not my metho of speaking of my customers. I refer to them as customers or dealer

Q. 15. Will you state whether or not it is your practice, in tryin to sell Quin-Coco, to compare it with Coco-Quinine, and what you practice is?

(Objected to as not within the scope of the order of the Court; as not in any sense sur-rebuttal, and as merely calling for repetition of what the witness testified to when he was previously called in the case.)

A. It is not my practice, in selling Quin-Coco, to compare it with Coco-Quinine. My procedure is to include it and mention it along with a good many other items, and especially in a special offer we have on an assortment of five gallons.

Q. 16. What is the nature of that special offer?

(Same objection.)

A. The druggist in making up an assortment of five gallons gets the special price of a five-gallon quantity on each item.

Q. 17. Is that a considerable reduction?

(Same objection.)

A. It is a considerably better price than a single gallon.

Q. 18. Do you mean that the druggist, in taking a gallon each of five different preparations, gets the same low price on each as he would get on any one article if he bought five gallons of that one item?

(Same objection.)

A. Yes.

635 Q. 19. Have you had business with Martin A. Kessel, a retail druggist in Saginaw?

(Objected to on the ground that the order of the Court does not give defendant any right to examine this witness on any matter except respecting the testimony of William Heim.)

Defendant's counsel agrees that the reference to Kessel is not in the order of the Court, but suggests that plaintiff's counsel will not raise the question at the hearing, and that the Court will grant relief to defendant's counsel in not having inserted the name in the order.

A. Yes.

Q. 20. Did you solicit him regularly?

A. Yes, I have called upon him on an average of three times a year since I took the territory from Mr. Rogers.

Q. 21. Do you know whether he had always stocked Q. C.?

(Same objection.)

A. I knew that he had been carrying Quin-Coco in stock, because when I was given the territory copies of orders sold Mr. Kessel by Mr. Rogers were turned over to me, and I noticed that he had been buying Quin-Coco.

Q. 22. What was the question you put to him when you reached Quin-Coco in going over your list?

(Same objection.)

A. When I called on Mr. Kessel, I stated that our proposition of buying five gallons of assortments was still in effect, and quoted the prices on several liquid preparations, among them Quin-Coco.

Q. 23. Would you know whether or not his stock of Quin-Coco was low?

(Same objection.)

636 A. I would only know that his stock of Quin-Coco was low in case he stated so himself, or re-ordered it.

Q. 24. Would you ask him?

(Same objection.)

A. I usually ask the dealer or druggist if he can use any more of any particular item, in case he has purchased it previously.

Q. 25. Will you state whether or not Kessel ordered a gallon at a time of Quin-Coco, in connection with four gallons of other specialties?

(Same objection.)

A. Mr. Kessel has purchased Quin-Coco several times from me with the other gallon preparations, to make up the five-gallon assortment.

Q. 26. Martin A. Kessel, when called as a witness for plaintiff, testified (p. 961) as follows:

"Q. 4. Among other items, did Mr. Rogers solicit your order for an item called Quin-Coco, and if he did what did he say to you about this preparation?

A. Yes, he did. He said it was very similar to Coco-Quinine and had the same amount of quinine in it, two grains to the teaspoonful, and that it could be sold as Coco-Quinine; that the price of it being much lower than Coco-Quinine, it would be more profitable to use it."

Also (p. 962):

"Q. 11. Has Mr. Starring ever solicited your order for Quin-Coco, and if so what did he say to you about this preparation?

A. Yes, he did. He said the same thing that Mr. Rogers did."

Please state whether or not you told Kessel that your Quin-Coco was very similar to Coco-Quinine and had the same amount of quinine in it?

(Same objection.)

637 A. I did not tell Mr. Kessel that our Quin-Coco was similar to Coco Quinine and had the same amount of quinine in it, because I knew that he was already familiar with the prepara-

tion, having purchased it on previous orders, and no introduction was needed for the item.

Q. 27. State whether or not you said to him that it could be sold as Coco-Quinine?

(Same objection.)

A. I did not tell Mr. Kessel that Quin-Coco could be sold for Coco-Quinine, nor have I told this to any other dealer or druggist.

Q. 28. Have you seen Martin A. Kessel personally within a short time, and when?

(Same objection.)

A. I called on Mr. Kessel in January of this year.

Q. 29. State whether or not in your conversation with him at that time he made any reference to his having testified on behalf of the Lilly Company in this case, and if so what he said?

(Same objection and further as calling for hearsay evidence.)

A. Mr. Kessel told me at this time which I have just stated, in January, that he had been called as a witness in the Quin-Coco case and at the time he was rather confused and did not exactly realize what his testimony was.

Cross-examination.

By Mr. Bradford:

X Q. 30. Do you know Mr. Heim pretty well?

A. I know him quite well as a salesman calling upon him.

X Q. 31. How long have you known him?

A. I have known him since the year of 1914.

X Q. 32. And have been calling on him continuously since then, on your regular trips?

638 A. I have been calling upon him quite regularly, which averages about three times a year.

X Q. 33. Do you sell him goods right along?

A. I sell him a bill of goods, occasionally, but not every trip.

X Q. 34. What kind of a man is Mr. Heim?

A. He is a man with rather individual ideas.

X Q. 35. A man of good character?

A. As far as I know, he is.

X Q. 36. What is his reputation in the drug trade?

A. As far as I know, his reputation is all right.

X Q. 37. What is his reputation as a man and citizen?

A. I have never heard him referred to as being anything but a good citizen.

X Q. 38. Is it not a fact that he stands as high in the drug trade as any other druggist in Saginaw, both as a druggist and as a man?

A. I would not consider him the most successful druggist in Saginaw.

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X Q. 39. By successful, I presume you mean doing the largest business?

A. Yes.

X Q. 40. But is there any drug store in Saginaw that has a higher reputation than Mr. Heim's drug store? I mean now for that class of business and as a prescription store?

A. There are a good many there that would claim a higher reputation than Mr. Heim, if you asked them personally.

X Q. 41. I am asking you personally, for your opinion?

A. I consider there are several stores in Saginaw with better reputations than Mr. Heim has.

X Q. 42. What stores have a better reputation as drug stores than Mr. Heim's in Saginaw?

A. I would mention Schermer Bros.; Culver, Deisler Co.; A. A. Schott; Neuendorf & Schmeck; and many more that I might mention.

639 X Q. 43. How many drug stores are there in Saginaw?

A. I think there are about thirty.

X Q. 44. Is it not a fact that Mr. Heim, both as a citizen and as a druggist, commands the universal respect of the people of Saginaw and stands high in the community?

A. I do not know regarding this, because I do not live in Saginaw; but I should think, from my observations in calling there, that Mr. Heim is only known by a small section of the city, that section being the one in which he conducts his business.

X Q. 45. As to those that know him, is it not true that he stands well as a citizen and as a druggist, and commands their respect?

A. I presme that he does.

X Q. 46. Is a man whom you have ever found guilty of misrepresenting things to you in your dealings with him?

A. Our dealings have always been very satisfactory, neither one of us to my knowledge misrepresenting anything.

BENJAMIN FRANKLIN JONES, recalled for further examination on behalf of defendant in sur-rebuttal, under the order of the Court.

By Mr. Rawle:

Q. 1. Are you the Benjamin Franklin Jones who has already been examined in this case?

A. I am.

Q. 2. Do you know a man named John W. Culver, who testified that he had been in the drug business at Gulfport, Mississippi, and was, at the time he testified, a traveling salesman for a wholesale drug house?

A. Yes, sir, I do.

Q. 3. Was Gulfport in your territory for a number of years?

A. Yes, sir.

640 Q. 4. What is your territory?

A. Now New Orleans and the neighboring parts of Louisiana, Mississippi and Alabama.

Q. 5. Will you state whether or not Culver was a trained pharmacist or druggist?

A. No, sir, he was not.

Q. 6. What do you know about him?

A. He was a bookkeeper before he went into the business. He bought out an interest in the Parlor drug store in Gulfport. He was formerly a bookkeeper.

Q. 7. Was he acquainted with the drug business?

A. No, sir, not before he went in there.

Q. 8. Who ran the drug part of it?

A. He hired a registered man to run the drug department.

Mr. Bradford: This line of examination is objected to as having nothing to do with the matters testified to by Mr. Culver.

Q. 9. Did he do some or most of the buying for that Parlor drug store?

A. Yes, sir, he did the buying.

Q. 10. When you went over your line and got to the pharmaceuticals, what did he do?

A. He walked over to his shelf and he looked to see what line he had been buying from us, from Warner and Searle and Hereth, and such as he was short on he would give me an order for. He never asked me for one thing or another.

Q. 11. Would he call out the orders from where he stood at the shelf?

A. Yes, sir.

(Objected to as leading.)

Q. 12. How did he communicate orders for items as to which he was short, when he stood at the shelf?

641 A. If he would see a bottle was short, he would say "Give me so much of this."

Q. 13. Would he confer with his druggist in giving such orders?

A. Sometimes he would. He would ask the druggist "Do we use much of this or not?" and then give me the order.

Q. 14. Was there any preliminary discussion as to the merits of any of your items before he went to the shelf?

A. Not a bit.

Q. 15. Will you state whether or not you ever had a conversation with Culver about Quin-Coco?

A. I never did. He not being a druggist, I could not converse with him about pharmaceuticals, because he did not know anything about them.

Q. 16. How long have you been connected with the Pfeiffer Chemical Company and the defendant continuously?

A. Ever since the Pfeiffer Chemical Company started in business, which was about 1904.

Q. 17. And then you kept on with Warner & Company when it was formed?

A. Yes, sir.

Q. 18. In substantially the same territory all the time?

A. Yes, sir.

Q. 19. John W. Culver, when testifying for the plaintiff in rebuttal (p. 775) testified in answer to Q. 4 that you said to him that your Quin-Coco was absolutely identical with Coco-Quinine and could be used in its stead. State whether or not his statement is true?

A. I never told him it was identical, or did not tell him it could be used for Coco-Quinine, because I had no conversation with him about it.

Q. 20. Culver further testified (p. 776 Q. 8) that you told him it could be dispensed in place of Coco-Quinine and represented
642 that neither the doctor nor anyone else could tell the difference between Quin-Coco and Coco-Quinine. State whether or not that statement is true?

A. It is absolutely not true. I never told him or anyone else that they could use it for Coco-Quinine, or that it was absolutely certain it was exactly the same thing. I never had any conversation with him about it at all.

Q. 21. State whether or not you ever told him, or anyone else, that neither the doctor nor anyone else could tell the difference between them?

A. No. That is not my way of selling goods. I do not tell a man that sort of thing.

Q. 22. Culver testified, in effect, that you told him that Quin-Coco could be dispensed in place of Coco-Quinine, and that neither the doctor nor anyone else could tell the difference between them, on physicians' prescriptions for Coco-Quinine and on general counter calls for Coco-Quinine. State whether or not this statement of Culver is true?

A. Absolutely not.

Q. 23. Culver testified that your statement on the witness stand that you never told a man that he could substitute is absolutely at variance with his experience of you. What have you to say as to this? Have you ever told a man he could substitute?

A. Never told Mr. Culver or anyone else that he could substitute. I do not use the word "substitute" in selling my goods.

Q. 24. Culver further testified (p. 780, in answer to X Q. 28) that the substance of your remarks to him in regard to Quin-Coco and Coco-Quinine was that the two preparations were identical and that Quin-Coco could be used in place of Coco-Quine. State whether or not this is true?

(Objected to as mere repetition of what the witness has already said several times.)

643 A. Absolutely not.

Q. 25. Culver further testified (p. 782, in answer to X Q. 36) that the gist of your remarks was in the use of the words "identical" and "substitution" in connection with Coco-Quinine in your conversation with him. State whether or not you ever used those words in regard to Quin-Coco and Coco-Quinine in talking to Culver?

A. I never used the words "identical" or "substitution" to Mr.

Culver or anybody else, and never had any conversation on Quin-Coco with Mr. Culver. He not being a druggist, I could not converse those things with him.

(No cross-examination.)

HENRY J. RITAYIK, recalled for further examination on behalf of defendant in sur-rebuttal, under the order of Court.

By Mr. Rawle:

Q. 1. Are you the Henry J. Ritayik who has already been sworn and examined in this case?

A. Yes, sir.

Q. 2. How long have you been working for the Warner Company or its predecessors, the Pfeiffer Chemical Company?

A. About ten years.

Q. 3. Have you ever called at a drug store where John Moise was employed as a clerk, at Napoleonville, Louisiana?

A. Yes, sir.

Q. 4. Whose drug store?

A. Mr. Heno's.

Q. 5. How often?

A. Just once.

Q. 6. About how long ago with reference to anything which enables you to fix the date?

644 A. I would say it was during the time that they were about to put the stamps on, those revenue tags; about the time the stamps were put into effect, about that time.

Q. 7. Will you state whether or not the call and the circumstances and the surroundings are clear to your mind?

A. As I remember, the store had a counter that we open up sample cases on right near the prescription case, and a soda fountain in front near the door.

Q. 8. Do you remember Moise personally?

A. Yes, sir.

Q. 9. Did you solicit a sale from Heno?

A. We worked the general line.

Q. 10. Did you do the talking.

A. Most of it.

Q. 11. John Moise testified as a witness in rebuttal, on behalf of plaintiff (p. 869 in answer to Q. 14) that you said to Heno in his presence that everybody along the road were using Quin-Coco, when the doctors prescribed Coco-Quinine, as they could not tell the difference. Please state whether or not this is true?

A. I would say that that is an absolute falsehood. To him or to any other druggist in the United States it has never been said.

Q. 12. Do you remember what was said at that interview?

A. There was no doctors brought in specially. It was put on this basis: I told Mr. Heno in the way of pharmaceuticals that a good many druggists throughout the United States were in a way doing

their own detail work, getting the consent of the doctor to use such prescriptions that they did their own personal detail work on.

Q. 13. Go ahead.

A. That about covers that point.

Q. 14. Please connect that statement up with the matter before us.

A. I do not understand just what is meant there. I do not
645 know now. You have got me a little in the air.

Q. 15. What bearing had it to say to Heno that druggists were doing detail work considerably?

A. On different products in the way of pharmaceuticals as a whole, and getting the consent of the doctor to use such products in their prescriptions that they done their own personal detail work on. That is the way I made the statement at first.

Q. 16. He further testified (p. 870, in answer to Q. 15) that you said to him that the druggists were using Quin-Coco all over on their prescriptions for Coco-Quinine and that you could not detect the difference. State whether or not this statement of Moise is true?

A. It is not true.

Q. 17. State whether or not you said anything of that sort to Moise?

A. Not along that line, no, sir.

Q. 18. Moise further testified (p. 872, in answer to X Q. 33) that you said to him that the druggists were using Quin-Coco for the same thing as Coco-Quinine. Will you state whether or not that is true?

A. That is not true.

Q. 19. Moise further testified (p. 873, X Q. 47) that he understood you to say that Quin-Coco is just like Coco-Quinine therapeutically. Will you state whether or not you gave him so to understand, or said anything to him to that effect?

A. No, sir. I simply said to him, like to every other druggist when they bring up that point, that it contains two grains of quinine sulphate. That is my answer.

Q. 20. Invariably?

A. Invariably, yes, sir.

Q. 21. Moise testified (p. 873, X Q. 48) that he understood you to say that the druggists all over were using Quin-Coco in prescriptions calling for Coco-Quinine, or susbstantially to that effect.
646 Please state whether or not you ever said anything which justified him in having that understanding?

A. No, sir.

Cross-examination.

By Mr. Bradford:

X Q. 22. You are still working for the William R. Warner Company?

A. Yes, sir.

X Q. 23. Have you been working for them all the time since you last testified in the case?

A. Yes, sir.
X Q. 24. In the same position that you occupied then?
A. Yes, sir.
X Q. 25. Assistant sales manager?
A. Assistant sales manager.
X Q. 26. You explained to Mr. Heno, you state, about the methods of detail work employed by other druggists?
A. By a good many druggists.
X Q. 27. Have you made this explanation to other retail druggists?
A. Yes, sir.
X Q. 28. Name some of them?
A. Offhand I could not.
X Q. 29. You only remember specifically Mr. Heno?
A. Well, no; the point is that it is my general conversation with different druggists. That is the way I will put that.
X Q. 30. Can you name any retail druggist, aside from Mr. Heno, on whom you have called, to whom you have made such representations?
A. As I say, to the trade in general.
X Q. 31. I understand you to say, then, that since you last testified as a witness in this case you have been continuously in the employ of William R. Warner & Company and in the same capacity
647 that you occupied at that time?
A. I will say this, that I still do the same work. I have the title of sales manager, but it is practically the same work.

SAMUEL J. HAGAMAN, recalled for further examination on behalf of defendant on sur-rebuttal, under the order of Court.

By Mr. Rawle:

Q. 1. Are you the Samuel J. Hagaman who has previously been examined in this case?
A. I am.
Q. 2. Do you know Charles S. Lebo, who has testified in this case that he had been a clerk in Bell's drug store in Reading?
A. Yes, sir.
Q. 3. How many calls did you make on the Bell drug store?
A. I would say about five.
Q. 4. Do you remember about what year?
A. I cannot remember.
Q. 5. Several years ago?
A. Yes.
Q. 6. Did you ever see Charles S. Lebo at that store?
A. Yes, sir.
Q. 7. Charles S. Lebo, when called as a witness for plaintiff, in answer to Q. 6, on page 656, testified that in selling Warner goods you seemed to lay great stress on the fact they could be sold in preference to higher priced articles of the same kind and could be used in substitution. State whether or not that statement is true and whether you ever said that, or anything similar to it?

A. I never did.

Q. 8. Lebo further testified (p. 657 in answer to Q. 12) that at interviews with you, from four to eight years before he testified, you had given him the impression that the Bell Drug Store could substitute Warner's line of pills A. B. S. & I. for Lapactic Pills and Triloids for Diamond Antiseptics, and that the druggist could substitute these two items of Warner for the others. Please state whether you ever said anything to Bell, or in the hearing of Lebo, to justify that impression?

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A. I never said anything like that.

Q. 9. Did you know, when you called on the Bell Drug Store, whether they kept in stock the pill known as A. B. S. & I.?

A. Yes, sir, they had on hand the pill A. B. S. & I., which was sold by a previous salesman.

Q. 10. State whether or not this was true at all your calls, that they had this pill on hand?

A. It was.

Q. 11. Will you state whether or not it would have any influence on your sales talk to a druggist, that he was already carrying a given article of which you were trying to sell him an additional supply?

Objected to as incompetent, immaterial and irrelevant.

A. I would say it would not be necessary to talk to him at all, other than to ask him how his stock was.

Q. 12. What was your practice in such case?

Same objection.

A. To ask the man how his stock was of the pill A. B. S. & I.

Q. 13. Was this universally your practice?

Same objection.

A. Yes, sir.

Q. 14. Do you know whether he stocked your Triloids when you called upon him?

Same objection.

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A. I am not sure of that.

Q. 15. Do you know whether your Triloids were similar in appearance and shape and all that sort of thing to the Diamond Antiseptic?

Same objection.

A. No, sir.

Q. 16. What was the shape of your Triloid?

Same objection.

A. Triangular.

Q. 17. What was the shape of the Diamond Antiseptic?

Same objection.

A. Diamond shape, four-cornered.

Q. 18. What other differences were there between Triloids and Diamond Antiseptics, besides shape of the article?

Same objection.

A. I would say it was a different made tablet. The Diamond Antiseptic is a molded tablet. The triangular tablet, otherwise Triloids, is a compressed tablet.

Q. 19. Will you state whether or not these differences between the two articles are readily noticeable by a buyer?

Same objection.

A. Yes, sir.

Q. 20. How long have you been working for the Warner Company or its predecessor?

A. I would say more than 20 years.

Q. 21. Were you under the old Warner management?

A. Yes, sir.

Q. 22. Did you know Samuel H. Bell, of the Bell Drug Store, Reading?

A. I did.

Q. 23. Bell, when called as a witness for plaintiff in rebut-
650 tal testified (p. 622), in answer to Q. 10, that you never came to call on him by yourself; is that true?

A. It is not true. I may say that I called on Mr. Bell at least once by myself, when I was looking to locate a salesman for the territory.

Q. 24. Bell also testified in the same answer that in trying to place an order for his line, you would place great stress on naming this, that or the other article which would be a good substitute for one of the standards; for instance, your A. B. S. & I. pill would be a good pill to replace the Lapactic, and your Elixir and Caffein Comp. to replace panpeptic Elixir. Will you state whether you ever, in selling to Bell, stated that your articles named would be a good substitute for corresponding articles of another house?

A. I never did.

Q. 25. Bell testified (p. 665 in answer to X Q. 22 and X Q. 23) that it was deceptive drug dealing for a druggist, when a doctor writes a prescription for panpeptic Elixir, to give him Warner's Elixir of Pepsin and Caffein Compound, and that that is what you said to Bell that he could and would do. State whether or not those statements of Bell are true?

A. Not true.

Q. 26. State whether or not you ever said anything similar to that, or corresponding to that, or relating to that in any way?

A. I never did.

Q. 27. Bell testified, in answer to X Q. 24, that he told you that he never allowed that practice in his drug store. State whether or not Bell ever said that to you?

A. He never did.

Q. 28. Bell testified in answer to X Q. 24 that he had refused you

an order because he was disgusted with you and that that was your last visit to him. Will you state what occurred at your last interview with Bell and whether you had any trouble with him then?

A. On my last visit to Mr. Bell I remember he told me that
651 he was sick and tired of the drug business, and he said, "I think I will sell out."

Q. 29. Have you a clear recollection of that last call and what was said?

A. Yes, sir.

Q. 30. Will you state whether he was pleasant to you on that last call?

A. Decidedly not.

Q. 31. What reason did he give for not buying any goods from you?

A. I repeat that Mr. Bell said that he thought he would sell out, and his wife had died and he was all broken up, did not care about anything. In fact, he told me that he felt so bad he thought he would put himself out of the way.

Q. 32. Will you state whether or not there was an occasion on which he was a little unpleasant with you, followed by a subsequent occasion on which he was more pleasant and bought goods?

Objected to unless it relates to the facts concerning which Mr. Bell testified as a witness for plaintiff.

A. I remember nearly all my visits with Mr. Bell. I remember that I called on him on one particular occasion on which I did not sell him, and on the following trip did sell him. On the last visit that I made to Mr. Bell I did not sell him. As I testified previously, he told me that he was all broken up and that he would get out of the drug business and end his life, and as I remember I had a statement of his account.

Q. 33. Was there any occasion on which he had been unpleasant to you, followed by a subsequent visit in which he bought goods from you?

A. Yes, sir.

Mr. Bradford: This line of examination is objected to as clearly not within the authority of the order of the Court, and as in-
652 competent, immaterial and irrelevant at this time. The questions should be confined to facts testified to by Mr. Bell.

By Mr. Rawle:

Q. 34. State whether or not at your very last visit at Bell's Drug Store, he refused you any order because he was disgusted with your selling methods?

Mr. Bradford: The question is objected to unless the time of said last visit is indicated as the one to which Mr. Bell referred in his testimony.

A. If he was disgusted with my selling methods, I never knew it.

Q. 35. Did he say anything of that sort to you at your last visit?

Same objection.

A. No sir.

Q. 35. Did you know Earl S. Peabody, who used to be a Warner salesman?

A. Yes, sir.

Q. 37. Did you ever travel with him?

A. Yes, sir.

Q. 38. About what year?

A. I do not remember the exact year.

Q. 39. Peabody, when testifying for plaintiff in rebuttal, said in answer to Q. 15 (p. 674) that he had seen Mr. Hagaman offer the pill A. B. S. & I. as a substitute or replacer for Lepactic Pills; is that true?

A. Not true.

Q. 40. Peabody also testified in his same answer that you had offered your Alophen Pills as a substitute or replacer for the corresponding or similar pill of another house; state whether or not that is true?

A. Not true.

Q. 41. Did you give Peabody any instructions about the time he became salesman for the Warner house?

A. I instructed Mr. Peabody just like I instruct most of
653 the salesmen in the studying of our different catalogs, which of course includes the salesmen's Confidential. I of course worked with Mr. Peabody.

Q. 42. How long did you first take to instruct him about his duties?

A. That is hard to say exactly.

Q. 43. As much as an hour?

A. I would say more than an hour.

Q. 44. About what did you talk to him?

A. I talked with Mr. Peabody like I talked with all the salesmen that I worked with, on house policy, which is printed in the salesmen's Confidential; methods of collection.

Q. 45. You talked to him about the goods he was to sell?

A. That is talked about usually on the road and when selling the dealer.

Q. 46. Peabody testified (p. 676) in answer to Q. 31: "Q. There was no chief requisite that Mr. Hagaman impressed upon my mind any more than to make all the sales that I could." State whether or not that is true?

A. Mr. Peabody, like all our salesmen, was on a salary and commission basis. It is not necessary to call attention especially to selling goods, on account of our contract, which is co-operative.

Q. 47. What effect would the fact that he was selling partly on commission have upon his deal in making sales, in your mind?

Objected to as incompetent, immaterial, irrelevant, calling for mere matter of opinion, and not within the scope of the order of the Court under which this deposition is taken.

A. It would be stimulating.

Q. 48. Peabody testified (p. 685 X Q. 75) that he had on hi Warner list and was selling a preparation of iron, quinine an strychnine, and that he had instructions that it could be used whe another manufacturer's brand was specified. Please state whethe or not you ever gave him such instructions?

A. I never did. It would be ridiculous to do so.

654 Cross-examination.

By Mr. Bradford:

X Q. 49. You were present on yesterday, ready to testify?

A. Yes, sir.

X Q. 50. What time did you arrive at this office this morning?

A. Ten minutes past 11.

X Q. 51. You were in consultation with counsel for defendant Mr. Rawle and Mr. Baldwin, and also with Mr. G. A. Pfeiffer, durin the 25 minutes immediately prior to your coming into this room t testify, were you not?

A. Yes, sir.

X Q. 52. When was your last visit to Mr. Bell?

A. I do not remember.

X Q. 52. Have you any recollection whatever on the subject? Ca you approximate the date?

A. Within the last two years.

X Q. 53. Has it been within the last year?

A. I would say within the last two years.

X Q. 54. Can you say that it has not been within the last year?

A. I would say within the last two years.

X Q. 55. That is your best answer to my question?

A. My best answer as far as I can say, yes, sir.

X Q. 56. Is your recollection as clear on the other matters con cerning which you have testified as it is respecting the time of you last visit to Mr. Bell?

A. Just what matters do you refer to?

X Q. 57. The matters concerning which you have testified?

(X Q. 56 read.)

A. I would say it was as clear.

Adjourned to a date to be arranged between counsel.

655 *Depositions on Behalf of the Defendant in Surrebuttal Under the Order of the Court, Taken at the Office of Francis Rawle, Esq.,* 1004-07 *West End Trust Building, Philadelphia, Pa., at* 11.00 *o'clock a. m., July 5th,* 1917.

Present:

E. W. Bradford, Esq., for Plaintiff.
Francis Rawle, Esq., for Defendant.

Defendant's Testimony.

JOHN FIELDING WILSON, JR., a witness called on behalf of the defendant, having been duly sworn testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. John Fielding Wilson, Jr., age 27, Atlanta, Georgia.
Q. 2. Your occupation?
A. I am a traveling salesman for William R. Warner & Company, the defendant, and I have been in that capacity since March 13th, 1916, I think—I am pretty sure it is March 13th, 1916—yes, that is right. My headquarters are at Atlanta, Georgia, and I have the Northern three-fourths of Georgia. I am a registered graduate druggist under the laws of Georgia. I was registered—I don't remember the year—I think it was 1910. I was registered the year before I was married, which was 1911. I have been in the drug business all these years, except for a few months—well, in fact I have been in the retail drug business—I was with Brown-Bigelow for a while—it was just a few months. I have been in the retail drug business all my life—I have been in the business ever since I have done
656 any work, except since I have been on the road for William R. Warner & Company. Since I was registered I have been in the retail drug business all my life except a short time I was with Brown-Bigelow, an advertising firm. I was in the drug business in Jacob's Pharmacy and Elkins Drug Company, both at Atlanta.
Q. 3. Do you know Ralph E. McCorkle, a retail druggist in Atlanta, Georgia, and how long have you known him?
A. I know him, but only saw him once.
Q. 4. With what druggist was he connected?
A. Atkins Drug Company, Atlanta, Georgia. He was a partner—I don't know that—he must have been a partner. He did the buying the last time I called there.
Q. 5. How many calls have you made at that drug store since you went into the employ of William R. Warner & Company?
A. Two.
Q. 6. Who did the buying for this pharmacy at the first call?
A. His partner.
Q. 7. Who did the buying at the second call?
A. McCorkle.

Q. 8. Have you a clear recollection of that second call?

A. I have.

Q. 9. Did you have with you at that call your demonstration book with the labels of your line pasted in it?

A. I did.

Q. 10. State what was said between you and McCorkle at this interview?

A. Well, we first talked up patents, then went into pharmaceuticals. I opened the demonstration book and came to each item as it is pasted in the book with the price written in pencil up-
657 side down so I can read it standing on the opposite side of the counter. Each item I came to I demonstrated its formula and its merits pharmaceutically. When we came to A. B. S. & I. pills, of which the formula was on the label in the book, I called the druggist's attention to the formula, saying that it was a pill that was made right and similar in formula to Sharp & Dohme lapactic pill; Lilly's A. B. S. & I. and, in fact, nearly every manufacturer made an A. B. S. & I. pill, and that our pill was not only properly coated and made right, but our price was only 85 cents a thousand, much less than any other pill of the same formula on the market.

When I came to glycerole thymol compound I called the druggist's attention to the fact that this preparation was a preparation containing benzoic acid, which was very high at the time; that it was a preparation which was absolutely made right, and as the formula was on the label, he could see it. This item was similar to Glyco antisepicus alkaline U. S. P. also glycothymoline, Cress & Owens, and all other glycothymoline antiseptic solutions, and on account of the price of benzoic acid being high, we were very fortunate in having a very good price on this item, that it was guaranteed, the quality of the item, to be perfect.

We came to the item, or the label in the demonstration book, Fluid Viburnum, S. & H. I called the druggist's attention to the formula on the label, which he had in front of him in the demonstration book, and I said to him, "Doctor, this preparation is one of our best—this preparation which is very similar to Hayden's Viburnum compound, cramp-bark compounds and most all Viburnum Opulus made, differing from some of them in not containing skunk cabbage, skull cap and squawvine. This preparation, Doctor, we can offer you at a very good price. This is a preparation that we have had on the market for a number of years, and it has enjoyed a great amount of success with the druggists and physicians
658 on account of its therapeutic value. This preparation we can offer you at a price, considering its quality, a great deal lower than any other viburnum upon the market."

There were a lot of other items which we came to in the demonstration book, which were demonstrated in the same way. We came to the label, "Quin-Coco," and I called the druggist's attention to the formula. I had a sample in my case which I showed him. I said, "Doctor, this is a perfect syrup of quinine with chocolate which we have had on the market for a number of years. As you

know, there are lots of preparations on the market of chocolate quinine, some of them sour in hot weather and some of them don't stand up for different reasons. We have got a preparation that is absolutely perfect in manufacture, and will not sour in hot weather, and guaranteed to be one of the best chocolate quinines on the market, containing two grains of quinine sulphate to the average teaspoonful, under a perfect chocolate syrup, and in that manner or that way it is very similar to nearly every chocolate quinine on the market, of which there are quite a few: Merrill's; H. K. Wampole's chocolate quinine, and a number of chocolate quinines on the market, and all we can claim for this preparation is the fact that it contains just what the label says it does and is a preparation made exactly right and guaranteed." We went into a few other labels in the line, demonstrated in the same way, and finally ended it on patents.

The Doctor seemed to be interrupted during this interview a great deal; seemed to be very worried about something and was just running from pillar to post. I had to nail him in the corner to get him to stand for my demonstration, and finally, we closed the patents, and I suppose the whole interview took up about 30 minutes, of which time most of the time was spent on patent medicine; very little taken by pharmaceuticals—in fact I did not try to sell any pharmaceuticals; we merely went through the
659 line. That is just about the end of it.

Q. 11. Ralph E. McCorkle, when called as a witness on behalf of the plaintiff in this case (p. 1144) testified that you were at his store in the first part of December, 1916, and "offered Quin-Coco as a substitute for Coco-Quinine, stating that it had the same appearance and same formula as Coco-Quinine." State whether or not that is true?

A. I asked him——

Q. 12. In answer to question 2——

Mr. Bradford: I wish it noted that the witness started to answer by saying "I asked him," when he was interrupted by his counsel, when he was asked to state whether or not that was true.

The Witness: In part it is and in part it is not. I was there sometime in December. I don't remember the exact date, but as far as my offering Quin-Coco as a substitute for Coco-Quinine, I did not. I merely called his attention to the preparation and its formula and said that it was a similar item to Coco-Quinine and all other chocolate quinines on the market. My argument was that we had the best preparation as before said, or one of the best, as before said.

By Mr. Rawle:

Q. In the same answer McCorkle testified as follows: "He said it could be used for Coco-Quinine to fill calls for Coco-Quinine, to be used as a substitute for it." State whether or not that statement is true?

A. Is that in A.—I did not say it could be used for Coco-Quinine or to be used as a substitute for Coco-Quinine. I only said what I said in my sales demonstration as to its guarantees and its quality, and called his attention only to its formula and that it was a similar item to nearly every chocolate quinine on the market of which
660 there were quite a few, and my sales talk was that we had a price on chocolate quinine below anybody else on the market, but not at half price.

Q. State whether or not you said to McCorkle at that interview that your Quin-Coco could be used to fill calls for Coco-Quinine?

A. I did not.

Q. 13. McCorkle testified that you told him that Quin-Coco was just like Lilly's Coco-Quinine. State whether or not that is true?

A. I did not tell him it was just like, but I told him similar to Merrill's Choc-Quin and the rest of them in the fact that it contained two grains of quinine sulphate to the average teaspoonful, and that the chocolate syrup——

Q. 14. McCorkle testified that you asked him if he carried Coco-Quinine, and that you said, "Yes," and then you said——

The Witness: He said, "Yes."

Q. 15. McCorkle in answer to X Q. 41 testified:

"He asked if I carried Coco-Quinine. I said 'yes.' He said 'I have it in Quin-Coco, being the same stuff under different name.'"

State whether or not this statement of McCorkle's is true?

A. I did not ask him if he carried Coco-Quinine. I knew he carried Coco-Quinne, and there was a possibility of him carrying Merrill's Choc-Quin and Wampole's Chocolate Quinine and most any other chocolate quinine, because chocolate quinine is sold very extensively in the South in nearly every manufacturer's brand.

Q. 16. Please notice that you have not fully answered my question. (Question read as follows: "McCorkle in answer to X Q. 41 testified: 'He asked if I carried Coco-Quinine. I said, yes. He said, I have it in Quin-Coco, being the same stuff under a different
661 name.' State whether or not this statement of McCorkle's is true"?)

A. I did not tell him I had Coco-Quinine under a different name. In fact, we did not do all this talking about Coco-Quinine or Quin-Coco either. There was only a very few minutes taken to the item, merely me explaining to him that Quin-Coco was as a chocolate syrup, containing two grains of quinine sulphate to the average teaspoonful, a very fine preparation at a very good price, and the argument was closed.

Q. 17. McCorkle (R. D. Q. 45) testified that you said that Quin-Coco "was the same stuff as Coco-Quinine." Is this true?

A. It is not. I said it was a similar item to Coco-Quinine, as it was also similar to Merrill's Choc-Quin and Wampole's chocolate quinine and other chocolate quinines on the market, in the fact that it contained two grains of quinine sulphate to the teaspoonful in the chocolate syrup.

Q. 18. McCorkle (p. 1145, Q. 2) testified as follows:

"That is about all about Quin-Coco. He had several other preparations I could tell you about that he offered as substitutes."

Q. 3. What other preparations?

A. A fluid viburnum as substitute for Hayden's Viburnum compound, and also Glycerothymol as a substitute for Glycothymoline, and also A. B. & S. I. pills as substitute for Lapactic pills, Sharp & Dohme. In fact, his chief talk in selling his pharmaceuticals was they were offered as substitutes for other preparations recognized as standards."

State whether or not you offered McCorkle your items which he mentioned as substitutes for the corresponding items of other houses as he there states?

A. I did not. I only offered them as similar items, not only in the case of Fluid Viburnum Compound, similar to Hayden's
662 Viburnum Compound and very similar to other compounds of cramp-bark, and that our preparation being made right, in the case of Glycerolthymol and A. B. S. & I. pills, which these two were similar to Glyco Antiseptic Alkaline, Glycothymoline, and any A. B. S. & I. pills, similar to Lapactics and all other manufacturers A. B. S. & I., that we had the price on these items, and that was what I wanted to interest him in concerning these items, the price, considering their quality.

Q. 19. McCorkle testified (X Q. 25) that you asked him if he carried Hayden's Viburnum Compound and was told yes. State whether or not that is true?

A. I did not ask him if he carried Hayden's Viburnum Compound, because I knew there is not a druggist in the South who does not carry Hayden's Viburnum Compound and nearly all other standard cramp bark compounds.

Q. 20. McCorkle in the same answer testified that you showed him a label of Fluid Viburnum and said it was the same thing at a cheaper price. State whether or not that is true?

A. When we were going through the demonstration book in the beginning, when we came to the label, "Fluid Viburnum Compound" I said as heretofore that it was a preparation of cramp-bark similar to Hayden's Viburnum Compound and all other cramp-bark compounds on the market, with some exceptions as I before stated.

Q. 21. If you know, please state whether these various Viburnum compounds of the different houses carry their formula and their ingredients on the label?

A. Nearly all of them do.

Q. 22. State whether or not Warner's do and whether or not Hayden's do?

A. Hayden's give the alcoholic strength and the fact that it is on the physician's circular, that is the Compound Viburnum
663 Opulus cramp-bark. Most all other preparations give the complete strength of each item of the whole formula and they are all very similar.

Q. 23. State, if you know the fact, whether all or most of the glycerolthymol products and the A. B. S. & I. products of the various houses carry their ingredients on the label?

A. I do not know of a single A. B. S. & I. pill that does not carry its definite strength of each ingredient on the label, Lapactics accepted—Lapactics, I think all—they have it on all.

Q. 24. What about Glycerolthymol Compound?

A. It has its constituents on the labels, its strength; Glyco Antiseptic Alkaline, Sharp & Dohme preparation, all have their formula of the pill, and on the physicians' circular. They are all very similar.

Q. 25. Do you know L. S. James, a retail druggist of Atlanta, Georgia?

A. I do.

Q. 26. Do you remember calling on him some time in May, 1916, to solicit his trade?

A. I remember some time in May calling on him, calling in the store that he was working in.

Q. 27. Did he do the buying?

A. He did part of the buying.

Q. 28. Who did the rest?

A. Well, he did the buying in my line.

Q. 29. Will you state what passed between you when you called on L. S. James in May, 1916?

A. When I called on him in May, 1916, I was really not soliciting an order, when I was out there, in a way. I went in and we talked and joked about lots of different things, not concerning business for ten or fifteen minutes. Then, I asked him how his stock of pepsin was and he told me he had plenty. I had my sample case open and I called his attention to Fluid Viburnum Compound, mentioning at the time that it was a similar preparation to Hay-
664 den's Viburnum Compound and nearly all the compound cramp-bark compounds on the market, and that we had a fine price of $4.05 a gallon in 5 gallon assortment, with which he was familiar. I asked him if he ever used Quin-Coco. He said, "No, what is it?" I pulled out the sample and gave it to him. I said, "Read that label. It is a chocolate syrup containing two grains of quinine sulphate to the teaspoonful in a perfect chocolate medium, guaranteed not to sour, at a cracking good price. It is very similar to Lilly's Coco-Quinine, Wampole's Chocolate Quinine and Merrill's Choc-Quin, and most all of the preparations of chocolate quinine on the market, and we have got the price on this item." With that, he said, "We don't use it," and we closed the argument right there. We mentioned A. B. S. & I. pills and I said "There is a pill cheaper than any other A. B. S. & I. on the market. It is similar to every one of them in the fact that they are about the same formula. We have got Lilly beat in price, only 85 cents a thousand; we have got Sharp & Dohme beat on the same item, the Lapactic pill, to which our pill is similar in the fact that it is the same formula, and theirs is $1.10 a thousand." He says, "Well, we can't use them." I said, "Well, that will close it." We mentioned Glycerol Thymol Compound in the same way as I mentioned the other items, as being one of the

best solutions on the market. Then we went into patents and I said to him, "I suppose you have plenty of Sloan's Liniment," and he said he had. He said, "We get those from the other store, we buy jointly." Then we talked about old times that we had at school together. I wished him good luck and spoke of different things, not concerning business, and I said "Good-by," and left.

Q. 30. James testified on behalf of the plaintiff and said that you asked him if he sold Lilly's Coco-Quinine, "I told him we did, he said, 'well, I have it.'" State whether that is true?

665 A. It is not. I did not ask him if he sold Lilly's Coco-Quinine. They all sell Lilly's Coco-Quinine as well as other chocolate quinines made by other manufacturers as well as Quin-Coco, but I knew he never did sell Quin-Coco. I did not tell him I had Lilly's Coco-Quinine. That never came up. The only talk we had about Quin-Coco was when I gave him the bottle, as stated heretofore, and told him we had a fine preparation and he read the label, showing two grains of quinine sulphate to the teaspoonful in a perfect chocolate medium and had a fine price; that it was a similar item to all other chocolate quinines on the market.

Q. 31. James testified on page 1152, that you said "You can't tell it from Lilly's." State whether or not you said that.

A. I did not say that you could not tell it from Lilly's. He had the bottle in his hand and was looking at the preparation, and all that was said about it, as I said heretofore, was that it was a similar item as all the other chocolate quinines on the market, Lilly's, Merrill's, in the fact it contained two grains of quinine sulphate to the teaspoonful in a perfect chocolate medium and was a preparation guaranteed not to sour, and absolutely right in price. He said he could not use it and that closed the argument.

Q. 32. James testified as follows (p. 1152): "The next thing he asked me if we sold Lapactic pills. I told him we did." State whether or not that is true?

A. I did not ask him if he sold Lapactic pills. I knew he sold Lapactic pills.

Q. 33. State whether or not you told him that you sold Lapactic pills?

A. I did not tell him I sold Lapactic pills.

Q. 34. In the same answer James testified that you asked him if he sold Hayden's Viburnum Compound, and told him that you sold it. State whether or not that is true?

666 A. I did not tell him that I sold Hayden's Viburnum Compound.

Q. 35. James testified in the same answer that you said that you had the identical thing at a less price than he had to pay for Hayden's Viburnum Compound. State whether or not that is true?

A. I told him I had a similar item. I did not tell him I had an item identical to Hayden's.

Q. 36. James testified in the same answer that you told him that the Hayden's Viburnum people had entered suit against them [meaning Warner] and that Warner had won out in the case and found

his preparation to be identical with others. State whether or not that is true?

A. No, it is not true.

Q. 37. James testified as follows (p. 1154):

"X Q. 13. State all that he said to you about his pills that were just like Lapactic pills, S. & D.?

A. He said we might sell them on orders for Lapactic pills and that we could tell no difference in them."

State whether or not you said that.

A. As I said before all that I said about Lapactic pills was that they—he had a sample in his hand, that they contained aloin, belladonna, strychnine and ipecac; that they were made right, gelatine coating and that they were similar to every other A. B. S. & I. pill on the market and that we had the price—similar to Sharp & Dohme Lapactic and Lilly's A. B. S. & I.

Q. 38. State whether or not you told him he could sell your products on orders for Lapactic pills?

A. I did not.

Q. 39. James testified as follows (p. 1156):

"X Q. 38. Did he tell you that his Quin-Coco was a similar preparation to Lilly's Coco-Quinine?

A. Yes, and that it could be dispensed on orders for Coco-Quinine."

State whether or not you told him that?

667 A. I told him it was similar preparation to Coco-Quinine, but I did not mention anything about dispensing it for Coco-Quinine.

Cross-examination.

By Mr. Bradford:

X Q. 40. Who was Mr. McCorkle's partner, to whom you referred?

A. I don't know his name.

X Q. 41. You spoke of having a price for your Quin-Coco below the price of any other chocolate quinine preparation. Are you familiar with the prices of the other houses?

A. I am familiar with them to a certain extent—that is, not to be exact to the penny, but within ten or fifteen cents. The prices fluctuate.

X Q. 42. What is Lilly's price for Coco-Quinine?

A. I don't know their price today.

X Q. 43. What was it the time you sold McCorkle?

A. I don't remember the exact price at that time.

X Q. 44. What was the difference between his price and yours, or approximately the difference?

A. It would be approximately a dollar a gallon—I don't know his exact price.

X Q. 45. What was Merrill's price?

A. I don't know his exactly. We were approximately a dollar below anybody else on the market—at that time.

X Q. 46. Do you know what the Mulford prices are?

A. No, I do not.

X Q. 47. Do you know whether Mulford's prices were higher or lower than Lilly's?

A. Mulford's prices—I don't know—I don't know exactly. I don't know Mulford's prices at all. Wampole's price, I think, was $5.60, the last I heard of it, about six months before, or about eight months before that—$5.60 or $5.70, something like that.

668 X Q. 48. What Wampole are you referring to?

A. H. K. Wampole.

X Q. 49. Did McCorkle have these other preparations in his store?

A. I don't know. I did not notice his stock, or what he had in the store.

X Q. 50. You did know that he had Lilly's Coco-Quinine?

A. I did not know he had that. I surmised that he did, because all druggists have Lilly's Coco-Quinine in their house.

X Q. 51. I understood you to testify in your direct examination that you did not ask him if he had Coco-Quinine, you knew he carried it?

A. I surmised that he carried it—you notice, I said, because all druggists in the South carry it.

X Q. 52. In your talk with McCorkle you are certain you called his attention to the fact that Quin-Coco was not only similar to Lilly's Coco-Quinine, but to all other chocolate quinine preparations to which you have referred?

A. Yes, sir, I told him that Quin-Coco was a similar item to Coco-Quinine and all the other chocolate quinines, Merrill's Choc-Quin; Wampole's Chocolate Quinine, in the fact that it contained two grains of quinine sulphate to a teaspoonful with a perfect chocolate medium.

X Q. 53. What do you know about Merrill's Choc-Quin?

A. Nothing. I have heard it contains two grains of quinine sulphate to the teaspoonful of chocolate syrup.

X Q. 54. Did you ever examine it?

A. I have looked at it.

X Q. 55. Did you ever handle it?

A. I never dispensed it. I poured it out of a bottle and looked at it in a graduate.

669 X Q. 56. Did you ever compare it with Quin-Coco?

A. No. With Quin-Coco—yes, with Quin-Coco.

X Q. 57. What do you know about some of the other preparations that you have referred to—Wampole's?

A. I have seen Wampole's. It is a chocolate quinine containing two grains of quinine sulphate to the average teaspoonful, but most of what I saw did not stand up in hot weather, and that was one of my chief sales talks. One of my chief ways in getting Quin-Coco into the druggists is the fact that ours does not sour in hot weather, and was an absolutely perfect chocolate quinine.

X Q. 58. How many of these chocolate quinines can you enumerate?

A. To be exact, some of them have gone off the market, and some are still on the market. Merrill makes Choc-Quinine, if I am not misinformed it is still made—I am not sure; Mulford formerly made chocolate quinine and I think they still make it.

X Q. 59. You are in constant touch with the retail drug business?

A. Yes.

X Q. 60. Do you meet these preparations very often?

A. I do not go around in the prescription room to see what a man has. I sell a man right off the bat. I take my demonstration book and go through it, and when we come to a certain item and he says, "I am out of that." I say, "I would be mighty glad to sell you."

X Q. 61. You did know that druggists handled Lilly's Coco-Quinine, and you knew they handled Hayden's Viburnum Compound, and Sharp & Dohme make of pills, you seem to have had that in your mind, with reference to those items. How did you know they handled those items?

A. Because they are used extensively in the South. I know that. I know that if a druggist is in the drug business, he handles the things that are used.

670 X Q. 62. Is the kind of talk that you put up to McCorkle the same kind of talk that you put up to all druggists in seeking to sell them Quin-Coco?

A. As a rule, it is.

X Q. 63. You tell all of them that it is similar in value to Lilly's Coco-Quinine and to all of those other specific preparations?

A. It is similar in the fact that it contains two grains of quinine sulphate to the teaspoonful of syrup.

X Q. 64. Did you ever compare Quin-Coco with Lilly's Coco-Quinine in talking with the druggists?

A. No, sir, I never compared them. I have had a druggist ask me, "Is that Coco-Quinine?" I said, "No, sir, it is Quin-Coco. It is similar to Coco-Quinine, but it is not Coco-Quinine."

X Q. 65. And you never said to any druggist anywhere, at any time, that he could sell Quin-Coco on calls for Coco-Quinine?

A. No, sir.

X Q. 66. And you never told any druggist that Quin-Coco was the same thing in appearance and pharmaceutically and nobody could tell the difference?

A. No, I did not say that Quin-Coco was the same thing pharmaceutically. I said it was similar in appearance, similar in formula and similar pharmaceutically in the fact that the medicinal ingredients of both preparations was quinine sulphate and the proportions in both preparations were the same in the medicinal ingredients, and that it was the same item, and that, as well as all other chocolate quinines on the market are all used for the same purpose.

X Q. 67. You never referred to Lilly's Coco-Quinine without including all the other chocolate quinine preparations on the market?

A. Never without the rest. Sometimes I referred to the others before I referred to Coco-Quinine, and lots of times I never referred to Coco-Quinine at all. Lots of buyers in Georgia use Merrill's, physicians and druggists.

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X Q. 68. Have you ever said to any physician that Quin-Coco was the same thing as Coco-Quinine?

A. No, sir.

X Q. 69. Did you ever say to any physician or druggist or other customer that he could dispense Quin-Coco on calls or prescription for Coco-Quinine, and no one could tell the difference?

A. No, sir.

X Q. 70. Did you ever compare Quin-Coco with Coco-Quinine in seeking to make a sale to any customer?

A. No, sir.

By Mr. Rawle:

X Q. 71. You mean physically?

Mr. Bradford: Yes.

A. No, I never did.

By Mr. Bradford:

X Q. 72. You never took a bottle of Quin-Coco and poured some of it out and then took a bottle of Coco-Quinine and poured some of it out to demonstrate to a customer or a prospective customer that the two items were identical in appearance?

A. No, sir.

X Q. 73. Why did James say that he could not use the article?

A. I did not ask him why he could not use the item.

X Q. 74. Why did he say he could not use the Lapactic pills at such a low price?

A. He said he did not handle anything of the A. B. S. & I. formula—that ended the argument, didn't handle anything in that formula but Lapactics.

X Q. 75. What makes of this chocolate quinine preparation sour?

A. Well, I have seen Merrill's sour; I have seen Wam-

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pole's sour, but I have never known a bottle of Quin-Coco to sour. I have not had a chance to know it very long, but I never had a customer kick about it being sour.

X Q. 76. What makes don't stand up?

A. Well, I have seen Wampole's go bad, and I have seen some of Merrill's go bad.

X Q. 77. You seem to confine your answers chiefly to these two makes, and I infer from that that you are not very familiar with other makes. Is that true?

A. I am not very familiar with Coco-Quinine, only in the fact that it contains two grains of quinine sulphate. Its label says so, and I know its appearance when I see it. I very seldom mention Coco-Quinine to the druggist in saying that Quin-Coco is a similar item to Merrill's Choc-Quinine and the rest of them.

X Q. 78. Why do you say it is similar to Merrill's Choc-Quin?

A. It is similar.

X Q. 79. Is there any demand for Merrill's Choc-Quin?

A. There is.

X Q. 80. Where, and in what trade?

A. Among physicians and druggists both; in my territory there is some of it sold, because I have seen the time when I asked how his stock of Quin-Coco was and a man has said, "Well, I have replaced that with Choc-Quin, Merrill's, you are a little late. My physician don't care which he uses." That is the reason I know there is some there.

X Q. 81. Have you ever in seeking an order from a prospective customer for any one of the items referred to in your testimony, suggested to him that he might use it to substitute for one of the well known and advertised items?

A. I do not suggest substitution.

X Q. 82. And that is not a feature of your sales talks to your customers?

673 A. No, I do not suggest substitution in any item, because we have thousands of items that are initiative with us, our own items.

X Q. 83. You follow the instructions of the house in your sales talk, do you not?

A. Yes.

X Q. 84. And you received those instructions from whom?

A. I get the instructions from the little "Salesman's Confidential," which says that in no case offer any item to be used in place of another item or as a substitute of an item; never mention your competitor only in a nice way, if at all; try not to mention your competitor at all.

X Q. 85. That is a little printed book?

A. Yes, printed instructions to each salesman.

X Q. 86. In the back of the price list?

A. In the back of the "Salesman's Confidential" price list.

X Q. 87. Repeat again what is said on the subject just referred to?

A. Well, it says in part, as best I can remember—the gist of it is this: Not to mention your competitor if you can help it, in any way, and only use his name in good terms and speak well of him and never offer a preparation as a substitute to be used in place of any other preparation when that preparation is called for.

X Q. 88. When did you read this in the book?

A. About a year ago.

X Q. 89. From whom did you receive your instructions?

A. William R. Warner & Company—well, Mr. Pfeiffer or Mr. Hagaman.

X Q. 90. What I want to know is what member of the firm or what representative of the firm travelled with you and gave you instructions?

674 A. Nobody travelled with me. They gave me my grips.

X Q. 91. From whom did you receive your grips?

A. William R. Warner & Company, by express.

X Q. 92. You have had a representative of the house with you in Georgia?

A. Yes, Mr. Hagaman with me, the sales manager.

X Q. 93. Mr. Hagaman travelled with you. Why did you say a minute ago that you never had a representative of the house with you?

A. You asked me if I had a representative of the house with me when I first started out—if that is it, I have had a representative of the house with me. I had the sales manager with me twice or three times.

X Q. 94. Mr. Hagaman?

A. Yes.

X Q. 95. And in your sales methods and sales talks you followed his teachings?

A. He did not teach me. I did the selling and he watched me.

X Q. 96. Didn't he give you any instructions?

A. I was fortunate enough for him not to have to give me any instructions.

X Q. 97. Mr. Hagaman gave you no instructions at all?

A. Only in collecting accounts?

X Q. 98. He left you to your own resources as to selling the goods?

A. No, they gave me instructions in the "Salesman's Confidential."

X Q. 99. And you found the instructions there like you have just stated?

A. Yes, that was part of them—in part. Not all the instructions. I could not repeat them all, because there are three or four pages of them.

X Q. 100. You said that Mr. James did part of the buying, and later that he did all of the buying of your line. What did you mean by that?

675 A. That is, I meant that the patent buying is done at another store; two stores buying jointly. Certain items bought at the other store and then divided.

X Q. 101. Then Mr. James did all the buying at the particular store you referred to?

A. Yes, sir.

Examination closed.

12.30 p. m.

Mr. Rawle requests that the presence of Mr. F. R. Eldred, Chemist for Eli Lilly & Company, be noted.

GEORGE M. BERINGER, being recalled by request of counsel for plaintiff, counsel for defendant consenting, for further cross-examination on testimony heretofore given in this case on June 8th, 1917, in answer to cross-questions testifies as follows:

Further cross-examination.

By Mr. Bradford:

X Q. 134. In testifying in respect to the Bibbins experiments, and referring to the suspending material selected by him, you stated, in answer to X Q. 10 that the materials selected for these ten experiments were such as were commonly selected for their mechanical power of suspending, etc. Will you kindly explain what you intend to be understood by the phrase "mechanical power of suspending"?

A. What I mean by the phrase "mechanical power of suspension"—in suspension we have a distribution of a material throughout a mixture evenly. The material that does the suspending or holding up of the distributed material, we call the suspending agent or suspending material. The process of suspension in connection with which I used the word "mechanical" is practically a physical
676 division or distribution of the substance. In that sense of the word, I use the word "mechanical" meaning it was a physical sub-division or distribution of the article.

X Q. 135. How does chocolate suspend quinine?

A. By virtue of the constituents of chocolate, it has the property of making a mixture that will hold up distributed throughout it in suspension the quinine sulphate.

X Q. 136. Is this, then, your definition of the phrase "mechanical power of suspension"?

A. It would come within the definition of the word "suspension". Suspension is not a chemical process in this class of preparations; it is really a physical one.

X Q. 137. Then, chocolate suspends quinine in a mechanical way?

A. What you might call a physical or mechanical way. It is not a chemical change of quinine, no change of its condition chemically, but it is distributed through the medium by the upholding or suspending power of the chocolate. I think I should explain that the usual use of the word "Chocolate" means cocoa. It is used in the same sense that we have used "Chocolate" throughout these depositions.

X Q. 138. In answer to Q. 11 you stated, respecting these Bibbins experiments, that they are not of the same viscosity. How did you determine the viscosity of the respective specimens?

A. Viscosity was determined by the way in which it flowed and

poured from the bottles. The statement here was a comparative one.

X Q. 139. Do you mean, merely by observation?

A. Observation, yes, sir. There was no determination of the viscosity by a viscosimeter.

X Q. 140. In answer to Q. 17 you say that "The suspending material must produce a uniform, homogeneous liquid." Please define *by* what you mean — "Homogeneous liquid".

677 A. By "Homogeneous liquid", I mean uniform, of the same consistency throughout, and the same composition throughout the fluid.

X Q. 141. Does chocolate form a homogeneous liquid?

A. Chocolate forms a homogeneous suspension in these syrups.

X Q. 142. Is quinine sulphate suspended mechanically in Coco-Quinine?

A. Quinine sulphate is in suspension in Coco-Quinine. Quinine is not in solution, but is in a state of physical or mechanical distribution throughout the syrup.

X Q. 143. Do you use the terms "Suspension" and "Distribution" with different significations? If so, will you distinguish?

A. No, I am using that in a way in which to bring out a definition of the word "Suspension" as we are using it here in its pharmaceutical meaning. In its pharmaceutical meaning it is really distribution, or holding up in the distributive condition, the suspended material.

X Q. 144. In answer to Q. 21 you stated that the acid test showed each of these ten specimens was acid, in varying proportions. How did you determine the degree of acidity?

A. That was simply a comparative term, expressing the action on the litmus paper and the degree of the reaction on the litmus paper.

X Q. 145. In answer to Q. 23 you stated that there appeared to be separated portions of tragacanth mucilage and quince seed mucilage throughout the field. How did you identify the tragacanth and quince seed?

A. By their appearance under the microscope.

X Q. 146. You spoke of the tragacanth "continuing to swell and swell and make an uneven mucilage." How long does it continue to swell?

A. Tragacanth swells practically indefinitely. Insofar as 678 the pharmaceutical use is concerned, it is practically indefinite in its swelling.

X Q. 147. What acid is formed when tragacanth and quince seed decompose?

A. The acid is most likely acetic acid, but that was not determined.

X Q. 148. Does cane sugar solution ferment and become acid?

A. If there is an insufficiency of sugar present, it will do so.

X Q. 149. Will the cane sugar solution, of the concentration present in Coco-Quinine, ferment?

A. I have never observed it, if it fermented.

X Q. 150. Do all acids act upon the quinine as you have testified those present in the Bibbins sample acted?

A. All that I am acquainted with, as possibly present, or have tested, acted in the way that I have testified.

X Q. 151. In answer to Q. 26, referring to the sealed specimen No. 1, you stated that in this specimen you found further separation and unevenness of the preparation since your previous examination in January, and stated that this indicated some additional decomposition or changes. Why does the further separation indicate further decomposition?

A. If you have got some decomposition—in other words, if the preparation had remained as a thorough pharmaceutical preparation there would have been no increase in the precipitation and no increase in the amount of material deposited.

X Q. 152. Please define "Decomposition"?

A. The word "Decomposition", as used here, I think the best way to consider it, is as the equivalent of "Deterioration". Decomposition, as used chemically, might mean that several changes had taken place. Decomposition of quinine, for example; decomposition
of the suspended material or syrup, due to changes of a
679 chemical nature or of a fungus growth, or something of that kind.

X Q. 153. Could not separation be brought about by simply standing?

A. No, not in a perfect preparation; that is evidence of the imperfect suspension.

X Q. 154. In answer to Q. 27, respecting specimen No. 2, you refer to the separation of the tolu in the resinous masses on the sides of the bottle. How did you identify the tolu in this case?

A. No, the tolu was not identified, excepting by the physical character of the sediment. Under the microscope it gave evidence of being resinous. The tolu was the only resinous substance indicated on the label that could have produced this sediment shown by the microscope, and I concluded that this was due to the tolu. Again, it complied with similar precipitates of tolu that I had on other occasions under the microscope.

X Q. 155. Can you distinguish, under the microscope, tolu, tragacanth and Irish moss, without the formulas on the labels?

A. Accepting the statements on the label as true, my conclusion as to what the sediment shown under the microscope was, was guided according to these statements. In each case they have been confirmed by solutions and mixtures of various known substances, examined microscopically.

X Q. 156. What was the size of the gelatinous mass of mucilage referred to in your answer to Q. 27? I am referring particularly to the phrase near the end of the answer, "Separated gelatinous mass."

A. They were of varying sizes. Some were quite perceptible to the naked eye, and others required the microscope to bring them out clearly.

X Q. 157. You have also referred to the gelatin in larger globules?

A. Yes, sir.

X Q. 158. What was the size of the globules?

680 A. They varied, likewise, in size. Some were quite apparent in the mixture themselves. By simply allowing the mixture to flow over the glass, you could see the separated gelatin

portions. It required no examination under the microscope to distinguish the yellow separation of the gelatin.

X Q. 159. You have stated that this specimen was decidedly bitter. Was it more bitter than the Coco-Quinine?

A. Very decidedly.

X Q. 160. In answer to Q. 33 you stated that Acacia, when mixed with water, forms mucilage that is acid. What acid?

A. Acacia contains the normal acid constituents of its own peculiar composition, which are always present, so that it forms immediately an acid solution.

X Q. 161. Does Acacia form a true solution in water?

A. Acacia forms a rather peculiar solution in water. When sufficiently diluted, it will form a solution that rarely can be filtered; but the normal solutions of the gums are peculiar in the solutions that they form. They either stop or clot the filter, or make imperfectly clear solutions. Yet I look upon gum Acacia as forming a true solution, in the ordinary pharmaceutical sense.

X Q. 162. The term "Colloidal" has been used in the previous testimony. Please define the meaning of that term?

A. The word "Colloidal" is used to designate substances which are without definite crystalline form.

X Q. 163. What is a colloidal solution?

A. The words "Colloidal solution," are used to indicate the solution in water of colloidal substances, like the metals, silver or gold.

X Q. 164. Is an Acacia solution a colloidal solution?

A. Not in the same sense.

X Q. 165. In answer to Q. 31 you stated that Acacia is very prone to undergo fermentation, and in this fermentation, an in-
681 creased amount of acid is produced. Is this increase of acid the same acid as referred to in Q. 33?

A. In my opinion, not. That is an acid produced by decomposition.

X Q. 166. What is the acid?

A. Most likely, acetic acid.

X Q. 167. What are the characteristics of dextrine? I have particular reference to your use of the term in your answer to Q. 40, where you say, speaking of the Bibbins Specimen No. 4, "Having flavor and characteristics of dextrine."

A. Do you mean the physical characteristics?

X Q. 168. I mean the characteristics you had in mind when you testified?

A. I said "Having the flavor and characteristics of dextrine." Dextrine has a peculiar, semi-musty flavor, like the ordinary commercial mucilage itself, because that is what much of the commercial mucilage is made of; a musty, peculiar, starchy flavor; and then, under the microscope, this sample showed a partly altered starch grain, which confirmed the presence of dextrine. That is the reason I used that remark there of "The characteristics of dextrine."

X Q. 169. In answer to Q. 41 you stated that coffee contains caffeotannic acid. Is that form of tannic acid a tannin?

A. It has some of the properties of tannic acid. But the words "Tannic acid" we usually use to refer to gallo-tannic acid.

X Q. 170. In the same answer you stated, "I have no doubt that part of that sediment is due to the form of the quinine precipitated out in the form of tannate." How did you determine that it had precipitated out in the form of tannin?

A. I am expressing an opinion there, and not a determination. That opinion is based upon the fact that caffeo-tannic acid was present, and the established fact that quinine is precipitated in
682 the presence of tannic acid.

X Q. 171. Is Quinine Tannate soluble in acids?

A. Quinine Tannate is not very soluble excepting in the strong acids.

X Q. 172. In answer to Q. 43 you said in reference to Bibbins Specimen No. 4, that you considered it "Unstable," &c. Why did you consider this specimen unstable?

A. Because of the sedimentation and lack of palatability, and the changes which the preparation had undergone, I considered it unstable and unmarketable.

X Q. 172*a*. What changes would take place in that preparation?

A. The change there indicated a bitter taste, with the presence of acid and a precipitation of sulphate quinine.

X Q. 173. Referring to "Beringer's Sketches of microscopic appearance," how were these sketches made?

A. They were pen and ink sketches made—a free-hand sketch, while looking through the microscope. That is, when the sketches were made.

X Q. 174. Can you distinguish the mucilage of quince seed, from the mucilage of Irish moss, under the microscope?

A. Yes, sir.

X Q. 175. In what way?

A. Irish moss is larger and more gelatinous and gluey in character.

X Q. 176. In answer to Q. 47 you stated that "Part of the quinine is separated out, as well as part of the mucilaginous material." How did you determine this?

A. The portions of the sediment from the sides of the bottle, where the sediments were shown, were taken out and examined under the microscope, to determine the character of the sedimentation.

X Q. 177. In answer to Q. 53 you stated, in respect to specimen No. 5, that it was less viscous, and would not hold the quinine
683 in suspension satisfactorily." Is this sample less viscous than the Coco-Quinine or the Quin-Coco?

A. Yes, sir.

X Q. 178. Did you determine its viscosity in the same manner as stated before?

A. The viscosity was not determined, excepting by comparative or physical appearance; simply by a matter of judgment, by comparison.

X Q. 179. Is there not some way to express the degree of viscosity numerically?

A. Yes, there is an instrument and method of doing that, which might have been used if I had thought of it as needed in this matter.

X Q. 180. What do you mean by "Thorough miscibility" as used in the answer to Q. 55?

A. The words "Thorough miscibility," as used there, were to explain the homogeneity. What I meant to say was the definite distribution or a homogeneous mixture.

X Q. 181. Is chocolate such a substance?

A. Chocolate itself, do you mean?

X Q. 182. Yes.

A. Chocolate is either a paste, or in a powdered form.

X Q. 183. Is chocolate thoroughly miscible?

A. It can be thoroughly mixed under proper conditions.

X Q. 184. In answer to Q. 56 you say that the medicinal ingredients should be equally and thoroughly distributed. Do you mean by this to state that the quinine in the sample under discussion is not thoroughly and equally distributed?

A. My answer to question 46 is a general answer, referring to all the specimens, and not to any single one.

X Q. 185. Then, I understand, that you did not find the quinine thoroughly and equally distributed in any of the ten samples?

684 A. The quinine was not evenly and thoroughly distributed in any of these samples?

X Q. 186. How did you determine this?

A. By an examination under the microscope, to see the unevenness in the quinine crystals, in the different fields.

X Q. 187. How did you determine the unevenness in the different fields?

A. Under the same magnification we would have, naturally, the same number of quinine crystals.

X Q. 188. Did you count the quinine crystals in the respective fields?

A. I did in a number of them.

X Q. 189. Which ones?

A. Every one of the examples that I examined, I made a number of mounts, and examined the different fields.

X Q. 190. Can you give the figures?

—. As I did not preserve the figures, I did not expect the question would be asked, and did not preserve them.

X Q. 191. Is quinine equally and thoroughly distributed in Coco-Quinine?

A. In the number of examinations that I have made of the Coco-Quinine, there appears to be a uniform distribution of the crystals of quinine sulphate.

X Q. 192. In answer to Q. 59, referring to specimen No. 6, you stated that this specimen was of uneven thickness, which showed separation of the gelatinous-like masses. What were these gelatinous-like masses?

A. They appear to be Irish moss jelly.

X Q. 193. In answer to Q. 66, referring to the Bibbin sample No. 7, you stated that the principal objection was the great acidity and bitterness. Was this sample more bitter than the others?

A. Yes, sir, that sample was decidedly more bitter than some of the others.

X Q. 194. Was it more acid than the others?

685 A. It was.

X Q. 195. In answer to Q. 70, referring to sample No. 8, you stated that starch is not a good suspending material, and that it is very prone to decomposition by hydrolysis. How do you distinguish between decomposition, hydrolysis and fermentation?

A. Fermentation would be one of the methods of decomposition. The production of a fungus growth would be another decomposition that might take place in starch. In other words, "hydrolysis," as used there, refers to the change which starch undergoes very rapidly in pasty forms to certain changes by which dextrose is formed.

X Q. 196. Which takes place first?

A. That would depend on the conditions which existed. I could not tell. It would depend on the temperature, and other conditions which would take place first.

X Q. 197. In answer to Q. 72 you used the word "Glueyness." Please explain the meaning you intended by that word, used in this connection?

A. The glue-like characteristic, both as to the taste, as to the consistency, and stick*y*ness, and the consistency of the mixture. The odor, the taste, and the stick*y*ness, all the glue-like characteristics.

X Q. 198. In answer to Q. 74, referring to specimen No. 10 you stated that "Under the microscope it showed broken-down quince seed mucilage." What do you mean by the term "Broken down," as used in that connection?

A. Separated—lack of evenness of separation.

X Q. 199. Is this the same condition in which you saw the quince seed in the other specimens?

A. In the same separation.

X Q. 200. In answer to Q. 83, referring to Quin-Coco and Coco-Quinine, you stated that "They are neutral, that is, free from acidity." How did you determine them to be neutral?

686 A. The same test that was applied to those two separations that I applied to these ten samples, to determine their acidity or the absence of acidity.

X Q. 201. After a bottle of Quin-Coco, and a bottle of Coco-Quinine have been standing for a long time, is there any difference in the quinine content at the top, and at the bottom?

A. I have not made such a determination.

X Q. 202. Does chocolate contain tannic acid?

A. There may be present in cocoas a minute quantity of an astringent-like principle, similar to a tannin, but the quantity is very small.

X Q. 203. Is that a tannin?

A. It is so classified.

X Q. 204. Do not the so-called natural colors tend to precipitate more than the coal tar colors?

A. That would depend entirely on the accompanying materials with which they were associated.

X Q. 205. Are not some of the natural colors identical with the coal tar colors?

A. Snythetic colors have been produced, wh-ch are stated to be identical, and are so considered, with the natural colors; as, for example, synthetic indigo, and alizarine, used as dyeing materials.

X Q. 206. Have not certain coal tar colors been shown to be harmless?

A. There are certain coal tar colors that are considered harmless, and they are admitted by the decisions of the Agricultural Department to be used as permitted colors in foods.

X Q. 207. Is the napthol yellow, "referred to by Allen," quoted in your deposition, the same as referred to by Bibbins?

A. I do not understand it as such.

X Q. 208. What is the difference?

A. That is not quite clear in my mind at the present time. I did not look into Mr. Bibbins' statement carefully enough to express an opinion as to the chemical difference.

687 X Q. 209. What are the conditions under which tragacanth can be used in solution as a suspending agent?

A. Tragacanth has been used as a suspending agent for oils, like cod liver oil emulsions.

X Q. 210. What are the conditions under which tragacanth can be used in solution as a suspending agent?

A. I do not consider it advisable as a suspending agent where a perfect homogeneous preparation of an insoluble or only slightly soluble substance is to be demonstrated, because of its own lack of forming a homogeneous mixture or solution.

X Q. 211. What are the conditions under which tragacanth will make a clear solution?

A. Tragacanth will make a clear solution in the presence of certain alkaline or chemical salts, such as borax, which would not be admissible to be used in such medicinal preparations.

X Q. 212. Does chocolate contain starch?

A. Chocolate does contain some starch, a peculiar starch of its own.

X Q. 213. How does this starch differ from other starches?

A. Naturally, every starch-bearing product has a starch that is peculiar to itself, and varies from other starches, just as corn starch varies from wheat starch, you might say, as an example. They vary in shape, in size, in texture, and in the character of their coatings.

X Q. 214. Do the different starches have the same chemical composition?

A. That is, to my mind, a mooted question. It is commonly considered that they are chemically of the same composition.

X Q. 215. In answer to Q. 95 you stated that it was objectionable

to use two or more articles, where one will answer the same purpose. Does not chocolate itself consist of several substances?

A. Yes, sir, but the word "Substance" is used there in a different way from what I used it. Chocolate does contain several
688 ingredients, which are natural constituents of chocolate. I used the words "Different substances," to relate to different articles entirely, and not to the constituents of the same one article.

X Q. 216. You also mentioned that there are well known mixtures and oils that become rancid much more quickly than the pure oils themselves. What mixtures do you refer to?

A. Adulterated olive oil, and almond oil become rancid very quickly.

X Q. 217. Adulterated with what?

A. With lard oil, and cotton-seed oil, or other common adulterants.

X Q. 218. In answer to Q. 101, speaking of the microscope which you used, you stated that the magnification was about 500 times. Do you mean 500 diameters?

A. I meant that the sketches shown here were magnified about 500 diameters. The magnification was about 500 diameters in the sketches that I made.

X Q. 219. What power of objective, and eye-piece, were used to obtain this magnification?

A. I was using an $\frac{1}{8}$-inch objective, and most of the time a one-inch eye-piece.

X Q. 220. Were the same used in all of the experiments?

A. The same microscope, and the appliances, were used in all the examinations.

X Q. 221. How long a period of time did you devote to these examinations?

A. Off and on, I spent, possibly, a month on this work.

X Q. 222. How many hours of time would you say were actually devoted to the examination?

A. I made no calculation of the hours. I have worked sometimes from 8 o'clock in the evening until 1 o'clock in the morning.

X Q. 223. Is there tannin in chocolate?

689 A. In chocolate there is an astringent principle, which is classified with the tannins. In my opinion, the trace of the tannin-like principle, present in the commercial cocoas or chocolates, is due largely to the admixture of portions of the shells which may be accidentally or otherwise present. In that hull you have a tannic acid principle. It is like a peanut. You take a peanut in the skin coating there will be tannin, and in the outer shell coating there is some more.

X Q. 224. You speak about certain acids that might be expected to be present in these Bibbins' samples. Can you state what acids you refer to?

A. The acids which would result from a decomposition of the various suspended materials, which were mostly mucilages of acacia, quince seed, tragacanth, etc. The acid which most commonly re-

sults from these decompositions in acetic acid, but at times other organic acids do result from such decompositions.

Redirect examination.

By Mr. Rawle:

R. D. Q. 225. Please explain by what appearance in the litmus paper, used as a test for acidity, the degree of acidity is more or less quickly and fully shown?

A. By the extent of the change in the color from blue to red, and the promptness with which this change takes place.

R. D. Q. 226. What is the natural color of litmus paper, and what effect on its color has an acid?

A. The normal litmus paper is blue, and acid changes this color to a red, the shade of red being increased with the strength of the acid.

The witness, having read his deposition, desires to correct the answer X Q. 172, so as to read thus: "The changes are all indicated by a bitter taste, the presence of acid, and a precipitation."

Examination closed.

690 Mr. Rawle: Counsel for defendant asks Counsel for plaintiff if he will consent to a stipulation respecting the testimony of James W. Wilkins, one of defendant's witnesses, as follows:

On acount of the expense of bringing James W. Wilkins from New Orleans to Philadelphia to be re-examined as a witness for defendant in surrebuttal under the order of the Court, Counsel for both parties stipulate that James W. Wilkins, if recalled as a witness, would deny that he ever said to Elzie H. White, a witness for plaintiff, or in his presence, that he, Wilkins, could sell Quin-Coco to John F. Whiteley to be used as Coco-Quinine, and that he was selling Quin-Coco only to the trade in general for the Coco-Quinine preparation, and that he the said Whiteley or the said White could use Quin-Coco for Coco-Quinine, and that he explained to said Whiteley and in the presence of said White that Quin-Coco was being used and sold to the trade as Coco-Quinine and was being used as such; and that Quin-Coco was being sold and successfully used as Coco-Quinine ; and that he assured Whiteley in the presence of Elzie H. White that he, Whiteley, could sell Quin-Coco as Coco-Quinine; and that he ever assured Elzie H. White that Quin-Coco was the same preparation and sold and used as Coco-Quinine; and that he would deny that he ever said to the said White or in his presence anything to the above effect or any part thereof.

Also that the said James W. Wilkins, if recalled as a witness, would deny that he ever said to William G. Walker, a drug clerk in the employ of the Dodson Drug Store in Dodson, Louisiana, or in his presence, that Quin-Coco could be dispensed on a doctor's prescription when Coco-Quinine was specified and was being dispensed all over the country in this way as Coco-Quinine and would,

if so recalled, deny that he ever said to the said Walker anything to the above effect, or any part thereof, and would testify, if recalled, that the sworn statements in the testimony of the
691 said White and the said Walker above referred to were entirely untrue.

It is further stipulated that this stipulation may be used at final hearing as part of the proofs in the case.

Mr. Bradford: Counsel for plaintiff on having the above proposed stipulation submitted to him for approval, consents that counsel for defendant may make the same a part of the record, as expressing what he (counsel for defendant) has reason to believe said James W. Wilkins would testify to if called as a witness for defendant; he further states that he has no reason to believe, judging by the testimony given by defendant's other employees and by the testimony given by said Wilkins when previously called as a witness for defendant, that he (said Wilkins) would not deny the facts testified to by Elzie H. White and Wm. G. Walker, witnesses for plaintiff; and to this extent and for these reasons he (counsel for plaintiff) agrees that the proposed stipulation may be made of record but does not agree that any of the statements therein are statements of fact, or true; or that they in any respect are sufficient to overcome the testimony of said White and Walker.

Mr. Rawle: Plaintiff's counsel is requested to stipulate, but only for the purposes of this case, the following to be facts:

1. That the average number of traveling drug salesmen employed by defendant during each of the specified years from July, 1908, to Dec. 31, 1916, was as follows:

	St. Louis office.	Philadelphia office.
1908, from July	21	21
1909	33	30
1910	37	33
1911	44	37
1912	47	39
1913	43	36
1914	46	31
1915	40	32
1916	46	33

692 2. That the total number of individual traveling drug salesmen (including the above average sales force (employed by defendant in each year from July, 1908, to December 31, 1916, was as follows:

	St. Louis office.	Philadelphia office.
1908, from July	21	21
1909	37	48
1910	55	61
1911	48	50
1912	65	59
1913	70	57
1914	55	45
1915	56	38
1916	54	43

3. That the total number of all individuals employed by defendant as traveling drug salesmen during said period was:

St. Louis office	150
Philadelphia office	163

of whom 104 were discontinued, at various times in the period specified, at the St. Louis office, leaving 46 salesmen on December 31, 1916; and 130 were discontinued at various times at the Philadelphia office, leaving 33 salesmen on December 31, 1916.

4. That Demonstration Books containing copies of defendant's labels, and such as are referred to by several of defendant's witnesses, were a usual part of the selling equipment of defendant's salesmen. Copies are offered in evidence marked Defendant's Demonstration Book No. 1 and No. 2.

5. That Charles A. Noiret who testified in this case on behalf of the plaintiff on July 12, 1915 (P. R. p. 628), left the employ of H. K. Mulford Company on December 14, 1914, and that in September, 1915, he entered the employ of Eli Lilly & Company, the plaintiff, as a Drug Salesman, through its New Orleans Branch
693 & 694 Office and remained in that employment until some time in December, 1915. He was not under the direct supervision of the Home Office at any time.

Mr. Bradford: Counsel for plaintiff is willing to stipulate that the statements recited in paragraphs 1, 2, 3 and 4 would be made by one of defendant's officers or employees if called as a witness and that they may be made of record to have the same force and effect as if so introduced, but subject to the objection that they are immaterial, irrelevant and incompetent as evidence; and the same objection is made to the introduction of the Demonstration Books as exhibits.

As to the statements in paragraph 5 respecting Charles A. Noiret, Counsel for defendant is advised that inquiry at the home office of plaintiff in Indianapolis shows that the statements as to Noiret's employment by plaintiff are correct, and he agrees that they may be taken herein as facts, upon the statement of H. K. Mulford & Co. as to their employment of Noiret, the above statement may be taken

herein as if testified to by a competent witness having knowledge of the facts.

Counsel stipulate that the signatures of witnesses to their typewritten deposition are waived.

Examination closed.

695 *Opinion upon Final Hearing upon Pleadings and Proofs.*

(Filed September 29, 1920.)

THOMPSON, *J.:*

The plaintiff is a corporation engaged, at Indianapolis, Indiana, in the manufacture and sale of pharmaceutical and chemical products. It employs a large staff of traveling sales agents in selling its product to druggists and physicians throughout the United States. In 1899 it commenced the manufacture and sale of a liquid preparation known as Coco-Quinine. It contains quinine as its therapeutic agent, and is designed for the administration of quinine sulphate in cases where the liquid form is preferred to capsules or pills. Yerba-Santa is used in the compound to disguise the bitterness of the quinine, and chocolate syrup is used for a coloring and flavoring medium. The formula is not patented and the preparation is not the subject of a registered trade-mark. It is put up in bottles with a label with the word "Lilly" in red script on a green background. The plaintiff, through its sales agents, was successful in introducing it and establishing extensive sale for it among pharmacists and dispensing physicians, that is, those who do not prescribe for their patients but supply medicine from their own stock. The sales by druggists were upon physicians' presriptions and to customers who inquired for chocolate-quinine or Coco-Quinine.

The defendant is a Pennsylvania corporation organized in 1908 to take over the long-established business of William R. Warner & Company, pharmaceutical and chemical manufacturers, and is chiefly owned and managed by Mr. Henry Pfeiffer, Mr. Gustavus A. Pfeiffer and Mr. G. D. Merner, through holdings of its stock,
and they are also the owners of the Pfeiffer Chemical Com-
696 pany and Searle & Hereth Company. For the purposes of this suit, the united control and the close union in business of these three companies is not disputed.

In 1906 the Pfeiffer Chemical Company put upon the market a product known as "Quin-Coco." This product is practically identical with the plaintiff's Coco-Quinine. It consists of quinine with yerba santa, vannilin, saccharin and coca, with a syrup base.

Since the organization of the defendant company in 1908, Quin-Coco has been manufactured by the Searle & Hereth Company, and distributed solely by the defendant, the Warner Company.

The defendant has since its organization through its sales agents distributed and sold Quin-Coco as a substitute for Coco-Quinine,

It has not attempted to sell it as Coco-Quinine, but has offered it and solicited orders for it from druggists as a substitute for Coco-Quinine and identical to it in therapeutic value. It is not established nor is it claimed that it is known to consumers as a product of the Eli Lilly & Company. The use of chocolate to disguise quinine in tablet and lozenge form and the use of yerba santa in the compound to disguise the bitterness of the quinine was not new when the plaintiff made its preparation in liquid form, nor was the plaintiff the first discoverer of the use of chocolate for disguising quinine in liquid form. First in tablets or lozenges and later in liquid form the combination was known long prior to the manufacture of the plaintiff's preparation. The plaintiff's bill is based upon the ground that it originated the product and distinguished and identified it as its product by the color and flavor of chocolate, which is not essential to its therapeutic value, the chocolate being used for the sole purpose of making the remedy known by color and taste. It claims that chocolate is but one of many in-
697 gredients which could be used for this purpose, but by no means the sole medium. It claims that Coco-Quinine was the first successful preparation commercially known to physicians and druggists; that by legitimate business methods the plaintiff made it a distinctive and desired product throughout the United States and won for it a high reputation with physicians, druggists and the public in general; that into the market created by the plaintiff at great expense and effort, the defendant introduced Quin-Coco by selling in that market a counterfeit of Coco-Quinine under name resembling that used by the plaintiff for its genuine article; that the defendant's product was sold as a substitute for plaintiff's by unfair and dishonest means, supplying the counterfeit where the genuine was desired and called for, with the result that in numerous instances druggists filed prescriptions calling for Coco-Quinine with Quin-Coco and sold Quin-Coco when they knew Coco-Quinine was desired. It is claimed that by these alleged deceptive and dishonest means the defendant acquired trade which had been built up by the efforts and at the expense of the plaintiff.

The plaintiff seeks an injunction restraining the defendant from the further manufacture and sale of a liquid preparation in the administration of quinine or quinine in liquid form colored or flavored with cocoa. It further wants an injunction restraining the defendant from the use of the name Quin-Coco as a name designating such product on the ground that it is a mere reversal of the words comprising the name long used by the plaintiff for designating its product Coco-Quinine.

The effect of issuing an injunction would be to grant the plaintiff a monopoly, perpetual in effect, of the right to manufacture and sell a liquid preparation containing quinine with its bitterness dis-
guised by the use of yerba santa, or some similar agent, if
698 any exists, in combination with cocoa, which is chocolate less its fatty components, and which gives the preparation a distinctive color and flavor. The defendant contends that it can

lawfully make and sell a substitute for any medicinal preparation, provided it does not do anything which would constitute "passing off" its product for that of another. The plaintiff, while conceding that it has no exclusive right to the formula unless patented and conceding further that it has no trade-mark, and that the defendant has not attempted to simulate the label upon its package, contends that because of the circumstance that after its formula for a liquid preparation of quinine and yerba santa was satisfactorily worked out, it adopted the use of chocolate so as to give the preparation a distinctive color and flavor, which would identify it as the plaintiff's product, the public was, through unfair means, deceived through the defendant's imitation containing the same color and flavor.

The plaintiff cites the case of Coco-Cola Co. vs. Gay-Ola Co., 200 Fed. 720, and the authorities on which that decision is based, to sustain its position that the defendant may not use chocolate or cocoa for coloring the product because the plaintiff has used it to give its product a distinctive color and flavor. This contention, if the facts were such as to show acts on the part of the defendant to induce dealers to deceive the consumer into believing that it was getting the plaintiff's product, would have support in the Gay-Ola case if the function of the chocolate were merely to give a disinctive color. The Gay-Ola product was colored by the use of caramel and, as stated by the Court:

"There is here no claim that caramel serves any other purpose in either compound, except merely to give color, and saying that it is one of the 'component elements,' as one of the witnesses does, 699 is saying nothing more. It follows that the adoption, not only of caramel, but of the selected amount of caramel, was for the main and primary purpose of making the two articles look just alike. In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers."

The plaintiff, however, must go further than debarring the defendant from the use of chocolate as coloring matter. It is alleged in the bill and proved in the case, and is a matter of common knowledge, which perhaps requires no proof, that the flavor of chocolate is obtainable from no other substance. The plaintiff must therefore debar the defendant not only from the use of the color, but from the use of the flavor of chocolate. In support of this proposition, the plaintiff has not cited any authorities, and I think the obvious reason is that there are none, to the effect that flavors, and particularly such a distinctive flavor as chocolate, may, because adopted by the plaintiff, be monopolized. While the plaintiff has shown that other liquid preparations of quinine with the bitterness disguised and flavor added may be made, it has not shown that the chocolate flavor may be obtained by any other means than by the use of chocolate, or that chocolate flavor may be used without producing the chocolate color in the liquid. While the distinctive flavor of chocolate is a matter of common knowledge, it is equally a matter of common knowledge

that it is a flavor which appeals to the palate and taste of people almost universally.

The plaintiff is confronted at first with this proposition: That it has no exclusive right to the use of its formula. Its only right is to prevent anyone from obtaining or using it through a breach of trust or contract, and anyone that came honestly to the knowl-
700 edge of it could use it without the plaintiff's permission and against its will.

Chadwick vs. Covell, 151 Mass. 190.

The ingredients of which its product was composed are of such common every-day use that the plaintiff cannot be held to have the right to prevent others from using the same combination as used by it, and the preparation may be used and manufactured by anyone who in good faith acquires knowledge of its composition and such person may publish the fact that he has made it in accordance with the original formula.

Hostetter vs. Fries, 17 Fed. 620.

Upon the right of the plaintiff to appropriate, through its appropriation of the color, the flavor of chocolate, the case of Wrigley & Company vs. Grove Company, 183 Fed. 99, is in point. The Court said in the case:

"The right to make and sell chewing gum out of ingredients not deleterious to health and to flavor it with wintergreen, vanilla, strawberry, pineapple, spearmint or any other flavoring material, is inherent in every citizen, whether a corporation or an individual. Having a right to make and sell gum, it follows, as a necessary corollary, that he has the right to describe it. The flavor is a very important factor, regarding which the public desires to be informed and which the seller has a clear right to communicate, if, indeed, he is not under obligation to do so. If his gum be flavored with spearmint, for instance, he cannot inform the public of this without using the word 'Spearmint,' and to deprive him of that privilege is to interfere with his rights. Spearmint is a descriptive term as applied to chewing gum and no one can deprive a manufacturer of its use or appropriate it as a trade-mark."

701 While that case was upon the question of the right to appropriate the word "Spearmint" as a trade-mark, it being the name of a well-known flavor, the denial of the right is based upon the right of any manufacturer to flavor his product with whatever flavoring material he desires.

To the same effect is Larson, Jr. Co. vs. Lamont, 257 Fed. 270, where the question was the right to the exclusive use of the word "Pep-O-Mint," which was denied upon the ground that it was the mere indication of a flavor, the use of which was open to the public generally.

It follows, therefore, that the right of the defendant to use chocolate flavor carries with it a right to use that color unless it should

appear, which it does not, that the flavor could be used without the color.

The effect of the plaintiff's contention would be that the consumer who asks for chocolate quinine, cocoa and quinine, or quinine flavored with cocoa or chocolate, cannot have his remedy with the desired flavor unless he purchases the plaintiff's Coco-Quinine, because one of the incidents of the flavor is that it carries with it a color in which the plaintiff has a monopoly to indicate the derivation of its product. If, conceding that the chocolate has no therapeutic value, although it is contended by the defendant that it has a peculiar value as a physical mixer for the quinine, there can be no exclusive use of the flavor, it follows that the plaintiff cannot acquire an exclusive use of it because of the incident of color under the claim that that marks the derivation of its product.

We come now to the right of the defendant to use the name Quin-Coco as affected by its similarity to that of the plaintiff's product, Coco-Quinine. It is too well settled to require citation of authorities that a mere descriptive name cannot be monopolized. What
702 the plaintiff has for sale is a mixture of quinine and chocolate or cocoa and the name discloses that fact. It does nothing more. It is not an arbitrary name, disclosing the derivation of the product from the plaintiff, and the defendant, therefore, has the right to use a combination indicating the same facts in relation to its product by use of the name Quin-Coco. The combination of quinine and chocolate was known in the books and catalogues under various names containing the same significance for years before the plaintiff adopted its name, and there is proof in the case of a number of products bearing names indicating the use of the same materials in pharmaceutical preparations for the past ten years.

The plaintiff does not contend and there is no evidence to show any direct "passing off" of the defendant's product for that of the plaintiff. The plaintiff contends that the evidence shows that the defendant's agents in selling Quin-Coco as a substitute for Coco-Quinine used unfair selling methods in suggesting to druggists that because of the similarity of the products in therapeutic value and appearance, it could be passed off by the druggist to the consumer who asked for Coco-Quinine, and could also be substituted by the druggist in prescriptions which called for Coco-Quinine, thus by suggestion inducing the druggist to pass off Quin-Coco for Quinine. And it is contended that there is sufficient evidence to establish the fact that druggists have, through these suggestions of defendant's salesmen, actually passed it off upon the public and physicians. The evidence upon this point has been carefully examined. In a charge of this nature, the testimony could be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses
703 upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the

defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions.

The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested the alleged unfair selling methods on the part of its salesmen. That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales-manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods.

It is held that the defendant had a lawful right to reproduce the plaintiff's preparation; to tell the plaintiff's customers that it was essentially the same as the plaintiff's product in composition and therapeutic effects; and to sell it as a substitute for the plaintiff's product.

Saxlehner vs. Wagner, 216 U. S. 375;
De Long Hook & Eye Co. vs. American Pin Co., 200 Fed. 66;
Viavi Co. vs. Vimedia Co., 245 Fed. 289;
704 Singer Mfg. Co. vs. Loog, L. R. 8 Appeal Cases 15;
Singer Mfg. Co. vs. June Mfg. Co., 163 U. S. 169.

The plaintiff has no exclusive right in the color and flavor inevitably following the use of cocoa or chocolate which the defendant had a right to combine with quinine in a pharmaceutical preparation.

The defendant had a lawful right to call its preparation Quin-Coco, which is a descriptive name of the same effect as Coco-Quinine.

The plaintiff has not established unfair selling methods on the part of the defendant.

It follows that the bill should be dismissed with costs to the defendant, and it is so ordered.

Final Decree.

(Filed October 18, 1920.)

Before Thompson, J.

And now, this eighteenth day of October, 1920, this cause having come on for a hearing on bill as amended and answer as amended and proofs and having been argued by Ernest W. Bradford, Esq., for plaintiff, and Francis Rawle, Esq., and Roger S. Baldwin, Esq., for defendant, thereupon upon consideration thereof,

It is ordered, adjudged and decreed, that the bill be dismissed with costs to the defendant.

By the Court,

Attest:
(Sgd.) GEORGE BRODBECK,
Clerk.

Agreed to as to form:

(Sgd.) E. W. BRADFORD,
Counsel for Plaintiff.

705 *Petition for Appeal.*

(Filed November 13, 1920.)

To the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania:

The Eli Lilly & Company, plaintiff in the above-entitled case, believing itself to be aggrieved by the final decree made and entered in this case on the eighteenth day of October, 1920, dismissing the bill of complaint in this cause, with costs to defendant, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that said appeal may be allowed and a citation issued directed to the William R. Warner & Company, defendant herein, commanding it to appear before said United States Circuit Court of Appeals for the Third Circuit to do and receive what may appertain to justice to be done in the premises; that a transcript of the record, proceedings, evidence, and exhibits in the case, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Third Circuit, and that the said decree of said District Court may be reversed and such decree made as to said United States Circuit Court of Appeals may seem mete and just; and desiring to supersede execution of the decree, petitioner hereby tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

(Sgd.) E. W. BRADFORD,
Solicitor and Counsel for Plaintiff.

706 *Order Allowing Appeal.*

(Filed November 13, 1920.)

Before Thompson, J.

The foregoing petition for appeal is granted and allowed this thirteenth day of November, 1920, and shall operate as a supersedeas

upon the petitioner filing a bond in the sum of $2,750 with sufficient sureties to be conditioned as required by law.

By the Court,

Attest:

(Sgd.) GEORGE BRODBECK,
Clerk.

Plaintiff's Assignment of Errors.

(Filed November 13, 1920.)

Now comes the plaintiff in the above-entitled cause and says that the final decree made and entered therein on the eighteenth day of October, 1920, is believed to be manifest error, and for errors it assigns the following:

The Court erred in holding in its opinion:

1. That in 1906 the Pfeiffer Chemical Company put upon the market a product "known" to the user as Quin-Coco;

2. That defendant has not attempted to sell its product as plaintiff's Coco-Quinine;

3. That defendant offered its product and solicited orders for it merely on representations that it is a substitute for Coco-Quinine and identical with it in therapeutic value;

4. That the evidence does not establish and that it is not claimed that defendant's product is used by consumers believing they are using the product of The Eli Lilly & Company;

5. That chocolate had been used to disguise quinine in tablet or in lozenge form prior to plaintiff's product;

6. That the combination of plaintiff's product in any form was ever known prior to plaintiff's preparation;

7. That the proofs do not show acts on the part of defendant which induced dealers to deceive the consumer into believing that the consumer was getting plaintiff's product when, as a matter of fact, he was being given defendant's product;

8. That the flavor or the color incident to the use of chocolate or cocoa in the preparation is in any way material to the therapeutic value or salability of the preparation;

9. That defendant had any right to use chocolate flavor or chocolate color in its preparation;

10. That plaintiff is not correct in its contention that the consumer who asked for "chocolate quinine," "cocoa and quinine" or "quinine flavored with cocoa or chocolate" is not entitled to have his order filled with plaintiff's product;

11. That plaintiff has not a right to have its product used to supply calls by consumers for "chocolate quinine," "cocoa and quinine" or "quinine flavored with cocoa or chocolate";

12. That plaintiff cannot acquire an exclusive right to the use of chocolate or cocoa as a coloring and flavoring medium in a medicinal preparation;

13. That "Cocoa-Quinine" is essentially a descriptive name and not capable of appropriation as a common-law trade-mark;

14. That "Quin-Coco" is a descriptive term free to defendant's use, and not such a simulation of plaintiff's name "Coco-Quinine"
708 as to be likely to cause confusion in the trade and constitute infringement of plaintiff's rights;

15. That plaintiff does not contend that there is no evidence to show direct passing off of defendant's product for that of plaintiff;

16. That plaintiff has not proved by competent evidence that defendant through its agent actually passed off its product upon the public for plaintiff's product;

17. That the evidence that defendant has through its agents, officials and employees, succeeded in passing off its product for plaintiff's product is not direct, clear and positive;

18. That such testimony in most instances consists of "impressions of the witnesses" as to what defendant's salesmen meant rather than statements of what they said;

19. That the answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through "objectionable leading questions";

20. That the denial by defendant's salesmen and employees of the acts of which they are charged, is of material consequence in this case;

21. That plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested alleged unfair selling methods on the part of its salesmen;

22. That defendant had a right under the law to represent to its customers that its product was identical with plaintiff's product;

23. That no officer or sales manager of defendant authorized or instructed its salesmen in unfair selling methods;

24. That plaintiff has failed to establish its right to a decree based upon unfair selling methods;

709 25. That defendant has a lawful right to reproduce plaintiff's preparation and to sell it as a substitute for plaintiff's product;

26. That plaintiff has no exclusive right in the color or flavor of its product;

27. That defendant had a lawful right to call its preparation "Quin-Coco;"

28. That plaintiff has not established unfair selling methods on the part of defendant;

29. That the bill should be dismissed with costs to defendant;

Wherefore, the plaintiff prays that said decree may be reversed and that the said District Court may be directed to enter a decree in accordance with the prayers of the bill of complaint.

(Sgd.) E. W. BRADFORD,
Solicitor and Counsel for Plaintiff.

710 *Præcipe for Transcript of Record.*

(Filed February 14, 1921.)

The appellant indicated the following portions of the record to be incorporated in the transcript on appeal:
Docket entries;
All pleadings and testimony as printed and included in the record on final hearing before the District Court;
All exhibits used in the trial before the District Court;
The Opinion of the Court;
Final Decree;
Petition for Appeal;
Assignments of Errors;
Citation;
Stipulation respecting record on Appeal;
Order approving Stipulation;
Præcipe;
Order as to Security for Costs on Appeal.

(Sgd.) E. W. BRADFORD,
Counsel for Plaintiff.

711 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the case of Eli Lilly & Company vs. Wm. R. Warner & Company, No. 1355, December Sessions, 1914; as per præcipe filed, a copy of which is hereto attached, the transcript in the above-entitled case is to include, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this eleventh day of March in the year of our Lord one thousand, nine hundred and twenty-one, and in the one hundred and forty-fifth year of the Independence of the United States.

[SEAL.] GEORGE BRODBECK,
Clerk.

712 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633.

THE ELI LILLY & Co., Appellant,

vs.

WM. R. WARNER & Co., Appellee.

And afterwards, to wit, on the eleventh day of May, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. Victor B. Woolley and Hon. J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the thirtieth day of September, 1921, come the parties aforesaid by their counsel aforesaid, and the Court now being dully advised in the premises, renders the following decision:

713 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633.

THE ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, Woolley and Davis, Circuit Judges.

WOOLLEY, *Circuit Judge:*

The issues in this case are unfair competition and infringement of a common law trademark. We shall give just enough of the facts to disclose the controversy and make clear our decision, referring to

the opinion of the trial court reported at 268 Fed. 156 for a statement in detail.

The plaintiff, The Eli Lilly and Company, a corporation of Indiana engaged in the manufacture and sale of pharmaceutical products, put upon the market in 1899 a compound called Coco-Quinine. It is a liquid preparation containing quinine as its therapeutic agent; yerba-santa, used to disguise the bitter taste of quinine; and
714 chocolate syrup, used as a coloring and flavoring medium.

The plaintiff built up a large trade in the product by having its salesmen first call upon prescribing physicians and explain its merits, and then by selling it to druggists, who retailed it to customers on physicians' prescriptions and on their own demand. The formula is not patented.

The defendant, Wm. R. Warner & Company, a Pennsylvania corporation, was organized in 1908 to take over the long established business of William R. Warner & Company, pharmaceutical and chemical manufacturers. The defendant corporation, Pfeiffer Chemical Company and Searle & Hereth Company are under one ownership and control. In 1906 the Pfeiffer Chemical Company put on the market a compound which it called Quin-Coco, being identical in color, taste and composition with the Coco-Quinine of the plaintiff. Later, Quin-Coco was manufactured by the Searle & Hereth Company and distributed by Wm. R. Warner & Company, the defendant. In competing for the trade of retail druggists the defendant did not pass off its Quin-Coco as Coco-Quinine but offered it on the representation that it is the same as Coco-Quinine and could be used as a substitute for it.

By its bill of complaint, the plaintiff avers that its Coco-Quinine was the first liquid preparation of quinine sulphate with the taste of quinine disguised, and the first of many similar preparations (afterward put out) to be colored and flavored with chocolate, and prays an injunction against infringement of its common law trademark and against the defendant's practices of unfair competition, claiming in effect the sole right to use chocolate as the distinguishing agent of its product. The court resolved the issue of unfair competition against the plaintiff on the ground that, as that concern does not manufacture its product under a patent, and as it has no exclusive right to the use of its formula or to any of its ingredients, the preparation may be made by anyone who, in good faith, acquires knowledge of its composition, and may be sold in open com-
715 merce on his representation that it is the same as the plaintiff's preparation. Hostetter vs. Fries, 17 Fed. 620. Thereupon, the court held that the defendant did not engage in unfair competition in using chocolate for the color and flavor of its preparation. It also held that the plaintiff had acquired no common law trademark in the words Coco-Quinine, they being merely descriptive of the contents of the mixture, and that, in consequence, it could not complain when the defendant used practically the same words transposed to describe the same things. On the dismissal of the bill the plaintiff took this appeal, raising here the same questions that were tried below.

We find ourselves in accord with the learned trial judge on the issue of infringement. Although the plaintiff conceived the name Coco-Quinine and gave it a substantial commercial value (as evidenced by the large trade built upon it as well as by its almost literal appropriation by the defendant), the name is, nevertheless, but descriptive of the ingredients in the compound and, therefore, cannot become the subject of trademark. Nor do we find ourselves at variance with the learned trial judge on the law of unfair competition, argued by counsel with great elaboration. We are constrained, however, to differ with him on the application of the law to what we regard as the controlling facts of the case. While these facts are many, they go to a matter that greatly narrows the area of the controversy and calls into operation but one principle of law. They are briefly as follows:

The defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, as it had a right to do. But the trouble is with the manner in which it did it. The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were
716 in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would given to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be "substituted without detection" and "without anyone being the wiser." Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law. This measure turns on two questions:

The first question is one of fact,—whether it is fraud for a druggist

to substitute a drug for the one called for by a physician's prescription or by a customer directly. That substitution of drugs is fraud upon the consumer, who, from the very nature of the transaction, is helpless to protect himself, is so obvious as to require no
717 discussion. For the protection of those who are exposed to the dangers of such fraud, courts will exercise to the utmost all the resources of the law. We have no doubt that the substitution of Quin-Coco for Coco-Quinine extensively practiced by druggists amounted to fraud and of the same opinion were a number of the very druggists who practiced the deception. This then was fraud, but it was the fraud of druggists.

The next question is one of law,—whether in counseling such fraud and in supplying the means with which to effect it (that means being in itself quite innocent) the defendant also was guilty of fraud. Put in this way the question is not whether the defendant can be held responsible for the fraud of third parties, the ultimate sellers (Hostetter vs. Fries, 17 Fed. 620), but it is whether in counseling fraud and in supplying on innocent means with which to bring it about the defendant has itself committed fraud. This question turns not alone on the character of the means. Admittedly the plaintiff has no monopoly in its formula nor has it an exclusive right to the use of any of its ingredients. This leaves the defendant and everyone else free to duplicate the plaintiff's preparation and enter the trade in competition, if, in so doing, they do not infringe the right of consumers not to have passed off on them the product of one maker as the product of another. This right resides in the public without regard to whether the party for whose goods another product is passed off has or has not a monopoly in them or an exclusive right to use certain of their distinguishing ingredients. A customer has a right to get what he calls for and pays for. If the effect of a practice is to deceive an unwary customer and lull him into the belief that he is getting what he asked for when in fact he is getting something else, the practice is illegal because a fraud upon him. And this is so (certainly where, as in this case, the purpose as well as the effect was to deceive the consumer) even when the dress or get-up of the substituted preparation is open to use by everyone.

Thus in the case of Lever vs. Goodwin, 57 Law Times Re-
718 ports, 583, 4 R. P. C. 492, the plaintiffs put their soap into wrappers of imitation parchment paper (which was then not a common thing), and printed (which was unusual) some letterpress on it in spaced or broken type. The defendants put up their soap in wrappers of imitation parchment paper, and they also printed on the wrappers letterpress in spaced or broken type. Their letterpress was quit different from the plaintiffs', and the defendants' name appeared in capitals four times among the letterpress, but the court found that though the printing was wholly different, the effect of the get-up was to mislead the customer, and held the practice unlawful notwithstanding the plaintiffs had no monopoly either in the kind of paper used as a wrapper or in the style of printing appearing upon it. Of a like opinion was the court in Coca Cola Co. vs. Gay-Ola Co.,

200 Fed. (C. C. A. 6th.) 720, where the defendant used the free agent of caramel to simulate the color of the preparation it was imitating. These English and American decisions are authority not only for the law that the innocence of the instrument of fraud does not per se avoid unfair competition but also for the law that in supplying the instrument (with similarities which singly would not be unlawful) the defendant cannot avoid responsibility for the part it took in the fraud committed—or completed—by the other. In the Lever case the retail dealer was not deceived in purchasing the product. Neither was he deceived in the Coca Cola case; nor in this case. The dress of the product in each case as it went to the dealer was entirely distinctive. The evident purpose in each case was to deceive, not the retail dealer, but the ultimate consumer. For the consumer in this case the preparation was rebottled. To him it came, not in the distinctive dress in which it reached the retail dealer, but naked. The only mark it had was that of color, which (as in the Coca Cola case) the defendant labored to make non-distinctive. Having counseled fraud upon the ultimate consumer and having put in the hands of the retail dealer the means of committing the fraud, there is no room for the defendant to shift the blame to the retail dealer
719 and no ground for the defendant to say that it is not answerable for the part which it itself played in the deception of the consumer. Certainly the defendant was an accomplice, if not the principal, in the practice. Lever vs. Goodwin, 57 Law Times Reports (N. S.) 583, 4 R. P. C. 492; Coca Cola Co. vs. Gay-Ola Co., 200 Fed. 720; Garrett vs. Garrett, 78 Fed. (C. C. A. 6th) 472, 476; Royal Co. vs. Royal, 122 Fed. 337, 345; Kalem vs. Harper, 222 U. S. 55, 63, 38 Cyc. 778, notes; Cutler on "Passing Off."

With unfair competition thus established, we think an injunction should issue restraining the defendant, directly or indirectly, from inducing and enabling retail drug dealers to substitute Quin-Coco for Coco-Quinine. But it is said that such an injunction would deprive the defendant of using, as a coloring agent, an ingredient admittedly free to everyone. That is true, but, as we are deciding this case on conduct rather than on chocolate, we think the defendant has forfeitted its right to the use of chocolate as a coloring agent because of its misuse; namely, the double fraud upon the public and a competing producer. That the defendant may no longer derive advantage from its own fraud by resort to an ingredient the use of which otherwise is lawful, we direct the court below to award an injunction restraining it hereafter from using chocolate as a coloring matter in its preparation named Quin-Coco. The only practical way of protecting the public and the plaintiff from a continuance of its unfair practices is to deprive the defendant of the ingredient by which alone it made those practices effective.

It should be noted that by this decision the plaintiff is not given a monopoly in the use of chocolate. Therefore the injunction restraining the use of chocolate in a liquid preparation where the taste of quinine is masked will extend only to the defendant whose practices with reference to it have been unlawful. We are not adjudicating the acts and responsibility of other makers of similar prepara-

tions, for with respect to them w have not been informed of wrong doing.

The decree below is reversed with costs.

720 Endorsements: 2633. Opinion of the Court by Woolley, J. Received & Filed Sept. 30, 1921. Saunders Lewis, Jr., Clerk.

721 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633 (List No. 19).

ELI LILLY & Co., Appellant,

vs.

WILLIAM R. WARNER & Co., Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with the direction that an injunction issue in accordance with the opinion of this court.

Philadelphia, September 30, 1921.

VICTOR B. WOOLLEY,
Circuit Judge.

Endorsements: 2633. Order Reversing Decree, etc. Received & filed Sept. 30, 1921. Saunders Lewis, Jr., Clerk.

722 In the United States Circuit Court of Appeals, for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & Co., Appellant,

v.

WM. R. WARNER & Co., Appellee.

Petition of Appellee for a Reargument.

Joseph W. Henderson,
Roger S. Baldwin,
Francis Rawle,
For Petition.
George W. Wickersham,
Counsel.

722*a* In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & COMPANY, Appellant,

v.

WM. R. WARNER & COMPANY, Appellee.

Petition for a Reargument.

This Court in its opinion while expressing its concurrence with the learned Judge in the District Court upon a number of points, has felt constrained to differ with him on the application of the law to what it says it regards "as the controlling facts of the case." Thereupon it makes a statement of what these facts are. Very respectfully, but most earnestly, we urge upon the Court that these so-called facts are not supported by the evidence in the case, that is to say, we do not urge that they are not established by the weight of evidence, but that to a very large extent there is no evidence whatever of the alleged fact, or that the evidence is entirely insufficient to justify a deduction of the so-called fact stated. We feel confident that this criticism can be shortly demonstrated.

722*b* I. Alleged facts concerning experimentation by defendant.

The opinion says:

"The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded."

The relations of Pfeiffer Chemical Company, Searle & Hereth Company and William R. Warner and Company (the defendant) to Quin-Coco were these:

Pfeiffer Chemical Company (a St. Louis concern) first made and sold Quin-Coco "in the fall of 1906." (3 D. Proofs, p. 9, Q. 5.)

In June, 1906, Pfeiffer Chemical Company became affiliated with Searle & Hereth Company, also a St. Louis concern. (3 D. Proofs, p. 58, Q. 229.)

Quin-Coco, being a pharmaceutical preparation, was then transferred to the Searle & Hereth list, and Pfeiffer Chemical Company discontinued its "pharmaceutical" line. (3 D. Proofs, p. 58, X Q. 231.)

Searle & Hereth Company made and sold it till some time after the defendant was chartered (July, 1908), after which the defendant became the distributing company, but Searle & Hereth continued to manufacture all the Quin-Coco at its laboratories in St. 722c Louis. In March, 1909, Searle & Hereth Co. manufactured the first batch at Philadelphia. Thereafter, it was also made here. (Fritsch, foreman at Philadelphia laboratory. 3 D. Proofs, p. 458, Q. 4, 5.)

The testimony on both sides was put in as follows:

1. The plaintiff in its opening called Groves who testified that he had been a "helper" in the Searle & Hereth Philadelphia laboratory in 1908, and that he saw Fritsch experiment with Quin-Coco in the fall of 1908, and when Fritsch had made samples, he saw him compare them with a bottle of Coco-Quinine.

Fritsch (for defendant) denied all of this and testified that he did not, in the fall of 1908, experiment on Quin-Coco, but that in February, 1909, he received the formula from the St. Louis laboratory and then began to manufacture it. His "Record Cards" showed that the "first batch" was made in March, 1909.

Fritsch testified, also, that in 1907 or the spring of 1908 (before the defendant was chartered and bought out the old Warner Company), he had tried his hand at a sweet chocolate-quinine preparation, but had "dropped it." This had nothing to do with the defendant. (See infra.)

2. In the rebuttal, plaintiff called Garvin, defendant's St. Louis head laboratory man, in order to show that, in 1906, he had experimented with Quin-Coco. But Garvin merely stated that Mr. Merner (head of that office) gave him the formula and that then he began to make it, and that he did compare his product with a bottle of Coco-Quinine. There is no evidence that he then changed his product to a closer resemblance to Coco-Quinine.

722*d* *a*. There Were No Experiments at Philadelphia. The Formula Came from St. Louis Laboratory.

The plaintiff's opening proofs attempted to prove only what was done at the Philadelphia laboratory after July, 1908. That was the only proof defendant was required to meet.

Searle & Hereth Company had been manufacturing and selling Quin-Coco at St. Louis for two years before the defendant was chartered. The defendant shows by the evidence of Fritsch, the foreman of liquid preparations at the Philadelphia laboratory, that after the defendant was chartered, no experiments were made there; that William R. Warner and Company at first marketed Quin-Coco shipped to it by Searle & Hereth Company from St. Louis; that in February, 1909, he received from the St. Louis laboratory its Quin-Coco formula and that the "first batch" turned out in Philadelphia was in March, 1909. This Fritsch testified to from his "Record Cards."

It is not probable that the Philadelphia laboratory would experiment on a formula for a Quin-Coco preparation when its St. Louis laboratory had been working under its formula for two years? Uniformity of product between the two offices was essential.

Here is what Fritsch, the foreman, testified to (3 D. Proofs, 457) when called as a witness to meet the testimony of plaintiff's witness (Groves) presently to be referred to:

"Q. 15. We made no experiments with Coco-Quinine, and did not compare Coco-Quinine with any preparations I was making. Positively no experiments made."

"Q. 16. I made no experiments."

722*e* "Q. 18. I did not get my formulas from St. Louis until the early part of 1909. The month of March I made my first batch. I had no formula for Quin-Coco in 1908, and when it comes to a difference in color, there were no experiments made, therefore we could not compare any colors."

"Q. 20. When he made his first batch he 'compared it with Quin-Coco, S. & H. bottle, which I had before me.' (Meaning, of course, a S. & H. bottle of Quin-Coco received from St. Louis.")

"Q. 104. Did you ever compare your product with the Lilly product?

A. No, sir.

Q. 105. Never held one sample of your product along side of a sample of the Lilly product?

A. I have not got a bottle of the Lilly product in my department."

"R. X Q. 127. How did you regard it (Quin-Coco) in point of being practically the same thing (as Coco-Quinine)?

A. We did not compare it in regard to being the same thing at all."

Again, Fritsch testified that his first instructions to make Quin-Coco came from Mr. Garvin (who was in charge of the St. Louis laboratories) and who came to Philadelphia (3 D. Proofs p. 469):

"X Q. 86. From who did you receive your first instructions to make this product?

A. Mr. Garvin, of St. Louis."

"X Q. 89. Did Mr. Garvin visit you in Philadelphia?

A. Yes, sir.

X Q. 90. What did Mr. Garvin say to you about the product?

A. Simply, he gave me instructions, how he made the
722f product, how he put it together, how he compounded it.

X Q. 91. What did he say about Coco-Quinine?

A. I do not believe the word 'Coco-Quinine' was mentioned."

This appears to be a perfectly straight story and to be in accord with the probabilities.

Why should Searle & Hereth experiment in Philadelphia on a formula when they had been making the preparation in St. Louis?

What Fritsch Did in 1907 and Spring of 1908.

Before referring to the plaintiff's witness (Groves) called in the same connection, a word should be said about another "experiment" referred to by Fritsch. It was made in 1907 or early in 1908, when he was working for the old Warner Company, and months before the defendant was chartered and took over the business and assets of the old company. This old company consisted solely of Mr. William R. Warner.

As to this "experiment" Fritsch testified (3 D. Proofs, p. 466):

"X Q. 65. Were any of these experiments conducted during 1908?

A. In the early part of 1908 I experimented, and also in 1907.

X Q. 66. Were there no experiments made while Mr. Groves was in the laboratory with you?

A. Mr. Groves saw me make experiments in the early part of 1908 and 1907.

X Q. 68. Is it not possible that you might be mistaken, and that some of these experiments ran into the fall of 1908?

A. No, sir.

X Q. 69. As stated by Mr. Groves?

A. No, sir, positively."

722g A. to X Q. 74. "It simply was not a success, and I did not bother with it. Dropped it." When, in answer to R. X

Q. 134, page 474, Fritsch said that he "had had a sample (of Coco-Quinine) which I told you I was trying to imitate for William R. Warner & Company," he referred to the old Warner Company prior to July, 1908, and to the bottle of Coco-Quinine which he mentions in his answer to X Q. 64.

There is nothing to show the extent of this "experiment." It may have taken a day or a week. It may have been perfectly casual. There simply is no evidence of what it was. And it was certainly made on Fritsch's own initiative—and apparently without orders, for he testifies (X Q. 71) that the suggestion to him came from salesmen who "wanted to know if I could make a tasteless chocolate-quinine preparation." He does not appear to have told the president, Mr. Warner. And Fritsch's superior officer, McCambridge, who was in charge of the old Warner Company Laboratories at the time, testified (2 P. Proofs, p. 928, Q. 3), that no such "experiment" took place. That is merely to say that Fritsch never told him of it, and that Fritsch was not as a part of his regular duties trying to make a tasteless chocolate-quinine preparation. But do we not all know that chemists are forever trying "experiments"? That is all it amounted to. It does not affect the defendant, for it was before the defendant took over the old Warner concern.

As to the plaintiff's evidence. (1 P. Proofs, p. 555): Groves had been a "general helper" under Fritsch in the laboratory some seven years before and until December 31, 1908. He testified, in substance, that Fritsch had experimented in the end of 1908, and was unable to make a satisfactory product.

We cannot spare space to set forth what Groves testified to but when Fritsch was on the stand (3 D. Proofs, p. 458), all
722*h* the pertinent statements of Groves were read to Fritsch and he denied them all. The learned Court is asked to read Fritsch's testimony from Q. 10 to Q. 18.

So it becomes a question between Fritsch and Groves—not perhaps of veracity, but of memory. Whom shall we accept? Surely we have shown that the probabilities are with Fritsch. And surely Fritsch, who did the work, is more likely to remember what he did than Groves is to remember a casual knowledge of what some one else merely mentioned to him. And Fritsch was then a chemist (a trained man) while Groves at twenty-six years of age, was but a laboratory "helper."

And, too, when Groves testified, he was an employee of the Lilly Company, plaintiff, and that, in a witness of that type, does not strengthen his evidence.

Again as to what Fritsch did in 1907 and early 1908, in the old Warner Company, lest the Court might misunderstand its bearing. This is it. A chemist in a laboratory, of his own initiative and without orders, makes an experiment. What it amounted to we do not know. It does not appear that he said anything about it to his superior or to any officer of the company. It came to nothing. "It was dropped." Six months later the present parties bought out the assets of the old Warner Company. Shall we be told now that, six months before you took over that property, one of its chemists,

of his own initiation, tried to get up an imitation of Coco-Quinine and failed? Surely such evidence as that can not sustain a finding that "the plaintiff first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation."

There certainly is no evidence even from Groves that Fritsch "learned the ingredients" of the plaintiff's preparation. No
722i one has said that he did. On the contrary, Fritsch testified that he first made Quin-Coco from the St. Louis formula received in February, 1909. This is not denied, because all that Groves testified to was (Q. 21): "I do not recollect whether the working formula was received during my time in the laboratory or not." (He left the laboratory December 31, 1908.)

h. There Were No Experiments at St. Louis Before June, 1906, When the Pfeiffer Chemical Company First Made and Sold Quin-Coco.

We would not have thought of referring to anything so remote as this—something done by another corporation more than two years before the defendant was organized, if opposing counsel had not, in the end of his brief (Index, p. ii), coupled that transaction with what it contends defendant did in Philadelphia in 1908-1909, as proving that "the defendants directed their energies not to the preparation of formula for a legitimate competing preparation with Coco-Quinine, but to the counterfeiting of Coco-Quinine." This language was adopted, almost exactly in the opinion. The Court may therefore have considered the plaintiff's evidence of what took place in St. Louis in 1906. (It was put in in rebuttal and therefore was inadmissible, being clearly part of plaintiff's opening case if offered at all.)

What did take place, according to Garvin, at St. Louis? This is all that appears:

Garvin (2 P. Proofs 932) was called by the plaintiff in rebuttal, though his testimony could only be part of the plaintiff's case in chief. He testified:

"Q. 29. Where did you get the formula from which the preparation was made?

A. * * * the formula was supplied to me by Mr. Merner.

722j Q. 30. Where was it obtained by Mr. Merner and from whom?

A. I don't know.

Q. 25. Did you have a bottle of the Lilly preparation in the laboratory while you were conducting four experiments?

A. Later on; yes, sir.

Q. 27. What use did you make of it? I mean the Lilly preparation.

A. Looked at it so see if the physical appearance of the sample on which I was working was something like Lilly's."

That was all. Garvin received his formula from his chief; made his "sample" and "later on" compared it with a Coco-Quinine sample "to see if it was somewhat similar to Lilly's," which he had a right to do.

Is this fraud?

Is this act of a laboratory man, not made known to any superior official of his company, "clear evidence" to establish fraud.

The whole history of Quin-Coco appears from what we have just written to be this:

Merner, head of the St. Louis office, gave Garvin, his laboratory man, a formula and directed him to make this preparation, prior to June, 1906. No evidence as to where the formula came from.

Garvin made Quin-Coco.

He compared what he had made with a sample of Coco-Quinine.

Two years later (July, 1908) the Warner Company was chartered. Until March, 1909, it distributed Searle & Hereth Quin-Coco shipped to it from St. Louis. Then the Searle & Hereth Company at its Philadelphia laboratory got the formula from St. Louis and began to "make Quin-Coco at Philadelphia from that formula."

722*k* *c.* The learned opinion states:

"The only mark it [defendant's product] had was that of color which the defendant labored to make non-distinctive."

As we have just shown, the original formula was given by Merner to Garvin in 1906, was worked under in St. Louis till February, 1909, when it was sent to Philadephia and used there without change or experiment. It can hardly be said that we "labored to make our color non-distinctive."

But as we had a right to copy Coco-Quinine, was it fraud to approximate its color by comparing our color with its color? Coco-Quinine is not shown to have any precise shade of color, and it is shown below that we use cocoa just as it comes in barrel lots. There is no evidence that after it was compared, Garvin made any changes.

d. Again, the learned Court says:

"Its [defendant's] efforts were expended not so much in making a compound that would act like that of the plaintiff," &c.

Counsel are apprehensive, in view of this language, that they had not made the case clear to the Court. Let us try again. The sole medicinal agent in these preparations is the quinine. If one took two grains of quinine and placed them in a spoonful of chocolate, it would "act like" Coco-Quinine or Quin-Coco, medicinally and would have the same taste, *i. e.*, a chocolate taste.

But to use quinine and chocolate and to make a stable and "elegant pharmaceutical preparation" (as the druggists terms it) requires a formula and perhaps some pharmaceutical skill, a sort of cooking up or compounding with some other ingredients. But, to repeat, merely making a dose out of quinine and chocolate
722*l* will give the patient something which will "act like" Coco-Quinine. That requires no skill nor experimentation.

There is absolutely no evidence whatever that the defendant did procure samples of plaintiff's preparation and learn its ingredients." The medicinal ingredient, quinine, and the color and taste ingredient, chocolate, appear on the plaintiff's label and in the name Coco-Quinine. There is absolutely no evidence that we "learned" any other ingredient from the plaintiff's preparation. The evidence is that Mr. Merner, head of the St. Louis plant originally gave the formula to Garvin prior to June, 1906 (2 P. Proofs 937). Where Merner got it is not shown. There is no evidence that any one analyzed Coco-Quinine to learn its formula. It cannot be assumed that Merner obtained the plaintiff's formula wrongfully and from that build up a charge of fraud.

e. The opinion states:

"In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded."

1. If we have satisfied the Court that the formula originally came from Mr. Merner, at St. Louis, in 1906 (source from which he received it not being disclosed) and that it was worked under for two and a half years at St. Louis, and from March, 1909, at both St. Louis and Philadelphia, all without further change, it cannot be true that the defendant experimented as to the "precise color and taste" of the plaintiff's chocolate.

2. The variation in chocolate color is negligible. When mixed with another ingredient it controlls the color.

722*m* 3. The variation in chocolate taste is negligible. In fact, in both color and taste, chocolate, inany mixture, is dominant and controlling.

4. Though there be slight variations in color, the plaintiff does not raise any such question. The plaintiff does not raise a question of the "precise" color (shade) of our chocolate but of our use of chocolate at all.

4. The evidence is that the defendant's practice is to buy its chocolate by the barrel and use it as it comes. Thus Fritsch (3 D. Proofs, p. 462):

"Q. 24. It comes to me in barrels, about 300 pounds.
Q. 25. Just as it comes in the barrels, I use it."

"Q. 34. I made no effort to standardize the Cocoa in making Quin-Coco.
Q. 35. There are variations in color between different batches [of Quin-Coco]."

5. The writer does not remember a word of testimony in the case about imitating the taste of chocolate.

6. The opinion refers to "chocolates of different kinds. There is nothing in this Record to show that there are "chocolates of different kinds."

II. The learned opinion proceeds thus:

"It [the defendant] did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers."

722*n* 1. The bill avers (1 P. Proofs 7):

"That, afterwards, the said Searle & Hereth Company was bought * * * and renewed efforts were made to push said product labeled Quin-Coco in the drug trade and medical profession."

Also, p. 8:

"The said defendant corporation * * * has by many and diverse ways and schemes placed its said product on the market, representing * * * to the purchasing druggists and physicians."

2. The amended bill (1 P. Proofs, p. 638) avers:

"That renewed efforts were then made by defendant and by the Pfeiffer Chemical Company to push said product labeled Quin-Coco * * * in the drug trade and medical profession."

Also (on p. 639):

"That the said defendant corporation * * * has by many and divers ways and schemes placed its said product on the market, representing through its agents and salesmen to the purchasing druggists and physicians, &c."

3. The evidence is uncontradicted that the defendant very largely and as a part of its selling plan, did solicit physicians. Before referring to the evidence, we ask the Court to observe that there are two distinct classes of doctors: Prescribing doctors and "dispensing" doctors. G. A. Pfeiffer has testified as to the fact (3 D. Proofs, p. 15.

As to the total number of doctors and the number in each of these classes, Mr. Pfeiffer has given the only evidence in this case. Thus (p. 15, Q. 51):

"Q. 51. What are dispensing doctors and how general is the practice?

722*o* A. * * * The practice of dispensing medicines has grown very materialy in the last twenty-five years.

Q. 52. Among the doctors?

A. Very materially among the doctors in the last twenty-five years, and at the present time I should estimate that about one-half of the doctors could be classed as dispensing doctors.

Q. 53. Are some of them interested in drug stores?

A. Many doctors are interested in drug stores. Usually, when a

doctor becomes interested in a drug store, he ceases to be a dispenser and writes prescriptions for that drug store.

At page 30, Q. 128, Mr. Pfeiffer testifies:

"There are over 130,000 doctors. I have previously stated, that, in my opinion, 50 per cent. are dispensing doctors. That would mean over 65,000 dispensing doctors."

"Q. 127. Please state among what classes of customers your market lies?
A. Among dispensing doctors, retail druggists and jobbers."
"Q. 129. What proportion of your output is sold to dispensing doctors?
A. I am unable to state accurately, but in my opinion it is about one-sixth of our sales of pharmaceutical preparations."

(NOTE.—Quin-Coco is a "pharmaceutical.")

"Q. 56. About what per cent. of your sales are to retailers and dispensing doctors?
A. Seventy-five per cent.
Q. 57. How does Warner & Company sell their goods?
A. We employ a large force of travellers. At present we have between 75 and 80. These travellers reguarly call on the drug
722p trade and dispensing doctors. We also distribute literature to our customers and others through the mails and with the products."

"A. to Q. 65. Our policy is to solicit orders from retail druggists, from dispensing doctors and from jobbers."

"Q. 120. * * * I merely meant to ask whether the Lilly Company 'details' the prescription doctors.
A. They do.
Q. 121. And your company does not?
A. We do to a limited extent."

That is, the defendant solicits the "dispensing doctors (one-half of the whole) and some of the other half (the prescribing doctors). G. D. Merner was head of the St. Louis business from "sometime in 1908" (D. Proofs, top of p. 138). He testified that his salesmen "called on their customers" "from six times to one time a year." (3 D. Proofs, p. 139, Q. 16.)

"Q. 17. Upon whom do they call?
A. Retail druggists, hospitals, physicians, veterinarians and so forth."

"Q. 22. State among what class of customers you have found a market for your product, Quin-Coco?
A. Physicians and druggists.
Q. 23. How about jobbers?
A. By druggists I mean wholesale and retail."

Defendant's salesmen testified to calling on doctors. Thus: McNulty (3 D. Proofs, p. 103).

"X Q. 70. What other work is allotted to them [defendant's salesmen]?

722q A. Calling on physicians.

X Q. 71. What proportion of their time is devoted to such work?

A. It varies in various territories.

X Q. 72. Approximately, as an average?

A. I would say a quarter."

"X Q. 76. Do you refer to dispensing physicians or prescribing physicians?

A. I refer to both."

"X Q. 78. Is your house doing considerable detail work at this time?

A. More or less, yes."

(NOTE.—"Detail" work applies only to prescribing physicians).

S. J. Hagaman (3 D. Proofs, p. 134). He was an assistant sales manager.

"Q. 24. To what extent do they call upon physicians in their territory?

A. I would say about 25 per cent."

"Q. 26. Are they prescription doctors?

A. They are both prescription and dispensing physicians."

Henry J. Ritayik (3 D. Proofs, p. 169). Sales manager.

Q. 43-46. Quin-Coco is 'sold to all classes,' including dispensing and prescribing doctors."

James W. Wilkins (3 D. Proofs, p. 188.) Western Louisiana and East Texas territory, but no large cities.

"P. 190, Q. 20. I call on physicians, particularly dispensing physicians." "I call on them about every other trip, sometimes I will skip, and may be the third trip." "There are from 100 to 150 physicians in my territory."

722r B. F. Jones (3 D. Proofs, p. 205). South Mississippi, South Louisiana, Mobile and New Orleans, with 500 drug stores on which he calls four times a year.

"Q. 4. He calls upon about one-sixth of the dispensing doctors."

Howard H. Richards (3 D. Proofs, p. 227). Covered mostly the large cities in South Texas.

"He had but few dispensing doctors in his territory; mostly situated in the isolated districts." (It was city territory).

H. J. Gonzales (3 D. Proofs, p. 252). Covered parts of Louisiana, Mississippi and Arkansas, including cities of Natchez, Vicksburg and Jackson.

He called on druggists "four times a year." He called on about one-sixth of the doctors the same number of times a year.

P. 264. X Q. 94. "He visited only dispensing doctors."

C. G. McCarthy (3 D. Proofs, p. 268).

"Q. 10-12. He visited doctors from ninety days to six months. He visited 75 per cent. of dispensing doctors."

Ernest B. DeVall (3 D. Proofs, 293). Covered Tennessee territory with nearly 1,000 drug stores.

He called on each from six to three times a year.

He called on the doctors "to a limited extent only." He said, "There is some territory where I call on the doctors regularly every four months. If I have a drive that I can make to see the doctors whereby I can see as many as four in a day, I call on them regularly every four months. There are probably 100, may be 125, accounts in my territory of that kind."

X Q. 66. He calls only on dispensing doctors.

722s Eugene R. Brown (3 D. Proofs, p. 322). Covered Mississippi and Missouri territory with 1,000 drug stores, which he visits every three and one-half months.

"X Q. 6. I endeavor to see all the dispensing doctors in my territory every trip, that is the three times a year."

"R. D. Q. 56. What were your instructions as to detailing physicians?

A. If I was in town and had time to spare I would go around and see as many doctors as I could and detail them on our specialties, but if I would have to miss a train or lay over, or anything like that, I would just pass it up."

F. C. Stevenson (3 D. Proofs, p. 332). Not examined on this point.

H. E. Starring (3 D. Proofs, p. 359). Covered Detroit and surrounding counties.

"Q. 9. Called on druggists three times a year."

"X Q. 89. Called upon 'about forty or fifty dispensing doctors."

Charles S. Rogers (3 D. Proofs, p. 383). Covered parts of Michigan, outside of Detroit. Five hundred drug stores.

"Q. 7. He called on druggists from six to three times a year.

Q. 10. Visits dispensing doctors 'not to any great extent. Perhaps not more than three or four a week.' "

P. 392. X Q. 74. He had sold Quin-Coco only to dispensing doctors.

S. J. Nottingham (3 D. Proofs, p. 396). Covered central Georgia including the large cities and adjacent territory.

722t "Q. 54-57. I go to see dispensing doctors wherever I think they are good for what I sell them." Had sold Quin-Coco to dispensing doctors.

V. M. Moon (3 D. Proofs, p. 410). Covered Virginia territory including Richmond, Norfolk and other cities. Six hundred drug stores which he visits three or four times a year.

"Q. 9. I visit a good many dispensing doctors up there, the different sections of Virginia, southwest Virginia have a good many dispensers, some in Eastern Virginia, some in my home town.

It is not possible for travelling salesmen to visit anything like all the country doctors. We know that they have no office practice, but are constantly driving about during daylight hours.

III. The opinion states:

"It sent its salesmen directly to druggists, the retail dealers and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by the trade name and maker's name)."

We submit that the evidence does not sustain the above words in brackets ("referring to the latter by the trade name and maker's name").

The officers, sales managers and substantially all of the salesmen stated that that was bad salesmanship and that a skillful salesman pushes his own goods and does not mention his competitors' goods, and that that had been the practice.

The "Salesman's Confidential" so teaches (3 D. Proofs, p. 539). Every new salesman was instructed on that book.

722*u* G. A. Pfeiffer (3 D. Proofs, p. 35). The "Salesman's Confidential" teaches in Par. 17, "It don't pay to speak ill of or even mention your competitor."

H. Pfeiffer (p. 71). Taught new salesmen the same doctrine.

G. D. Merner (p. 143). "It is my aim to caution salesmen not to talk about their competitors."

H. J. Hagaman (p. 132). Sales manager, taught them not "to mention a competitor."

H. T. Ritayik (p. 172). Sales manager, taught new salesmen "not to mention the name of competitors in selling our products."

J. W. Wilkins (p. 195). Always had a copy of the "Salesman's Confidential" which taught the same doctrine.

B. F. Jones (p. 214, Q. 56): "I have always too much to do with my own line to mention a competitor."

H. H. Richards (p. 228, Q. 18): "Well as a rule, I make no reference to a competitor in selling an article."

H. J. Gonzales (p. 254, Q. 15) had carried out the instructions of the "Confidential" "right to the letter."

C. J. McCarthy (p. 270, Q. 16). The "Confidential" taught us "to avoid mentioning all competitors' goods." "I obeyed those instructions."

E. B. DeVall (p. 295, Q. 15, 16): "It is the policy of the house not to mention any competitor's goods at all." "I have obeyed it."

722*v* H. E. Starring (p. 362, Q. 26): "There is one rule, which we interpret from the instructions which Mr. Hagaman

us, that we should not mention our competitor's goods, but sell our own."

C. S. Rogers (p. 386, Q. 29 to 31): "The 'Confidential' teaches that it does not pay to speak ill of or even mention your competitors." "I understood these rules when I became employed." "I have acted upon them in my work."

S. J. Nottingham (p. 397, Q. 8 to 12): "I received my instructions as to my duties from Mr. H. Pfeiffer when I joined the house." "He has always said, never to mention a competitor."

V. M. Moon (p. 415, Q. 22): "My idea has always been to forget my competitors and try to sell my goods. I very seldom mention a competitor because it is very bad policy."

This includes all officers and sales managers and all of the salesmen except Brown.

IV. The opinion states:

"Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors."

There is but one witness who so testifies. In the charges at page 34 of appellant's brief no reference is made to such a practice, and in the "Index" at the end of that brief it is not referred to.

V. The opinion further states:

"For the consumer in this case the preparation was rebottled."

722*w* This would not be true as to Quin-Coco sold to dispensing doctors (who gave their patients what they thought best for them).

Nor to filling prescriptions in drug stores. With regard to sales over the counter, ther- is no evidence as to how many were by the dose or how many by the bottle.

VI. The opinion goes on to say:

"We have no doubt that the substitution of Quin-Coco for Coco-Quinine extensively practiced by druggists," &c.

"Extensively" is a relative word. There are 53,000 retail druggists. A few of these—half a dozen—were witnesses and admitted their dishonesty.

But defendant shows (Brief, p. 96) that trade morals among druggists are above the average; and when, in our emergencies, we deal with druggists we really do trust their honesty.*

The plaintiff's brief does not group them, or state the number of proven cases, but depends upon the false assumption that there is "no market" for anything but its Coco-Quinine, and therefore, it argues, all sales of Quin-Coco by druggists can be made only by "passing off."

The Court, we believe, will have a more enlightened opinion of

*Plaintiff's Brief, Index, p. iii, gives the names of only four dishonest druggists.

The officials of the defendant and nearly all of their salesmen who were impugned, testified to their belief in the dishonesty of "passing off" drugs.

druggists, and will not easily approve this aspersion of the retail drug trade by opposing counsel.

It is not true that there is no market for Quin-Coco. We have shown that there is (Brief, p. 118, 247). The plaintiff has
722*x* roamed the whole country and out of 53,000 druggists and 130,000 doctors has found thirty-four druggists who had never had a call for Quin-Coco, and fifteen doctors who had never prescribed it. Not very sufficient evidence to prove that there is "no market" for it. Defendant's brief, page 118, shows that Quin-Coco has a market.

VII. The opinion in early passages states as follows:

"That the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable."

"The next question of law, whether in counselling such fraud * * * the defendant also was guilty of fraud."

"Having counselled fraud upon the ultimate consumer."

"The purpose as well as the effect was to deceive the customer."

As to these findings we cannot here prolong an argument, but merely pray the Court to reconsider the following:

1. The improbability that the defendant, with millions at stake, should, as to one drug out of 5,000, and for a profit of $1,000 a year, adopt a dishonest and "ruinous" method of selling. "The strength of arguments must be in direct proportion to the improbabilities."

2. The care with which the defendant taught its salesmen the morals of selling.

3. The unqualified denial by every officer of the charges made.

We submit that these considerations negative fraud and require very clear evidence to overcome. Had the Court found that
722*y* enough of defendant's salesmen were "unfair" to charge the defendant with knowledge, we could have understood. But to begin with an independent finding that the defendant "counselled" fraud, we are unable to understand.

VIII. Again, reading from the opinion:

"We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses."

1. Only thirty-one druggists are urged even in the plaintiff's brief (see "Contents," p. i.) as impugning the salesmen and this out of 53,000 druggists; and out of some seventy-three druggists examined by plaintiff, the rest of whom had no charges to make. Substantially all of the thirty-one broke down in cross-examination.

2. Out of over 300 salesmen employed by defendant in these years, charges were made against only about ten, and many of these were single incidents in the selling work of salesmen who had visited from 400 to 1,000 drug stores three or four times a year, for years.

3. Every salesman (but one whose mind had failed) specifically denied the charges against him, and testified to entirely proper selling methods on his part.

In the light of this evidence we submit that fraud has not been "clearly" proved.

Defendant's Former Salesman Who Testified for Plaintiff.

We ask the Court to permit a few words as to these men. There are ten of them listed in the Table of Contents of plaintiff's brief, page *iv*.

722z Most of them were harmless.

Others became harmless under cross-examination.

Two of them were discharged men with an obvious bias.

If any of them, in chief, gave testimony derogatory to the defendant, they were testifying, in effect, that they themselves had been dishonest salesmen while in defendant's employ.

Such witnesses, we submit, are not favored in the law.

And seven of them were called in rebuttal, and one of them, O'Connell, in a second rebuttal. All of such evidence was objected to and ought to be rejected as contrary to the ordinary rules of practice.

The great mass of evidence (a large portion of it brought into the case to sustain the plaintiff's untenable contention that it had a monopoly of its preparation) has imposed on the Court a very onerous task. Counsel is willing to admit that in some way he may have failed to aid the Court. If he has, it was largely due to the fact that when the case was argued the plaintiff's brief had not been prepared and that the defendant's counsel did not know what the case was that he had to meet. A very large number of plaintiff's witnesses referred to below were not mentioned in the brief filed since the argument. If the defendant's counsel had received the opposing brief in due time, he could have focussed his brief and oral argument on the evidence relied upon by plaintiff.

Perhaps the proper penalty to have visited upon the plaintiff for not being ready would have been the dismissal of its appeal. As it is, the penalty has fallen upon the defendant.

We respectfully ask the Court to consider how very broadly its condemnation falls:

722aa On the officers, men of uprightness, who have built up this great business.

On the salesmen, of whom there are always seventy-five to eighty, and who, in these eight years, have numbered 300.

And (by the finding that "the substitution of Quin-Coco for Coco-Quinine is extensively practiced by druggists"), on the retail drug trade.

Does the evidence warrant it?

Further, we submit that the scope of the injunction directed by this Court to issue goes far beyond any decree in a similar case reported in the books. Even if the Court should fail to yield to the

considerations above set forth, we most earnestly protest against the imposition of such far-reaching restraint.

We submit that, for the above reasons, the defendant's counsel should be permitted to reargue this case after they shall have received a brief from the plaintiff and had time to prepare their brief in reply. The plaintiff's main contention (for a monopoly of its preparation) which permeates its entire brief, is now eliminated from this case. The reargument can be greatly narrowed.

JOSEPH W. HENDERSON,
ROGER S. BALDWIN,
FRANCIS RAWLE.
For Appellee.

GEORGE W. WICKERSHAM,
Counsel.

I hereby certify that the foregoing petition is not filed for the purpose of delay; and that, in my opinion, the grounds therein set forth are sufficient to justify a rehearing of the cause.

FRANCIS RAWLE.

723 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

Appellant's Reply to Appellee's Petition for Reargument.

E. W. Bradford,
Counsel for Appellant.

Washington, D. C.,
November 29, 1921.

723a In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

Appellant's Reply to Appellee's Petition for Reargument.

Counsel for plaintiff-appellant begs leave to submit a brief reply to appellee's petition for reargument. Such reply would have
723b been forwarded more promptly except that he has only today returned from a business trip that has kept him away from home since Thursday, the 24th instant.

Upon inquiry of the Clerk, it is understood that while the rules do not require replies to petitions for reargument, yet, when submitted, they will be considered by the Court. This reply is submitted chiefly for fear that failure to answer some of the statements in appellee's petition may be understood as acknowledging that they are supported by the "weight of evidence."

Replying to the statement on page 2 of said petition respecting the relationship of the several concerns associated with the Wm. R. Warner & Company: Attention is called to paragraph 8 of defendant's answer, page 3, Vol. III of the Record, and to the testimony of G. A. Pfeiffer X-Qs. 214-233, pp. 56-59, Vol. III, Record.

As to the testimony of Witness Groves for plaintiff and Witness Fritsch for defendant, referred to pp. 3-9 of petition:

In the first place, the record is full of testimony as to the identity of defendant's preparation with plaintiff's in physical appearance. This subject together with the testimony of Groves is reviewed beginning on p. 143 of appellant's principal brief.

The finding of this Court that defendants first procured samples of plaintiff's preparation and then proceeded to imitate it in appearance and in taste, is shown not only by Groves but by their own
723c chemist Garvin (Vol. II, p. 932) whose testimony is reviewed p. 147 of appellant's principal brief.

The duplication of the taste followed as a matter of course from the use of chocolate as a coloring and flavoring medium. The duplication in appearance was the result of careful comparison and experiment, with plaintiff's preparation as the standard.

That defendant succeeded in producing a preparation of deceptively similar appearance is shown not only by numerous witnesses for appellant but likewise by defendant's principal expert witness, Beringer. Mr. Beringer's testimony on this point is reviewed in appellant's principal brief under the heading "Beringer's

Blunder," p. 169. The testimony is found in Vol. III of the Record, pp. 528-529, X-Qs. 145-151.

As to the testimony of Fritsch claiming that his endeavors to reproduce Coco-Quinine, or make a substitute for it, in the laboratories of Wm. R. Warner & Company were prior to the time when it was acquired by the present owners, i. e., the owners of the Pfeiffer Chemical Company and the Searle & Hereth Company, there is absolutely no testimony in support of Fritsch, except his own, while all of the circumstances are against the truth of his statement and it is disputed by several very reliable and disinterested witnesses.

John E. McCambridge (Vol. II pp. 928-932) was the chemist in charge of the Warner laboratories from May, 1880, to August, 1908. He left a month or six weeks after the Pfeiffer Chemical Company took over the Warner business. Mr. Fritsch was a part of
723*d* Mr. McCambridge's laboratory force and was not in charge of any part of the laboratories.

Mr. McCambridge when asked (Vol. II p. 929, Q. 10) respecting Mr. Fritsch's testimony about the experiments on a chocolate quinine preparation under the old management replied:

"No such experiments were conducted."

Frank M. Ramsey (Vol. II, pp. 995-999) was connected with the Warner Company from 1871 to November 1908. In 1879 he began managing duties and for the last ten years of his employment was General Manager of the concern (Q. 2). Mr. Ramsey testified that Mr. Fritsch was an assistant to Mr. McCambridge (Q. 4).

This witness further testified that prior to severing his relations with Wm. R. Warner & Company in November, 1908, he had no knowledge of any experiments in the laboratories for the purpose of making a chocolate quinine preparation similar to Lilly's Coco-Quinine (Q. 7); that he never authorized or requested anyone to make any such experiments (Q. 8); and that the instructions to conduct any such experiments would have gone from himself or Mr. McCambridge (Q. 9).

John E. McCambridge (Vol. II, pp. 1059-1073) was recalled after Mr. Fritsch had been further examined and testified that all new preparations were first referred to him (Q. 6); that during all of his connection with the Warner laboratories he did not recall that they ever secured samples of the goods of other houses to imitate (Q. 7); that any order coming to the laboratory to reproduce a specialty of another house or to imitate it would have been an
723*e* unusual event (Q. 8) and not easily forgotten (Q. 9); and that at no time did the Warner concern under the old management consider manufacturing a substitute for any preparation of any other firm (Q. 11, p. 1063).

John E. McCambridge, Jr. (Vol. II, pp. 1073-1078) testified that he was employed in the Warner laboratories from June, 1901, to the middle of August, 1908, and after June 4, 1904, had charge of the analytical department in the laboratories (Q. 3); that he had no recollection of Mr. Fritsch's having conducted any experiments in an endeavor to make a duplicate of Coco-Quinine, Lilly, while he

witness) was connected with the Warner laboratories (Q. 6); and that he was so connected with the laboratories that had such experiments been made they would have been likely to have received his notice (Qs. 7-8); that the pharmaceutical department was a small department and the work was so concentrated that all would be likely to know what was going on and that experiments made from time to time were always compared by the employees who conferred with each other (Q. 9).

It is submitted that the testimony of these witnesses makes the testimony of Mr. Fritsch not only very unlikely but unbelievable and that the clear and convincing testimony of Mr. Groves is entitled to the credit given it in the opinion of the Court, particularly in view of all this testimony showing that Mr. Fritsch was clearly mistaken.

Replying to the argument beginning at the bottom of page 13, with quotations from plaintiff's bill found on page 14:

(23f) Plaintiff has never pretended that defendant has not made sales to those who are referred to frequently in the record as "dispensing doctors," a class of doctors that have been referred to by the Court as "druggist doctors." The bill does not charge that defendant solicited prescribing doctors but "purchasing druggists and physicians." Dispensing doctors are in the class of "purchasing druggists and physicians," that is, they buy their medicines and then dispense them.

Moreover, it is immaterial as to the averments of the bill for the proofs are abundant that defendant did not "detail" prescribing physicians to build up trade among the drug stores, or solicit said stores except by their methods complained of to induce the druggists to buy defendants' preparation to sell as a substitute for plaintiff's preparation.

The testimony of defendants' own salesmen is to the effect that it was not a part of the business nor in accordance with their instructions to detail their preparations to the prescribing physicians. (E. R. Brown Vol. III, p. 331—X-Qs. 53-55).

The record is so full of testimony which supports the statement quoted from the opinion of this honorable Court on page 20 of appellee's petition that comment is unnecessary.

The reference to defendants' "salesmen's Confidential" cannot be taken seriously. The evidence bearing upon this book, particularly the instructions in the back of the book to which counsel for appellee refers, was of a nature calculated to provoke a smile rather than serious consideration.

(23g) Replying to appellee's comments on the quotations from the opinion of the Court found on page 22 of the petition:

Witnesses testified not only to the salesmen comparing the color by pouring the respective preparations on white paper but also by pouring into glass graduates, such as are found in every drug store, and holding up for comparison, one preparation with the other. (Joseph A. Grimaldi, Vol. II, p. 977.)

The record is full of testimony by druggists and others that the representations of the defendants' salesman to the druggists were that neither the doctor nor anyone else could tell the difference between

defendant's preparation Quin-Coco and plaintiff's preparation Coco-Quinine (John W. Culver, Vol. II, p. 774).

Replying to appellee's comments on the quotation from the opinion of the Court found on page 23 of the petition:

Counsel for appellee again seems to complain because all of the 53,000 druggists in the United States were not called as witnesses. In other places he has complained because plaintiff called so many witnesses in so many different cities and sections of the country. Counsel is hard to please. It is submitted that sufficient testimony was taken and in sections so widely separated as to establish a practice, or a "habit," and that a sufficient number of druggists in each section were examined to show that the "habit" was exactly what this Court found it to be and to fully justify the conclusion that the substitution of Quin-Coco for Coco-Quinine is "extensively practiced" by druggists, as a result.

723*h* Replying to appellee's comments respecting the quotation from the opinion found on page 24 of its petition:

The suggestion made is entitled to no consideration. That defendants have made profits far in excess of one thousand dollars per year and far in excess of several times one thousand dollars a year in its infringement of plaintiff's goods is a matter that plaintiff expects to establish when it comes to an accounting. Defendant by the testimony of Harry E. James (Vol. III, p. 582) sought to show that its sales of Quin-Coco run from $13,000 to $15,000 per year. This is not believed to be an accurate statement of the volume of defendant's sales of this preparation for, as has been shown by numerous witnesses, it is found in the stocks of many drug stores in many sections of the country where it universally is sold as a substitute for plaintiff's Coco-Quinine.

Replying to counsel's comments on the quotation from the opinion of the Court found on page 25:

It is submitted that even if only 31 druggists testifying in perhaps as many different cities and towns throughout the country show the practice to be as found by the Court, this in itself is sufficient to "fully establish" such practice.

Counsel, on page 26, complains because the brief on behalf of appellant was not on file at the time of the argument. The

723*i* Court will recall that counsel for appellant had not been able to complete his brief and have it printed before the argument but the argument was ordered to proceed and a printer's proof copy of the brief was used. Counsel for appellant was given ten days within which to complete and file his brief, and counsel for appellee was then allowed thirty days within which to file a brief in reply should he desire to do so. This privilege he exercised and presumably covered all matters which he had not been able to reply to because of any failure by counsel for appellant to have his brief ready in time.

In this connection, it is submitted that as a reason for re-argument such statement is without force because the brief for appellant before this Court is substantially the same as used in the District Court, only reprinted and to some extent re-arranged to bring the

subject matter and the argument into what was thought to be better form. The subject-matter is the same as that of the brief for plaintiff in the Court below, copies of which counsel has had since May, 1920.

Defendant has had the advantage of the services of eminent counsel of national reputation from the inception of this proceeding. Its case was prepared with great elaboration and care. No questions with which counsel for appellee were unfamiliar and had discussed before the District Court were raised in this Court.

Counsel for appellant was in Philadelphia on the morning of November 25, 1921, and on inquiry at the Clerk's office, found that the expected petition for re-argument had not been filed by appellee but that it was likely to be filed during the day.

723*j* Counsel for appellant then filed a brief memorandum calling the attention of the Court to the manner in which the defendant is utilizing the time, while the sending down of its mandate is delayed by these proceedings, in pushing the sales of its preparation in infringement of appellant's rights.

In order that the same may appear in printed form, it is printed as the last page hereof.

It is submitted that no good reason has been advanced for a re-argument.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Appellant.

Washington, D. C.,
November 29, 1921.

723*k* In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633.

ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Counsel for Appellant upon inquiry of the Counsel for Appellee ascertains that it is Appellee's purpose to file a petition for re-argument during this day, it being the last day allowed for such petition under the extension of time granted by the Court.

Without presuming to advise the Court on any question raised by such petition, Counsel for Appellant begs leave on behalf of his client, to state to the Court that reports are coming to Plaintiff from its traveling representatives that defendant's salesmen are now and have been since the decision of this Court in this case using unusual effort to place defendant's infringing preparation in the drug stores

of the country and are making statements to the druggists to the effect that this case has not been finally decided, that an appeal to the Supreme Court has been taken, and that they still have the right to make such sales.

Ample and competent proof in support of this statement can be furnished if desired.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Appellant.

Philadelphia, Penna.,
November 25, 1921.

(Copy furnished Counsel for Appellee.)

724 *Petition for Rehearing.*

This action, vigorously contested, resulted in an immense record. The testimony was directed to various aspects of the case arising from the rather technical law of trademarks and the much broader law of unfair competition. In analyzing the testimony and distinguishing the law we have been greatly aided by counsel for both parties. Their industry in collecting the evidence and their thoroughness in discussing the law were of such high order and so equally balanced that our labors have been lightened. That our decision finally turned on an aspect of the case which caused others to pass out of view was due to no fault or omission of counsel for the respondent but to the controlling importance which the court gave the testimony in this regard. By the respondent's petition for a rehearing, we have not been shown that we have mistaken this testimony or misinterpreted its imputations, nor have we been persuaded that we have erred in our deductions. We believe that a rehearing would produce nothing more than a repetition of the able argument already made. We are constrained, therefore, to deny the petition for rehearing.

Per CURIAM.

Endorsements: 2633. Order Denying Petition for Rehearing. Received & Filed Jan. 16, 1922. Saunders Lewis, Jr., Clerk.

725 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennyslvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between The Eli Lilly & Company (plaintiff below) Appellant, and William R. Warner & Company (defendant below) Appellee, a decree was entered in the said District Court on the eighteenth day of October, 1920, which decree is as follows:

"And now * * * this cause having come on for a hearing on bill as amended and answer as amended and proofs and having been argued by Ernest W. Bradford, Esq., for plaintiff, and Francis Rawle, Esq., and Roger S. Baldwin, Esq., for defendant, thereupon upon consideration thereof,

It is Ordered, adjudged and decreed, that the bill be dismissed with costs to the defendant."

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

726 And Whereas, in the term of March, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with the direction that an injunction issue in accordance with the opinion of this Court; and that the said Appellant, Eli Lilly & Co., recover against the said Appellee, William R. Warner & Co., in the sum of two hundred and sixty-two dollars and twenty-five cents ($262.25) for its costs herein expended, and have execution therefor.

Philadelphia, September 30, 1921.

726½ You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixteenth day of January, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

Costs of the Eli Lilly & Co.

Clerk	$55.25
Printing Record	187.00
Attorney	20.00
	$262.25

[Endorsed:] Original File No. 2633. U. S. Circuit Court of Appeals, Third Circuit, March Term, 1921. No. 19. Eli Lilly & Co., Appellant, vs. Wm. R. Warner & Co., Appellee. Copy of Mandate. Received & Filed Jan. 16, 1922. Saunders Lewis, Jr., Clerk.

727 Duplicate.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Eli Lilly and Company is appellant, and William R. Warner & Company is appellee, No. 2633, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

728 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

729 [Endorsed:] 2633. File No. 28,812. Supreme Court of the United States, October Term, 1921. No. 857. William R. Warner & Company, vs. Eli Lilly & Company. Duplicate Writ of Certiorari.

730 In the United States Circuit Court of Appeals for the Third Circuit.

No. 2633.

WILLIAM R. WARNER & COMPANY, Appellee,

vs.

THE ELI LILLY COMPANY, Appellant.

Counsel for the respective parties hereby Stipulate that the Record now before the Court on the above Petition shall be taken to constitute the Return to the Writ of Certiorari.

FRANCIS RAWLE,
For Petitioner.
E. W. BRADFORD,
For Respondent.

May 25th, 1922.

Endorsed: 2633. Stipulation of Counsel for Return to Writ of Certiorari. Received & Filed May 31, 1922. Saunders Lewis, Jr., Clerk.

731 & 732 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Stipulation of Counsel for Return to Writ of Certiorari in the case of William R. Warner & Company, Appellee, vs. The Eli Lilly Company, Appellant, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Twentieth day of July in the year of our Lord one thousand nine hundred and Twenty-two and of the Independence of the United States the one hundred and Forty-seventh.

[Seal of United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

733 [Endorsed:] File No. 28812. Supreme Court U. S., October Term, 1922. Term No. 322. Wm. A. Warner & Co., Petr., vs. Eli Lilly & Co. Duplicate Writ of Certiorari & Return. Filed July 21, 1922.

734 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of: The Eli Lilly & Co., Appellant, vs. Wm. R. Warner & Co., Appellee, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this first day of April in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

[Seal of United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Supreme Court of the United States.

Supreme Court, October Term, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, Petitioner,
vs.
ELI LILLY & COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Counsel for the respective parties hereby stipulate subject to the approval of the Court, that the annexed copy of the Bill of Complaint shall be taken to be a true and faithful copy from the original record in the Circuit Court of Appeals, Third Judicial Circuit, in the above entitled case with the same effect as if it had been duly certified in obedience to the above mentioned writ of certiorari.

February 13, 1923.

FRANCIS RAWLE,
For Petitioner.
E. U. BRADFORD,
For Respondent.

Washington, D. C., Feby. 19/23.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity. No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,
vs.
WM. R. WARNER & COMPANY, a Corporation.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The Eli Lilly and Company, a corporation, organized and existing under the laws of the State of Indiana, and a citizen of said State, and located and doing business in the City of Indianapolis, County of Marian and State of Indiana, and having its principal place of business in said City, brings this its bill of complaint against the Wm. R. Warner & Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State, and located and doing business in the City of Philadelphia, County of Philadelphia and State of Pennsylvania;

And thereupon your orator complains and says:

1. That it is a corporation organized under the laws of the State of Indiana and located at Indianapolis in said State; that it has been for many years and is now engaged in the preparation, manufacture, sale and distribution of pharmaceutical and other chemical

products and that it has manufactured and sold many such products of high therapeutical value; that by reason of the care and skill exercised in the preparation thereof and in the selection of the ingredients therefor, its products have been found of exceptional quality and value in use and are regarded as standard in the medical profession and drug trade; that its products enjoy the confidence of physicians, nurses and pharmacists and its name and reputation have come to be regarded as a guarantee of the quality and character of any products associated therewith; that among others of such products that it has manufactured and placed upon the market is one which it named "Coco-Quinine," the same being a Quinine compound of high medicinal value in the treatment of malaria and kindred diseases.

2. That it began the manufacture and sale of said product, so known as Coco-Quinine, in the year 1899; that at the time it commenced the manufacture and sale of said product no similar product was known either to the drug trade or to the medical profession, and that the name so selected to designate said product had not theretofore been in use to designate any product of a like class, and that the product and the name were each and both new to the drug trade and to the medical profession; that said product was the result of long study and expensive experiment required to overcome various difficulties encountered in its production in a commercial, palatable, and fixed medicinal form; that on introducing the product to the drug trade and medical profession it was received with favor and the sales grew and became profitable and in time became an important part of your orator's business; that it maintains at great expense an extensive selling organization through which it introduces its products not only to the drug trade but to the physicians of the country, acquainting them with the therapeutical values of said products; that by its introduction of said product Coco-Quinine, to the druggists and physicians through said organization and, in turn, to the public by said druggists and physicians, it became widely and favorably known as a remedy for the physical ills for which it is indicated; that its sales grew from year to year until it became not only well and widely known by the name Coco-Quinine, which your orator had adopted as its designating name, but also became known and recognized as one of your orator's products, and that your orator's name and reputation as a manufacturer of medicinal preparations did and does stand as a guarantee of its quality and character.

3. That as a further means of identifying the origin of said product your orator made it of a special color, substantially that commonly called "chocolate" color, as will appear by samples of said product to be properly identified and produced in evidence herein, which color is wholly non-essential to the medicinal or other vital characteristics of said product.

4. That as a further means of identifying the origin of said product, and enabling it to be identified by taste as well as by observation it adopted a certain arbitrarily selected flavor, secured by combining with the Quinine compound a prepared chocolated syrup, which gives said product a chocolate flavor; that notwithstanding

said syrup serves to make said product palatable, there are many other syrups of other flavors that might be used for the same purpose, and said chocolate flavor is wholly non-essential to the medicinal or other vital characteristics of said product.

5. That from the beginning of the manufacture and sale of said product in the year 1899 to the present time, it has been known and recognized by said name Coco-Quinine, and also by its color, and is also recognized by users by its flavor or tastes as well as by its medicinal effects, and that its wide sale and extensive use, resulting from the continuous development of the business from then until now, have resulted in said product becoming known as a standard remedy for certain physical ills, and so identified as the product of your orator, that it has been so known since shortly following its introduction to the public by your orator, as aforesaid, and that until the acts by defendant and its predecessors and associates, herein complained of, your orator's exclusive rights as originator and proprietor of said product, its name and designating color and flavor, were recognized, acknowledged and freely acquiesced in by the trade and are so acknowledged today by the majority of its reputable competitors and by the great majority of druggists and physicians.

6. That your orator has sold and continues to sell said product not only in bottles of various sizes adapted to be sold by the drug trade in the original packages, but also in bulk in large containers, adapted to be retailed by the drug trade in their own containers and under their own form of label identifying the product as Coco-Quinine; that your orator's bottles and containers have been marked and identified by special labels prepared by your orator, samples of which will be duly identified and offered in evidence herein, on which the name Coco-Quinine has appeared in connection with its own corporate name; that said name Coco-Quinine has thus been associated with its business and its name in the drug trade and medical profession for more than fifteen years, until now and since said beginning the mention of the name "Coco-Quinine" immediately suggests to the drug trade or the physician, your orator's product, and that such name means to them your orator's product and none other.

7. That your orator has diligently, by all legitimate methods and means, sought to increase the sale of its said product wherever any demand therefor existed; that it has from the beginning manufactured said product in quantities to fill all orders coming to it therefor, always maintaining its high standard for medicinal properties, and that its efforts, its care and skill in manufacture, its large expenditures of money and labor in distribution, and its own reputation as a manufacturer of medicinal products of high therapeutical value, have created for said product not only a large demand but established for it a high reputation as a remedy for the physical ills for which it is indicated.

8. That the defendant, the Wm. R. Warner & Company, is a corporation organized under the laws of the State of Pennsylvania, a citizen of said State, and is located and has its principal place of

business in the City of Philadelphia, in said State, and is engaged in the preparation, manufacture and sale of medicinal products, and is also the selling agent or distributor of the products of various other concerns and corporations, owned and controlled by the same parties or stockholders as the said defendant corporation; that among the said concerns for which the said defendant corporation acts as distributor is the Searle & Hereth Company, a corporation of Illinois, formerly located at Chicago, Illinois, but now having its principal office and place of business with the Pfeiffer Chemical Company, at 500 North Commercial Street, in the City of St. Louis, State of Missouri; that the said Pfeiffer Chemical Company is another of the concerns or corporations for which said defendant corporation, the Wm. R. Warner & Company acts as selling agent or distributor of its product, and that said several corporations are all owned, officered and managed by substantially the same parties; that some time about the year 1907 or 1908, the said Searle & Hereth Company, a corporation now thus associated with said defendant corporation, well knowing the facts hereinbefore recited in reference to your orator's product Coco-Quinine, with wrongful and fraudulent intent to divert and appropriate to its own use and profit a part of your orator's business in the sale of Coco-Quinine, began the manufacture of a product of the same color and appearance and similar flavor and intended for the same purposes as your orator's said product; the said Searle & Hereth Company made its said product in exact imitation of your orator's product with the purpose and intent of selling it as a substitute therefor and enabling druggists and others to substitute it for your orator's product when Coco-Quinine was called for by customers and indicated on physicians' prescriptions; that said Searle & Hereth Company adopted the name "Quin-Coco" as a name for its said product and so labeled the same; that the said name and label are such close imitations of the name and label by which your orator's product has become widely known that they are easily confused therewith; that said product of said Searle & Hereth Company both by flavor, appearance and name was and is so identified as a substantially exact imitation of and substitute for your orator's product, and so recognized in the trade; that said Searle & Hereth Company offered its said product to your orator's customers, druggists and dealers, informing them that it could and can be sold, and used, as a substitute for your orator's product; that it was sold to the trade on such representations, and was sold by druggists, following such instructions, to supply demands from customers for your orator's product; but for a time the efforts of said Searle & Hereth Company to market its said product met with indifferent success and did not materially interfere with the business of the sale of your orator's product.

9. That afterwards, the said Searle & Hereth Company was bought by the same parties or interests now owning the Wm. R. Warner & Company, the defendant herein, and renewed efforts were made to push said product labeled Quin-Coco in the drug trade and medical profession as a substitute for your orator's product known as Coco-Quinine; that the exact date of this transaction is not known to

your orator but it is informed and believes that it was about the year 1908 or 1909; that your orator is informed, and alleges the fact to be, that the said corporation Searle & Hereth Company is no longer an active manufacturing concern but that its corporate existence is being kept alive although its business is practically merged into and combined with the business of the Pfeiffer Chemical Company of St. Louis, Missouri; that while the said product called "Quin-Coco" is put out under the original Searle & Hereth label, that it is actually manufactured in the laboratories of the said Pfeiffer Chemical Company in St. Louis, the original label being used by said Pfeiffer Chemical Company for purposes best known to itself; that said Pfeiffer Chemical Company and the said defendant corporation, Wm. R. Warner & Company, although separate corporations, are composed of the same stockholders and managed by the same officers and that the said defendant corporation in pushing the sale and distribution of said product called "Quin-Coco" is for all practical purposes the manufacturer as well as the distributor; that the said defendant corporation, since the establishment of the relations with the said Pfeiffer Chemical Company and the Searle & Hereth Company, as aforesaid, has by many and divers ways and schemes placed its said product on the market, representing through its agents and salesmen to the purchasing druggists and physicians that said product can be furnished in lieu of and for your orator's product Coco-Quinine when it is called for by customers, or by physicians' prescriptions; that following such instructions druggists have sold and are now selling said product called "Quin-Coco" as and for your orator's product "Coco-Quinine" and when your orator's said product is called for; that customers frequently receive said imitation product from druggists labeled with the druggist's own label but bearing the name "Coco-Quinine," the name of your orator's original product; that such methods have resulted in depriving and are now depriving your orator of large sales of its product and the consequent profit thereon, and have resulted and are resulting, further, in the deception and defrauding of the purchasers and users who in asking for Coco-Quinine, intended to purchase and expected to receive your orator's product, which they had been accustomed to use and which product had acquired an established reputation with them for its quality and medicinal characteristics; and that by said methods the said defendant corporation has, through its agents, salesmen and confederates, pushed the sale and distribution to the trade of the said product called "Quin-Coco," but largely retailed as Coco-Quinine.

10. That the product so sold by said defendant is inferior in quality and in medicinal properties to Coco-Quinine and its use as a substitute for Coco-Quinine has not only deprived your orator of profits to which it is justly entitled, on the sale of goods for which it has created a demand, but has injured the reputation of your orator's product in many localities, and for these reasons, interfered seriously with the demand therefor and also resulted in defrauding the public by giving it a different product from that demanded, and one of less merit.

11. That by reason of the long and continuous use of the name "Coco-Quinine" to designate your orator's product, said name has come to have a secondary significance as a trade mark, and for a long time, or since its adoption in 1899, has been recognized in the trade and by physicians and users as your orator's exclusive trade name for said product; that by reason of the long and continuous use of the particular color of your orator's product, said color has also come to be recognized in the trade and by physicians and users as identifying the origin of said product as that of your orator; that by reason of the long and continuous use of said product of the certain chocolate flavor, said flavor has come to identify the origin of your orator's product; your orator therefore charges that said defendant is guilty of willful infringement of your orator's rights to said trade name, and also that it is guilty of willful infringement of your orator's trade right to said arbitrary distinguishing and identifying color for said product and also that it is guilty of willful infringement of your orator's trade right to said arbitrary distinguishing and identifying flavor, and that the name "Quin-Coco" and the closely imitated color and flavor of defendant's said product, each was adopted and used, and is used, with the fraudulent and wrongful purpose and intent of unfairly and fraudulently diverting to said defendant part of your orator's trade and to enable its product to be palmed off upon the public as and for the product of your orator, and your orator is informed, believes and so charges that the defendant, through its salesmen, agents, druggists, dealers and confederates, when Coco-Quinine has been asked for, has artfully and fraudulently substituted, and is now substituting, for and in the place of your orator's product, desired and expected by the customers, the said substitute product for identification called "Quin-Coco," all to the manifest injury of your orator, the deception of the public, and contrary to equity and fair dealing.

12. Your orator further says that its exclusive right to the use of said name Coco-Quinine, and in the premises, are of very great value in its business, to wit, in excess of five thousand dollars; and, further, that its exclusive right to the use of said arbitrary designating color and also to said flavor, for its said product Coco-Quinine, are each of great value, to wit, in excess of five thousand dollars each, and the defendant's acts and doings hereinbefore complained of in the infringement of your orator's rights, and in diverting business and profits from your orator, have caused and are now causing your orator great and irreparable pecuniary loss and injury, the exact amount of which it cannot, with certainty state, but the said loss and injury to your orator as it verily believes, amounts to more than ten thousand dollars, exclusive of interest and costs, and so charges the fact to be, and your orator verily believes that if the said acts of the defendant are continued, that such loss and injury will amount to many more thousands of dollars, and result in great damage to your orator's trade in said Coco-Quinine, and to the value of its trade name, and other distinguishing and identifying characteristics, and to your orator's own reputation as a manufacturer of medicinal products of standard therapeutical value.

13. Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed and may make a full disclosure and discovery of all the matters aforesaid, your orator prays that the defendant may be required according to the best and utmost of its knowledge, information and belief, to make full, true and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived; and your orator further prays that the defendant be ordered and decreed to account for and pay over to your orator the income and profits thus unlawfully derived in violation of your orator's rights in and to said trade name, and in and to said designating color, and said flavor, and, in addition, that your Honors assess or cause to be assessed against the defendant the damages sustained by your orator; and also that the profits accrued to the defendant, and the damages resulting to your orator, resulting from the unfair competition in trade, aforesaid, may be assessed and decreed to be paid over to your orator, and that upon the rendering of a decree herein, your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the willful and unfair infringement by the defendants as herein set forth.

14. And your orator further prays, to the end that the defendant be restrained from further violation of your orator's rights aforesaid, that your Honors may grant a writ of injunction issued out of and under the seal of this Honorable Court, perpetually enjoining and restraining the said defendant, its associates, and its and their agents, clerks, attorneys, and employees, from any use in any manner of said name "Coco-Quinine," or the reverse form thereof, "Quin-Coco," or any similar confusing modification of said name, Coco-Quinine, as a trade-mark for such product, or for goods of substantially the same descriptive properties, and from the use of the chocolate color as a distinguishing mark for such product, or for goods of substantially the same descriptive properties, and from the use of said flavor as a distinguishing mark for said products or for goods of the same descriptive properties, and from any colorable imitation of said marks, or designating characteristics, or from any use of either in such manner as to be calculated to deceive the public into buying the goods sold by the defendant for the goods of your orator, and from selling any product of substantially the same descriptive properties as your orator's compounded, flavored and colored to resemble your orator's, or in any such near resemblance thereto as might be calculated to deceive, and from offering said product identified herein as Quin-Coco, or any similar product, as a substitute for your orator's product Coco-Quinine, and from informing or instructing those in the trade, or physicians, that such product can be substituted, sold and used for your orator's said product, or in any manner inducing, persuading or suggesting to retailers, or others, that they offer or sell or use such or any other substitutes, for your orator's product.

15. And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendant from any further infringement of said trade rights and any further unfair competition, in manner and form as prayed for in respect to said perpetual injunction.

16. And your orator prays that the defendant may be ordered and decreed to deliver up to your orator to be destroyed, all labels signs, prints, bottles, packages, wrappers or receptacles in the possession of the defendants, bearing the said trade name Quin-Coco, or any other colorable imitation of your orator's trade name, Coco-Quinine, or any reproduction, copy or counterfeit thereof, and likewise that the defendant be ordered to deliver up to be destroyed, all of said product "Quin-Coco" in its possession, and that your orator may be awarded the costs of this suit and such other and further relief as the equity of the case may require and to your Honors may seem meet.

17. May it please your Honors to grant unto your orator, not only the writs of injunction conformable to the prayers of this bill, but also writs of subpœna ad respondendum of the United States of America, directed to the said defendant corporation, Wm. R. Warner & Company, commanding it on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree in the premises as to the Court shall deem proper and required by the principles of equity and good conscience.

THE ELI LILLY AND COMPANY,
By JOSIAH K. LILLY, *President.*

J. ADDISON ABRAMS,
Solicitor for Complainant.
BRADFORD & DOOLITTLE,
Of Counsel for Complainant.

UNITED STATES OF AMERICA,
State of Indiana, County of Marion, ss:

On the 10th day of December, 1914, before me personally appeared Josiah K. Lilly to me personally known, who, being by me duly sworn, deposes and says that he is the President of The Eli Lilly and Company, the complainant corporation named in the foregoing Bill of Complaint, and that he is familiar with its business, that he has read the foregoing Bill of Complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

[SEAL.] A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

[Endorsed:] File No. 28,812. Supreme Court U. S., October Term, 1922. Term No. 322. William R. Warner & Co., Petitioners vs. Eli Lilly & Co. Stipulation and addition to record. Filed Feb 20, 1923.

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IN THE

Supreme Court of the United States

No. 32—October Term, 1923.

WILLIAM R. WARNER & COMPANY,
Petitioner,

vs.

ELI LILLY & COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1923

WILLIAM R. WARNER & COMPANY,
Petitioner,

against

ELI LILLY & COMPANY,
Respondent.

No. 32

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S BRIEF.

Statement.

I. This cause comes up on a writ of certiorari granted by this Court on May 15, 1922,* and issued on May 27, 1922, upon petition of William R. Warner & Company, defendant in the District Court, appellee in the Circuit Court of Appeals, to review the decision of the Circuit Court of Appeals reversing the decision of the District Court for the Eastern District of Pennsylvania, and directing an injunction to issue against the defendant-petitioner as hereinafter stated (Rec., Vol. III, p. 1686).

II. The suit was brought to procure an injunction against the manufacture and sale by defendant of a product known as "Quin-Coco," on the ground of infringement of plaintiff's alleged common law trade-mark rights

*259 U. S., 578.

and of unfair competition. By an error in the printing of the record, the bill of complaint was omitted, but subsequently has been printed, and will be inserted in Volume I. An amendment to paragraph 9 of the bill, which was allowed by the District Court, is printed at pages 411-413, Volume I, of the record. Defendant's answer is printed in Volume III of the record, pages 1191-1195, and amendments to the answer occasioned by the amendment to the bill above referred to, are printed at pages 1561-1564 of Volume III of the record. Upon the joining of issue, testimony was taken by deposition in various parts of the United States, and a voluminous amount of evidence adduced by both parties. The case was heard upon the depositions so taken, no witnesses being examined in open court.

On the final hearing in the District Court, the bill was dismissed (Rec., Vol. III, p. 1651), on the ground that the plaintiff had established no trade-mark rights in the name, color, physical appearance or the formula of the product manufactured and sold by the plaintiff known as "Coco-Quinine," and that plaintiff had failed to prove by competent and credible evidence that the defendant had been guilty of unfair competition. The opinion of the District Court, by THOMPSON, J., is reported in 268 Fed., 156, and a copy is to be found on pages 1646-1651 of Volume III of the record.

III. On appeal taken by plaintiff to the Circuit Court of Appeals for the Third Circuit, the decree dismissing the bill was reversed (Rec., Vol. III, pp. 1660, 1661), and the cause remitted to the District Court, with directions to issue an injunction restraining the defendant hereafter from using chocolate as a coloring matter in its preparation named "Quin-Coco" (Rec., Vol. III, p. 1661). The opinion of the Circuit Court of Appeals by WOOLLEY, J., is reported in 275 Fed., 752, and a copy is to be found at pages 1656-1661 of Volume III of the record.

IV. A petition for a reargument was submitted to the Circuit Court of Appeals by defendant, on the ground that the learned Court had misinterpreted the evidence and placed its decision upon so-called facts which, not only were not established by the weight of evidence, but respecting which, to a large extent, there was no evidence whatever to support the stated conclusions, and that the scope of the injunction order went beyond permissible limits (Rec., Vol. III, pp. 1662-1678). This application was denied (Rec., Vol. III, p. 1684). On January 16, 1922, the mandate was issued from the Circuit Court of Appeals to the District Court in conformity with the decision of the former tribunal (Rec., Vol. III, p. 1685). Defendant thereupon petitioned this Court for a writ of certiorari to review the decision of the Circuit Court of Appeals, which was granted as above stated, and the case is now here for review upon such writ.

V. As stated in the opinion of the Circuit Court of Appeals, the case of the respondent is based upon the allegation of unfair competition and infringement of common law trade-mark rights. The bill alleged that defendant was guilty of unfairly "passing off" its product when the plaintiff's product was asked for, thereby deceiving and imposing upon purchasers. The bill of complaint prayed for an injunction restraining the defendant from the use of the name "Coco-Quinine," or the reverse form thereof of "Quin-Coco," as a trade-mark for its product; from the use of chocolate color as a distinctive mark for such product; from the use of chocolate flavor as a distinguishing mark for such product; from the use of any colorable imitations of said marks or designating characteristics in such manner as to be calculated to deceive the public into buying the goods of defendant for the goods of plaintiff; from selling any product compounded, flavored and colored to resemble plaintiff's, or any such near resemblance thereto as

might be calculated to deceive; from offering its product as a substitute for plaintiff's Coco-Quinine, and from informing or instructing the trade or physicians that its said product can be substituted, sold and used for plaintiff's product.

VI. The District Court found that there was no infringement by defendant of any common law trademark of plaintiff, and with this conclusion the Circuit Court of Appeals agreed (Rec., Vol. III, p. 1658). On the issue of unfair competition, the District Court also decided in favor of the defendant-petitioner on the law and the facts. The Circuit Court of Appeals, while expressing agreement with the District Court on the law of unfair competition, reached a different conclusion "on the application of the law to what we regard as the controlling facts of the case" (Rec., Vol. III, p. 1658).

> "The defendant," said Judge WOOLLEY in delivering the opinion of the court, "realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, as it had a right to do. But the trouble is with the manner in which it did it." (Rec., Vol. III, p. 1658.)

No findings of fact were made in either court, but the opinions in each court contain statements of facts which the respective authors of the opinions have inferred from the evidence.

The decision of the Circuit Court of Appeals condemned petitioner and confiscated this part of its business, because of the *manner* in which it exercised an admitted and adjudicated right.

The Circuit Court of Appeals directed the District Court

"to award an injunction restraining it [the defendant] hereafter from using chocolate as a coloring matter in its preparation named 'Quin-Coco'" (Rec., Vol. III, p. 1660).

VII. Two questions, therefore, are presented to this Court for its determination:

First: Whether or not the evidence warranted the decision of the Circuit Court of Appeals holding that the *manner* in which defendant exercised its legal rights to manufacture and sell its compound Quin-Coco in competition with plaintiff, required or justified that Court in depriving defendant of the further exercise of its admitted right.

Second: Whether, even if this Court should agree with the Circuit Court of Appeals that defendant had resorted to unfair methods of competition, the injunction granted did not go far beyond what was properly required to protect plaintiff from the further employment of such alleged unfair methods.

VIII. The following brief statement of the facts giving rise to the controversy is taken from the opinion of Judge THOMPSON in the District Court, these facts being substantially adopted by the Circuit Court of Appeals:

"The plaintiff is a corporation engaged, at Indianapolis, Ind., in the manufacture and sale of pharmaceutical and chemical products. It employs a large staff of traveling sales agents in selling its product to druggists and physicians throughout the United States. In 1899 it commenced the manufacture and sale of a liquid preparation known as 'Coco-Quinine.' It contains quinine as its therapeutic agent, and is designed for the administration of quinine sulphate in cases where the liquid form is preferred to capsules or

pills. Yerba santa is used in the compound to disguise the bitterness of the quinine, and chocolate syrup is used for a coloring and flavoring medium. The formula is not patented, and the preparation is not the subject of a registered trade-mark. It is put up in bottles with a label, with the word 'Lilly' in red script on a green background. The plaintiff, through its sales agents, was successful in introducing it and establishing extensive sale for it among pharmacists and dispensing physicians; that is, those who do not prescribe for their patients, but supply medicine from their own stock. The sales by druggists were upon physicians' prescriptions and to customers who inquired for chocolate-quinine or Coco-Quinine.

"The defendant is a Pennsylvania corporation, organized in 1908 to take over the long-established business of William R. Warner & Co., pharmaceutical and chemical manufacturers, and is chiefly owned and managed by by Mr. Henry Pfeiffer, Mr. Gustavus A. Pfeiffer, and Mr. G. D. Merner, through holdings of its stock, and they are also the owners of the Pfeiffer Chemical Company and Searle & Hereth Company. For the purposes of this suit, the united control and the close union in business of these three companies is not disputed.

"In 1906, the Pfeiffer Chemical Company put upon the market a product known as 'Quin-Coco.' This product is practically identical with the plaintiff's Coco-Quinine. It consists of quinine with yerba santa, vanillin, saccharin, and cocoa, with a syrup base. Since the organization of the defendant company in 1908 Quin-Coco has been manufactured by the Searle & Hereth Company and distributed solely by the defendant, the Warner Company.

"The defendant has since its organization, through its sales agents, distributed and sold Quin-Coco as a substitute for Coco-Quinine. It has * * * offered it and solicited orders for it from druggists as a substitute for Coco-Quinine

and identical to it in therapeutic value. It is not established, nor is it claimed, that it is known to consumers as a product of Eli Lilly & Co." (268 Fed., 156).

As above stated, both courts held that plaintiff had no trade-mark which defendant had infringed. WOOLLEY, J., in the Circuit Court of Appeals, said:

> "Although the plaintiff conceived the name Coco-Quinine and gave it a substantial commercial value (as evidenced by the large trade built upon it as well as by its almost literal appropriation by the defendant), the name is, nevertheless, but descriptive of the ingredients in the compound and, therefore, cannot become the subject of trade-mark" (275 Fed., 752, 754).

IX. In the District Court, the learned Judge dealt with the subject of the alleged unfair methods of competition as follows:

> "The plaintiff does not contend, and there is no evidence to show, any direct 'passing off' of the defendant's product for that of the plaintiff. The plaintiff contends that the evidence shows that the defendant's agents, in selling Quin-Coco as a substitute for Coco-Quinine, used unfair selling methods, in suggesting to druggists that, because of the similarity of the products in therapeutic value and appearance, it could be passed off by the druggist to the consumer who asked for Coco-Quinine, and could also be substituted by the druggists in prescriptions which called for Coco-Quinine, thus by suggestion inducing the druggist to pass off Quin-Coco for Coco-Quinine; and it is contended that there is sufficient evidence to establish the fact that druggists have, through these suggestions of defendant's salesmen, actually passed it off upon the public and physicians. The evidence upon this point has been carefully examined.
>
> "In a charge of this nature, the testimony

should be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions.

"The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged, or suggested the alleged unfair selling methods on the part of its salesmen. That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine—were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods." (268 Fed., at pp. 160-161.)

X. In the Circuit Court of Appeals, a different view was taken of the same evidence, the opinion on this point running as follows:

"The defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, *as it had a*

right to do. But the trouble is with the *manner* in which it did it. The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolate of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.' Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

"We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law." (275 Fed., at p. 754; italics ours.)

XI. In its petition for a reargument, the petitioner urged upon the Circuit Court of Appeals that the so-called facts of the case upon which it based its conclusion that defendant had been guilty of unfair methods of competition justifying a reversal of the judgment of the District Court, not only were not established by the weight of evidence, but that, to a very large extent, they were supported by no evidence whatever. (See Petition for a Reargument, Rec., Vol. III, pp. 1662-1678). The petitioner respectfully urges the same contention upon this Court.

Assignments of Error.

(1) The Circuit Court of Appeals erred in holding that the manner in which petitioner offered its preparation Quin-Coco to the trade in competition with plaintiff justified the Court in holding that the petitioner had forfeited its right to use chocolate as a coloring agent because of such alleged misuse.

(2) The Circuit Court of Appeals erred in holding that petitioner's efforts were expended not so much in making a compound that would act like that of plaintiff as they were in making a compound that would look like it and taste like it.

(3) The Circuit Court of Appeals erred in holding that in its laboratory petitioner conducted experiments to get the precise color and taste derived from the chocolate used by plaintiff.

(4) The Circuit Court of Appeals erred in holding that petitioner

> "sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-Quinine is

> prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.'" (275 Fed., at p. 755.)

(5) The Circuit Court of Appeals erred in holding that to induce druggists to make purchases, the petitioner represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

(6) The Circuit Court of Appeals erred in holding that this alleged practice of the petitioner's salesmen was fully established by the evidence of an unusual number of witnesses, or that such practice was followed by its salesmen with the sanction of their superiors, or that such practice was so general that the petitioner is charged with knowledge of it, and is accordingly answerable for it in the measure prescribed by law.

(7) The Circuit Court of Appeals erred in holding that the substitution of Quin-Coco for Coco-Quinine was extensively practiced by druggists.

(8) The Circuit Court of Appeals erred in holding the petitioner liable for any fraud practiced by a retail druggist who purchased from it the product Quin-Coco manufactured by it, or that the petitioner was an accomplice, if not a principal, in any such illegal practices.

(9) The Circuit Court of Appeals erred in holding that the evidence established unfair competition by the petitioner as against respondent in the sale of petitioner's product Quin-Coco.

(10) The Circuit Court of Appeals erred in holding that an injunction should issue restraining the petitioner, directly or indirectly, from inducing and enabling retail drug dealers to substitute Quin-Coco for Coco-Quinine.

(11) The Circuit Court of Appeals erred in holding that petitioner has forfeited its right to use chocolate as a coloring agent, because of its alleged misuse.

(12) The Circuit Court of Appeals erred in directing the District Court to award an injunction restraining the petitioner hereafter from using chocolate as a coloring matter in its preparation named Quin-Coco.

(13) The Circuit Court of Appeals erred in holding that the only practicable way of protecting the public and the respondent from a continuance of the alleged unfair practices of the petitioner was to deprive the petitioner of the use of the ingredient chocolate or cocoa.

(14) The Circuit Court of Appeals erred in holding that the use of chocolate as a coloring matter in its preparation named Quin-Coco alone made effective the practices alleged to have been employed by the petitioner in competition with respondent in the sale of its product Quin-Coco.

ARGUMENT.

POINT I.

The entire record is before this Court with the same power to decide the case presented to the Circuit Court of Appeals as that Court had.

In *Lutcher & Moore Co.* v. *Knight*, 217 U. S., 257, this Court, having granted a writ of certiorari, reversed the decree of the Circuit Court of Appeals on the ground that that Court had disposed of the case on questions not raised by either party and contrary to the attitude of the District Court towards the defenses interposed. The Court said (p. 267):

> *"It is undoubted that by the operation of the writ of certiorari, * * * the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court.* Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this court on certiorari * * * it will be disposed of so that the mandate of this court, to avoid circuity, will go directly to the Circuit [district] Court." (Italics ours.)

The Court declared that by reason of the failure of the Court below to consider the case before it, the record presented an exception to the general rule of procedure and therefore reversed the judgment and remanded the case to the Circuit Court of Appeals to the end that the duty to hear and decide the case might be performed.

In *Delk* v. *St. Louis & S. F. R. R. Co.*, 220 U. S., 580, a case of negligence, a verdict was rendered for the plaintiff. On appeal to the Circuit Court of Appeals, the judgment was reversed on the ground that the jury were led incorrectly to suppose by the charge of the judge that the

Safety Appliance Act did not impose an absolute duty to keep its cars in good order at all times.

In this Court it was held that the law was incorrectly stated by the Circuit Court of Appeals, and that the Safety Appliance Act did impose an absolute duty to provide and keep proper couplers at all times and under all circumstances, citing *Chicago, B. & Q. Ry. Co.* v. *U. S.*, 220 U. S., 559.

The Court said (p. 588):

> "In this state of the record what must be done with the case? As the case is here upon certiorari to review the action of the Circuit Court of Appeals, *this court has the entire record before it* with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court. *Lutcher & Moore Co.* v. *Knight*, 217 U. S., 257-267. In this view, the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute, * * * imposed on the carrier an absolute duty to provide its cars, * * * with the required couplers, and keep them in proper condition, * * * without any reference to the care or diligence * * * exercised in performing its statutory duty. But on looking further into the record from the Circuit Court, we find that no error of law was committed by that court; * * * the judgment of the latter court must be affirmed." (Italics ours.)

After granting the writ of certiorari, the Supreme Court determines the questions raised by the record, and whether the decree brought up for review is justified by the law and the testimony.

In *The Conqueror*, 166 U. S., 110, the Court stated there were two questions involved in the merits of the case. First, whether the vessel was taxable under the

tariff laws, and, second, *whether the award of damages was justified by the law and the testimony.*

The Court not only discussed the evidence but stated that the testimony of experts fell far short of establishing such a loss of profits as to entitle the libellant to recover a large sum for the detention of the vessel and that the testimony was insufficient and the judgment of the Circuit Court of Appeals therefore was reversed.

POINT II.

In so far as the facts were found concurrently by both the District Court and the Circuit Court of Appeals they will be accepted as conclusive in this Court unless error is clearly shown.

For the purposes of this discussion we treat the statements of fact in the opinions as findings.

In *Compania La Flecha* v. *Brauer,* 168 U. S., 104, the Court said (p. 123):

> "Upon consideration of the conflicting testimony, with the aid of the careful arguments of counsel, no ground is shown for reversing or modifying the conclusions of fact reached by both courts below. *Their concurrent decisions upon a question of fact are to be followed, unless clearly shown to be erroneous. Moorewood* v. *Enequist,* 23 How., 491; *The Richmond,* 103 U. S., 540, and cases cited; *The Conqueror,* 166 U. S., 110, 136." (Italics ours.)

In *Stuart* v. *Hayden,* 169 U. S., 1, this Court, on certiorari, considered the evidence, quoting from the testimony, but declared (p. 14):

> "We will add, that as the Circuit Court and the Circuit Court of Appeals agreed as to what were the ultimate facts established by the evidence, this

> court should accept their view of the facts unless it clearly appeared that they erred as to the effect of the evidence."

In *Baker* v. *Cummings*, 169 U. S., 189, which was an appeal from the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of said District, this Court analyzed the evidence upon the question of the fact of knowledge of a party, and whether he remained silent for three years after acquiring such knowledge.

The Court said (p. 198):

> "In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this Court—of which *Stuart* v. *Hayden*, 169 U. S., 1, decided at the present term, is the last expression—that when *two* courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous."

The Carib Prince, 170 U. S., 655:

> "The settled doctrine of this court is that the concurrent decisions of *two* courts upon a question of fact will be followed unless shown to be clearly erroneous" (p. 658).

The Wildcroft, 201 U. S., 378:

> "This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive" (p. 387).

La Bourgogne, 210 U. S., 95:

> "We may not disturb the concurrent findings of both the courts below * * * unless we are of opinion that those findings were so unwarranted by the evidence as clearly to be erroneous" (p. 114).

Baker v. *Schofield*, 243 U. S., 114:

In this case the Court said (p. 118):

> "Both the District Court and the Circuit Court of Appeals found that the sale from Baker to Simpson was only colorable, and that Simpson purchased the property for Baker. Our consideration of the evidence must be governed by the well settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous. [Citing cases.] The concurrent decisions of the courts upon the establishment of a trust as a question of fact will be followed unless shown to be clearly erroneous."

To the same effect are

Southern Ry. Co. v. *Puckett*, 244 U. S., 571;
Piedmont & Georges Creek Coal Co. v. *Seaboard Fisheries Co.*, 254 U. S., 1;
Geddes v. *Anaconda Copper M. Co.*, 254 U. S., 590;
Bodkin v. *Edwards*, 255 U. S., 221.

No formal findings of fact were made by either court, but in the opinions in both courts, the facts as they were deduced from the evidence were set forth.

The Circuit Court of Appeals expressly stated that it was in accord with the trial Judge on the issue of infringement (Rec., Vol. III, p. 1658).

The facts on this issue are set forth by Judge THOMPSON on pages 1647-1648, Volume III of the Record.

POINT III.

On the issue of unfair competition, the Circuit Court of Appeals placed its decision upon the "manner" in which it found petitioner had exercised its admitted right to duplicate respondent's preparation and offer it to the trade in competition with the latter. What the Circuit Court of Appeals found to be the facts on this issue, are directly at variance with the facts found by the trial Judge (Cf. Rec., Vol. III, pp. 1658-1659 with pp. 1648, 1650). Neither court saw or heard the witnesses. The case was tried on depositions taken out of court. Under similar circumstances this Court itself has analyzed the evidence and drawn its own conclusions of fact as a basis for its decision.

In *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S., 280, where after a second appeal had been taken to the Circuit Court of Appeals after reversal of the District Court, the Supreme Court in the exercise of its supervisory jurisdiction, issued a writ of certiorari to bring up the whole record, and *held* that upon such writ the entire case is before it for examination.

In this case the libel was dismissed in the District Court. On appeal, the Circuit Court of Appeals reversed the case to ascertain damages, which were assessed and final decree entered. A second appeal was taken to the Circuit Court of Appeals, which affirmed the decree.

It was argued that the Supreme Court was limited to the question of damages, but the Court held that it would be giving too narrow a construction to its powers to hold that it was intended to bring before the Court

only the question of damages, when it appeared that the petition for the writ of certiorari set forth the facts of the case and claimed that upon these facts the libel should have been dismissed.

The Court said (p. 284):

> "A difference of opinion existed in the court below upon the question of liability and the writ was granted to review the whole case, * * * . But while the [Circuit] Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. *Upon such writ the entire case is before us for examination.*" (Italics ours.)

In *Adams* v. *Cowen*, 177 U. S., 471, this Court on certiorari affirmed a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court dismissing the bill of complaint. The District Court and the Circuit Court of Appeals were not agreed as to the facts. On certiorari from the Supreme Court, the judges divided equally and the judgment was affirmed (174 U. S., 800). On rehearing the judgment was again affirmed (177 U. S., 471).

On the last hearing, the Supreme Court certainly did analyze the evidence, agreed with the Circuit Court of Appeals and rendered a decision by a divided court of 5 to 4, affirming the Circuit Court of Appeals.

In the case of *Adams* v. *Gilliland*, 242 U. S., 350, this Court reversed the decree of the Circuit Court of Appeals, which had reversed a decree of the District Court in favor of the plaintiff, sustaining the claim for infringement of a patent.

It appeared that in a previous suit, the District Court gave the plaintiff a decree after hearing evidence of both plaintiff and defendant. In the later suit, upon taking

additional evidence the Court again decided in favor of the plaintiff.

The Circuit Court of Appeals treated the action of the district judge as a mere yielding to the authority of the former decision and *reversed the decree upon the evidence as it stood in print.*

The Supreme Court was unable to agree with the Circuit Court of Appeals.

The Court said (pp. 352-353):

> "There is no doubt that the defendant had castings made. The essential question is the time when they were first made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the District Judge and mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking and other details. Considering that a patent has been granted to the plaintiff the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis* v. *Schwartz,* 155 U. S., 631, 636. * * * Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed."

POINT IV.

The facts and the law upon the issue of unfair competition are so interwoven that it is necessary for this Court to analyze the evidence in order to determine whether or not the Circuit Court of Appeals erred in reversing the District Court, as charged by the petitioner.

The issue of unfair competition is always a mixed question of fact and law, and the conclusion of law can only be determined after a careful analysis of the facts.

Had the District Court made specific findings of fact establishing fraud and the Circuit Court of Appeals affirmed the judgment, a very different question would have been presented. Then there would arise a case of concurrent decisions by two courts and this Court would be limited to the single question whether clear error was shown, or whether the action of the lower courts was arbitrary, or transcended the legitimate bounds of their authority.

In view of the circumstances under which the writ of certiorari in this case was applied for, the whole case is before the Supreme Court on the record upon which eminent judges have differed, and this Court has the power to review the evidence, for by that method alone is it possible to determine the issue of unfair competition.

An analogy is found in the rules concerning the review in this Court of the decision of a State court, where the conclusion of law as to a Federal right and the findings of fact, are so intermingled as to make it necessary to analyze the facts in order to pass upon the Federal question.

Such a case was *Jones Natl. Bank* v. *Yates*, 240 U. S., 541, where no findings of fact were made by the Supreme Court of the State. It was declared that the opinion could not be regarded as embodying findings.

The Court said (pp. 552-553):

> "In this state of the record, for the purpose of determining whether in thus reversing the judgment and depriving the plaintiffs of their recovery, the Federal question was wrongly decided, there are two questions to be considered *(a)* whether the facts found by the trial court justified a recovery under the Federal law and, if so, *(b)* whether there was substantial evidence to support these findings, as the duty to decide the Federal question in its very nature involves this further inquiry." (Citing cases.)

In *Truax* v. *Corrigan*, 257 U. S., 312, TAFT, C. J., said (p. 324):

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here" (citing cases). *"Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts."* (Citing cases.) (Italics ours.)

POINT V.

The Circuit Court of Appeals erred in holding that the manner in which petitioner marketed its product Quin-Coco in competition with respondent's Coco-Quinine was unfair.

The Circuit Court of Appeals first asserted that

> "the defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, *as it had a right to do*" (Rec., Vol. III, p. 1658).

But then the Court takes exception to the *manner* in which the defendant exercised its admitted right, describing this manner in the following language:

> "The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market" (Rec., Vol. III, p. 1658).

If the facts were as thus recited, nevertheless, it is submitted, the petitioner was entirely within its rights in following the course described.

In the District Court, Judge THOMPSON, referring to this claim, said that in order that plaintiff should succeed, it must debar the defendant

> "not only from the use of the color, but from the use of the flavor of chocolate. In support of this proposition, the plaintiff has not cited any authorities, and I think the obvious reason is that there are none, to the effect that flavors, and particularly such a distinctive flavor as chocolate, may, because adopted by the plaintiff, be monopolized. While the plaintiff has shown that other liquid preparations of quinine with the bitterness disguised and flavor added may be made, it has not shown that the chocolate flavor may be obtained by any other means than by the use of chocolate, or that chocolate flavor may be used without producing the chocolate color in the liquid. While the distinctive flavor of chocolate is a matter of common knowledge, it is equally a matter of common knowledge that it is a flavor which appeals to the palate and taste of people almost universally.
>
> "Plaintiff is confronted at first with this proposition: That it has no exclusive right to the use of its formula. Its only right is to prevent anyone from obtaining or using it through a breach of trust or contract, and anyone that came honestly to the knowledge of it could use it without the plaintiff's permission and against its will. *Chadwick* v. *Covell,* 151 Mass., 190.
>
> "The ingredients of which its product was composed are of such common every-day use that the plaintiff cannot be held to have the right to prevent others from using the same combination as used by it, and the preparation may be used and manufactured by anyone who in good faith acquires knowledge of its composition and such person may publish the fact that he has made it in accordance with the original formula. *Hostetter* v. *Fries,* 17 Fed., 620" (Rec., Vol. III, pp. 1648-1649).

Chocolate used not only for color but for flavor.

The evidence clearly shows that chocolate or cocoa, which is merely chocolate from which some of the fats have been removed, is not only used to give distinctive color, but also to add to the pleasant taste of the mixture, and furthermore, it aids to some extent in holding the quinine in suspension (Beringer Rec., Vol. III, p. 1507).

Use of Chocolate as disguise for Quinine practiced years before respondent made its preparation.

The evidence further established beyond controversy that the use of chocolate as a disguise or excipient in the administration of quinine was known and employed for many years before plaintiff devised or put upon the market its product known as Coco-Quinine. In 1851, in a work entitled "New Remedies," by Robley Dunglison, published by Blanchard & Lea, typical prescriptions were given for the production of powders composed of sulphate of quinine and chocolate (Rec., Vol. III, p. 1264).

In 1861, prescriptions for a paste composed of quinine and chocolate were published in the "Allgemeine Pharmacopoe," by Dr. F. L. Strumpf, the publisher being C. F. Winters, of Leipsic and Heidelberg (Rec., Vol. III, p. 1264).

In 1868, the American Journal of Pharmacy (Vol. 40), advertised a syrup of chocolate as an excipient for the administration of quinine (Rec., Vol. III, p. 1265). The Druggists' Circular and Chemical Gazette, published in New York in 1871, advertised a formula of a French physician, Dr. Heuze, for the preparation of an extract of Peruvian Bark possessing no unpleasant bitter taste and mixed with pure chocolate paste "so as to form a readily potable, and at the same time an agreeably dietetic medicine."

In February, 1872, the same Journal contained the following statement:

> "Cocoa or chocolate, if the quinia sulphate is not in large proportion, conceals the taste to a great extent, provided it be used of a sufficient strength as in the solid or semi-fluid state" (Rec., Vol. III, p. 1266).

In 1879, The National Dispensary stated:

> "Chocolate also forms the basis for exhibiting iron and other medicinal substances, and has been proposed as a pleasant vehicle in the preparation of lozenges containing santonin, etc." (Rec., Vol. III, p. 1511).

In the decade between 1880 and 1890, Caswell & Company in New York manufactured quinine chocolate lozenges or tablets which had a large sale (Rec., Vol. III, p. 1512).

Henry C. Blair, a well-known retail druggist in Philadelphia, testified that his drug store had sold tablets called "Yerba-Chocolates" since the Centennial Exhibition in 1876. He could not say how long before that time, but continuously ever since. These tablets contained some form of quinine, also chocolate and yerba santa. That prior to 1895, he had compounded a liquid preparation of chocolate, yerba santa and quinine, making a syrupy mixture, on the prescription of Dr. Samuel K. Ashton, of Philadelphia (Rec., Vol. III, pp. 1558, 1559).

The foregoing evidence, which was entirely undisputed, demonstrates that respondent's claim that its preparation of chocolate and quinine known as Coco-Quinine was unknown to the pharmaceutical world at the time when respondent first compounded it is unfounded. Chocolate is not used to destroy the bitterness of quinine, that office being performed by yerba santa, but to impart an agreeable flavor to the mixture, which otherwise would be unpalatable.

The following are the names of the fourteen concerns that have marketed a sweet syrup of Quinine and Chocolate, and the names of their articles and some of their earlier dates when marketed:

"Syrup Quinine, with Chocolate," H. K. Mulford Co., Philadelphia; first made, 1902;

"Wampole's Chocolate Quinine," Henry K. Wampole Co., Philadelphia;

"Quin-Choc," First Texas Chemical Manufacturing Co., Dallas, Texas; first made, 1910;

"Koquin," John T. Milliken & Co., St. Louis, Mo.;

"Chocolate Quinine Syrup," Tilden Company, New Lebanon, New York, and St. Louis, Mo.;

"Quinico," Meyers Bros. Drug Company, St. Louis, Mo.; first made, 1905;

"Chocolate Quinine," Burrough Bros., Baltimore, Md.;

"Quin-coco-ine," Harvey Company, Saratoga Springs, N. Y.; first made, 1909;

"Chocolate Syrup Quinine," Webster-Warnock Co., Memphis, Tenn.; first made, 1910;

"Cocoa & Quinine Comp.," Henry S. Wampole Company, Baltimore, Md.; first made, 1912;

"Choquin," William S. Merrell Chemical Co., Cincinnati (Rec., Vol. III, p. 1207).

Other witnesses testified that there were numerous makes of Chocolate-Quinine on the market.

The respondent did not invent any new product or decoction which it put upon the market and to which it had an exclusive right, but it utilized knowledge which was open to any and everyone to secure and which was open to petitioner as well as to respondent. "Admittedly," says the Circuit Court of Appeals, "the plaintiff has no monopoly in its formula, nor has it an exclusive right to the use of any of its ingredients." The respondent first began the preparation of its mixture in 1899 (Rec., Vol. I, p. 8). In making this preparation, chocolate was

used to furnish a satisfactory color and flavor (Rec., Vol. I, p. 43). Francis, one of respondent's witnesses, for 23 years pharmaceutical chemist with the well-known firm of Parke, Davis & Co., testified that the utility of chocolate or cocoa in such preparation would be that it serves the purpose of imparting "a distinctive flavor and a distinctive color" (Rec., Vol. I, p. 57).

The petitioner—and all others—the Circuit Court of Appeals correctly holds—was "free to duplicate the plaintiff's preparation and enter the trade in competition * * * ."

History of Petitioner's Quin-Coco.

In 1906, Pfeiffer Chemical Company, a St. Louis concern, first made and sold a compound known as Quin-Coco (Rec., Vol. III, p. 1196). In June, 1906, the Pfeiffer Chemical Company became affiliated with Searle & Hereth Company, also a St. Louis concern (Rec., Vol. III, p. 1228). Quin-Coco, being a pharmaceutical preparation, was then transferred to the Searle & Hereth list, and Pfeiffer Chemical Company discontinued its pharmaceutical line (Id.). Searle & Hereth Company made and sold Quin-Coco until some time after this petitioner was incorporated (July, 1908), after which petitioner became the distributing company, but Searle & Hereth continued to manufacture all the Quin-Coco at its laboratories in St. Louis. In March, 1909, Searle & Hereth Company manufactured the first lot of the product at Philadelphia. Thereafter it was manufactured by it in Philadelphia (Rec., Vol. III, p. 1494).

It is the practice of Searle & Hereth Co. to buy chocolate in barrels of about three hundred pounds each, which is used just as it comes. No efforts are made to standardize the cocoa in the making of Quin-Coco, and there are variations in color in different batches; nor is there any effort to imitate the taste of chocolate (Rec., Vol. III,

p. 1497). It hardly requires any testimony to demonstrate the effect as a flavor of the use of chocolate in a medicinal preparation, nor can there be any need of expert testimony to establish the effect upon the eye of the introduction of chocolate considered as a coloring matter alone.

Certain statements in the opinion of the Circuit Court of Appeals as to Petitioner's acts in the preparation and method of sale of Quin-Coco are contrary to the weight of evidence.

The Court stated that the petitioner, when it began to market Quin-Coco, etc., first procured samples of the plaintiff's (respondent's) preparation. "Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff (respondent) as they were in making a compound that would look like it and taste like it."

The evidence does not support this statement, but shows the facts to be to the contrary. The defendant corporation was not organized at Philadelphia until July, 1908. As early as 1906 the Pfeiffer Chemical Company had begun to manufacture and market Quin-Coco at St. Louis. This was two years before the petitioner was chartered. It was afterwards placed on the list of Searle & Hereth Company (being a pharmaceutical). After the petitioner was incorporated, July, 1908, Quin-Coco was shipped by the Searle & Hereth Company from its St. Louis laboratory to Philadelphia to be marketed by the petitioner. This continued until March, 1909, when the Searle & Hereth Company began to make its Quin-Coco at its Philadelphia laboratory; the petitioner acted and has ever since acted only as the sole distributor for East and West.

Therefore, there was no need in 1908 or thereafter (as stated by the Circuit Court of Appeals) for the petitioner to "procure samples" or "learn the ingredients" of Coco-Quin or "conduct experiments" with chocolates of different kinds in an effort to get the precise color and taste of Coco-Quinine. "Experiments" could not have been "at first unsuccessful," as stated by the Circuit Court of Appeals, because none was made. The article had been on the market for over two years. The petitioner has never manufactured it. It is now a Searle & Hereth article and always has been.

Again, the Circuit Court of Appeals states in its opinion that when the petitioner placed Quin-Coco on the market "it did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, etc., etc."

The evidence on this point also establishes the contrary to the foregoing statement.

Mr. G. A. Pfeiffer, treasurer and general manager of petitioner, testified (Rec., Vol. III, p. 1200), that their salesmen regularly call on all the retail drug trade and dispensing doctors (doctors who supply their own drugs to their patients), that about one-sixth of petitioner's sales of pharmaceutical preparations is sold to dispensing druggists (Rec., Vol. III, p. 1209).

The respondent's salesmen likewise called on all of the druggists and took orders. The only difference in their business method was that the goods when ordered by the druggists were charged to the local jobber.

The statement in the opinion of the Circuit Court of Appeals, that petitioner's salesmen would at times pour both mixtures on paper to demonstrate the identity of color, is hardly supported by evidence of only two or three instances out of three or four calls a year for ten years

on over 50,000 druggists by about eighty salesmen of the petitioner. It really runs up to over 100 million calls.

The statement by the Circuit Court of Appeals that petitioner in its efforts to produce a compound like Coco-Quinine did not show the same concern for the use of chocolate as a medium of color and taste as it showed in finding a chocolate that would give to its mixture the color and taste of the respondent's, is not supported by the evidence.

Groves, a former employee of petitioner, who, when he testified, was an employee of respondent, testified that experimental work on this product, conducted in the laboratories of the petitioner during the latter part of 1908, was directed to making a product similar in color to that of the Lilly product; that the experiments at first were not a success, but after receiving a formula from the Pfeiffer Chemical Co. at St. Louis, they produced a product of the same color as that which they were endeavoring to duplicate, namely, Lilly's Coco-Quinine (Rec., Vol. I, pp. 360-362). This testimony was denied by Harry Fritsch, foreman of petitioner's Wet Goods Department, engaged in the manufacture of its liquid preparations, who also testified:

> "When it comes to difference in color, there were no experiments made, therefore we could not compare any colors."

Fritsch further testified that no steps were taken to standardize the precise color of the cocoa that goes into the Quin-Coco preparation (Rec., Vol. III, pp. 1494-1498).

But all this testimony was directed towards what happened in the Philadelphia Laboratory of Searle & Hereth in 1908. The testimony, however, is conclusive, as above shown on page 28 of this brief, that Quin-Coco was manufactured by Searle & Hereth in St. Louis in 1906 and continuously thereafter until Petitioner was

organized in July, 1908. After that it was made both in Philadelphia and St. Louis, but solely by Searle & Hereth. There was, therefore, no occasion for Petitioner to experiment to produce this article, as they did not manufacture it.

As a matter of fact, in the Court below, respondent laid little stress upon this contention. Its main contention and the principal basis of the decision of the Circuit Court of Appeals was, that petitioner in selling its product to druggists, through its salesmen, represented that it could be passed off as the product of respondent; that as a matter of fact it was indistinguishable in appearance from that of respondent, and that as it cost less than respondent's product, druggists were tempted to dispense it when that product was prescribed, and that petitioner was responsible on the evidence for that fact that some druggists did so dispense it.

Testimony that in two or three instances salesmen poured Coco-Quinine and Quin-Coco into a dish to demonstrate their similarity in color and appearance, does not sustain a finding that petitioner in making the preparation Quin-Coco strove primarily to give it the same color and taste as that of Coco-Quinine.

IT IS NOT CLAIMED THAT PETITIONER SOLD ITS PRODUCT QUIN-COCO IN BOTTLES MADE OR LABELLED TO RESEMBLE THOSE IN WHICH RESPONDENT SOLD ITS COCO-QUININE. NOR WAS SUCH THE FACT.

All of the bottles of Coco-Quinine manufactured and sold by respondent bear a label on which is printed a representation of a factory with the word "Lilly" in red script, this being a facsimile of the signature of the founder of respondent's house and a registered trademark on all labels affixed to the goods emanating from its laboratories, and they advertise their product in the words, "If it bears a red Lilly, it's right." The name

of the corporation, The Eli Lilly & Company, appears with these trade-marks on all packages (Rec., Vol. I, pp. 50-51).

W. S. Cavedo, one of respondent's witnesses, a retail druggist of Richmond, Virginia, testified, that when inspecting a bottle of Coco-Quinine, he always knows it by the label, that " 'Eli Lilly & Company' is right on the bottom of the label printed in red," and to his eye, that is distinguishing as indicating a Lilly product (Rec., Vol. I, p. 328). A. B. Garber, another of respondent's witnesses, a druggist from Emporia, Virginia, testified to the same effect, as did Van Schaak, representative of a large jobbing house in Chicago, who testified:

> "As far as I personally know, all of their products are identified by that trade-mark, printed on the labels or wrappers, or both.
>
> "XQ18. The name so printed has a very considerable currency in the trade, has it not? I mean as a trade name. A. Yes" (Rec., Vol. I, p. 75).

There is not a syllable of evidence to suggest that petitioner has used a label similar to that employed by respondent, or so bottles its product as to deceive any person into confusing the two products by leading him to believe that the bottle containing the product of defendant is in fact that of plaintiff. Compare Complainant's Exhibit Bottle No. 4 (Coco-Quinine) with Complainant's Exhibit Bottle No. 5 (Defendant's Quin-Coco).

POINT VI.

The Circuit Court of Appeals erred in holding that because of representations made by salesmen of petitioner in selling Quin-Coco, petitioner became a party to frauds practiced by retail druggists in passing off its product upon customers who ordered and thought they were getting respondent's Coco-Quinine.

"That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine," were, substantially, the representations of petitioner's salesmen—matters which the District Court, it is submitted, properly held under the law petitioner had a right to represent to its customers.

The added charge made by the Circuit Court of Appeals, that petitioner systematically sought to promote sales by suggesting to retail druggist purchasers that they could, without fear of detection, pass off Quin-Coco for Coco-Quinine, when the latter was called for, while charged by certain of respondent's witnesses, was denied in every instance by the impugned salesman, and the testimony to that effect is far too inconclusive to afford a sound basis for the conclusion reached by the Circuit Court of Appeals.

Specifically, the Circuit Court of Appeals found that petitioner

> "did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-

> Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.' Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper" (Vol. III, p. 1658).

This practice of the salesmen of defendant-petitioner the court found was

> "fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law" (Rec., Vol. III, pp. 1658-1659).

Judge THOMPSON, in the District Court, says of the same evidence as that upon which the Circuit Court of Appeals bases these conclusions, which evidence Judge THOMPSON states has been carefully examined, that

> "In a charge of this nature, the testimony should be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions.

> "The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested the alleged unfair selling methods on the part of its salesmen. That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it would be placed upon the market as a substitute for Coco-Quinine were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods" (Rec., Vol. III, pp. 1650-1651).

In view of this marked difference between the conclusions deduced from the same evidence by the two courts, the attention of this Court is invited to the evidence itself.

The Inherent Improbability of the Respondent's Case.

The petitioner is one of the large manufacturing drug houses in this country. It has the William R. Warner & Company business, which has been in existence in Philadelphia for more than 50 years, and the Searle & Hereth and Pfeiffer Chemical Company business. It has also the Sloan's Liniment and the Bucklen businesses (Pfeiffer, Vol. III, p. 1196). Since this case began, it has taken over the Hudnut Perfumery business in New York (Nottingham, Vol. III, p. 1575).

The petitioner's "net sales for 1915 were over $2,600,000" (H. E. James, Vol. III, p. 1542).

It spends over $250,000 a year on its selling force (G. A. Pfeiffer, Vol. III, p. 1200, Q62).

It marketed (1915) 5,000 items (Pfeiffer, Vol. III, p. 1213, Q146).

Experience teaches that a business of this magnitude cannot be built up and carried on except upon correct business principles. It seems to require no proof to show that a drug house would harm its reputation and business if it practices "unfair" selling methods. If any proof were required it is furnished by Dr. Beringer, a prominent and experienced pharmacist and chemist, closely connected with the College of Pharmacy of Philadelphia, who testified that "such a thing would discredit the house represented, and would be a serious injury to their standing and business" (Record, Vol. III, p. 1536, Q113).

The total sales of Quin-Coco by petitioner in 1914 as shown by H. E. James (Vol. III, p. 1542) were $13,000, covering also two other similar drugs. But of this $2,100 were sold on mail orders. The total sales by traveling salesmen were therefore $10,900. This amounted to .0045 per cent. of the total sales of the company.

Assuming a 10 per cent. profit, this would be $1,090 a year for 75 salesmen. Each would earn by his sales an average profit of $13.20 for the house. On a 5 per cent. commission on gross sales the salesman would earn $7.26 a year.

The probability of a large business concern perpetrating on the public a general business fraud as charged by the Circuit Court of Appeals seems so slight it would be almost unthinkable. Experience teaches that big men with a great property at stake do not commit petty frauds.

COXE, Dist. J., pertinently said in *Hostetter Co.* v. *Comerford*, 97 Fed., 585, 586:

> "Again, there is nothing in the record to indicate that the defendants are men who would descend to the level of the petty trickster. For aught that appears they are men of fair standing in the business in which they are engaged. The burden is strongly upon the complainant to prove fraud by a fair preponderance of evidence. This it has not done. Stated as fairly as the complainant can expect, the matter is involved in doubt. Should the court decree for the complainant it would be still harassed by the fear that it may have condemned innocent men."

Again, these "unfair" selling methods are charged to have been committed on the retail drug trade. That, too, is quite unthinkable. Consider that trade for a moment. Its morals are "above the average of the ordinary commercial man" (Pfeiffer, Vol. III, p. 1205, Qs. 98-100). Blair, an eminent Philadelphia druggist, testified that the American Pharmaceutical Association had had a Code of Ethics for more than fifty years, drawn up "on a very high moral standard" (Vol. III, p. 1558, Q9).

It was revised and republished at the annual meeting of the Association at Cleveland in 1922.* Among its canons are these:

> "Pharmacy has for its primary object the service which it can render to the public in safeguarding the handling, sale, compounding and dispensing of medicinal substances.
>
> The practice of pharmacy demands knowledge, skill and integrity on the part of those engaged in it. Pharmacists are required to pass certain educational tests in order to quality under the laws of our States. The States thus restrict the practice of pharmacy to those persons who by reason of

*Published in Amer. Journ. of Pharmacy, for 1922, p. 703; Amer. Pharm. Apoc. Journ., for 1922, p. 728. The revision of it is not in the proofs, but it seems to be a matter of public knowledge and concern.

special training and qualifications are able to qualify under regulatory requirements and grant to them privileges necessarily denied to others.

In return, the States expect the Pharmacist to recognize his responsibility to the community and to fulfill his professional obligations honorably and with due regard for the physical and moral well being of society.

The Pharmacist should not, under any circumstances, substitute one article for another, or one make of an article for another in a prescription, without the consent of the Physician who wrote it."

To attempt to practice "unfair" selling methods on such a body of men would be largely futile. To suggest it would be to impugn the morals of the whole drug trade, on whose morals human life depends to a certain extent.

The Petitioner's Training of Its Salesmen Was Ethical and Thorough.

The testimony on this point included that of petitioner's officers, sales managers, and the salesmen themselves. One, at least, of the respondent's witnesses was an excellent witness for petitioner in this respect. Without quoting the evidence we will briefly refer to the testimony on this point:

The Officers.

G. A. Pfeiffer, Vol. III, p. 1212, Q143.

H. Pfeiffer, Vol. III, p. 1234, Qs 6 to 22.

G. D. Merner, head of the St. Louis office, Vol. III, p. 1284, Q39, etc.

The Sales Managers.

Ritayik, Vol. III, p. 1303, Q25.

Hagaman, Vol. III, p. 1277, Qs 3 to 11.

McNulty, Vol. III, p. 1252, Qs 9, 10.

The Salesmen.

Richards, Vol. III, p. 1342, Qs 36 to 43; p. 1351, Qs 145 to 149.

Gonzales, Vol. III, p. 1357, Qs 14 to 16.

Moon, Vol. III, p. 1465, Qs 19 to 22.

Jones, Vol. III, p. 1331, Qs 54-56.

Respondent's Witness.

Kelton, Vol. I, p. 98, Qs 24, 25.

THE "SALESMAN'S CONFIDENTIAL."

This was a pocket manual for the use of Warner salesmen. They all received copies of it. It was offered in evidence at page 1236; as to pp. 86 and 87, which were there read into the Record, it taught:

> "It pays to adhere strictly to the truth at all times."
>
> "It don't pay to speak ill of, or even mention, your competitor."
>
> "We believe in honesty and fair dealing."
>
> "Never speak ill of a competitor."

The evidence shows that there are about 53,000 retail druggists in the United States; 73 were examined by the respondent; only 22 gave testimony tending in any degree to support the charge that petitioner's salesmen, in pushing the sale of Quin-Coco, represented that it could be passed off for Coco-Quinine, and substantially all of these, upon cross examination, narrowed the testimony down to a representation that Quin-Coco was the same as Coco-Quinine, and could be sold for the same uses. Out of more than 300 salesmen employed by defendant during the ten years covered by the evidence, charges of improper representation were made against only about ten. Many of these were single instances in the selling work of salesmen who for years had visited from 400 to 1,000 drug stores three or four times a year. Every salesman, except one, whose mind had so failed that he could

not be called, specifically denied the charges against him, and testified to entirely proper selling methods on his part. All of the officers and sales managers of the petitioner corporation categorically denied any authorization, knowledge or approval of the alleged dishonest practices.

Respondent's Witnesses on "Unfair" Trade Were Stale.

The respondent's witnesses as to "unfair" trade were all or nearly all stale, especially considering that they were called only to testify *as to what had been said* to them respectively by a Warner salesman in soliciting their trade in Quin-Coco, *i.e.*, to repeat oral statements made to them.

The English rule on this subject is very strict. See, for example, *Carr & Sons* v. *Crisp & Co., Ltd.*, 19 Rep. Pat. Cas., 497, where the Chancery Division of the High Court (per BYRNE, J.) laid down the principle that in "passing off" cases, which depend substantially on oral testimony only (p. 499),

> "it is only fair that if it is intended to take proceedings those proceedings should be taken as quickly as possible, so that warning may be given to the defendants that certain transactions are going to be called into question before the memory grows dull with reference to such transactions" (p. 502).

Another case is *Ripley* v. *Griffiths*, 19 Rep. Pat. Cas., 590, where Mr. Justice FARWELL, speaking for the same Court, said (p. 597):

> "To say that anybody can possibly recollect the sale of one halfpenny cake of blue, weeks after, or even days after, seems to me to be almost preposterous."

See, to the same effect, *Lever Bros., Ltd.*, v. *Masbro' Equitable Pioneers Society, Ltd.*, 29 Rep. Pat. Cas., 225 (C. A.). In this case it appeared that in July, 1910, the

plaintiff sent boys to the defendant's shop to buy the plaintiff's soap. In most instances the defendant's salesmen sold to the boys the defendant's soap without explanation. The plaintiff began his action on August 5, 1910, and served the statement of his claim in December, 1910. The trial did not occur until October, 1911. In the meantime the clerks involved had left the employ of the defendant. The Court of Appeal took the position that the defendant's attention should have been called to the facts within a day or two after each occurrence, so that each transaction could have been inquired into and the shopmen confronted with the trapper. The shopmen, when called, could not remember the trapper or the transactions, and could only say generally what their sales practice was and what they would have said if they had received requests for the plaintiff's brand. The Court went on to characterize as *"rather ludicrous"* the argument that upon such facts the Court should accept the testimony of the trappers as correct and uncontradicted.

The following is a table of fifty-six of respondent's witnesses, showing the respective periods that had elapsed since the interview to which the witness testified as the occasion on which a salesman had *spoken* to witness about Quin-Coco; or, in the case of petitioner's former salesmen (here testifying for respondent), since the time at which each received his selling instructions to which he here testified.

Vol I. of Record Page	*Witness*	*When Examined*	*Period Since Interview*
15	Hooper	March 22, 1915	3 years and over
60	Merithew	" 24, "	18 to 12 months
68	Wright	" " "	No date stated*
77	Wolsey	" 29, "	3 or 4 months
81	Kinder	" 30, "	No date stated*
94	Kelton	" " "	Over 2 years

*A witness who is called to testify as to what was *said* at an interview deemed by plaintiff to be important, and who does not give, or is not asked to give, the date, or who says he "does not remember it," is entitled to small credit or none.

Vol. I of Record Page	*Witness*	*When Examined*	*Period Since Interview*
113	Scott	March 30, 1915	5 months, also 3 mos.
165	Prochnow	April 3, 1915	3 months as to Richards, 2 or 3 yrs. as to Gill
177	Porter	" 5, "	6 or 7 years
179	Barnes	" 5, "	Don't remember date
201	Heno	" 6, "	3 or 4 years
210	Ray	" 7, "	3 or 4 years
217	Ames W.	" 8, "	Dont' remember
233	Stoval	" " "	No date stated
244	McMillan	" 9, "	1 month
272	Reid	" 13, "	3 years
285	Jolly	" 14, "	"Inside 6 months"
358	Groves	June 3, "	7 years
369	Hardy	" 5, "	7 years
377	Garner	July 12, "	5 or 6 years
387	Whiteley	" 12, "	4½ years
Vol. II.			
418	Ege	June 28, 1916	4½ years
422	Weber	" 28, "	5 years and 1 month
429	Lebo	" 28, "	4½ years ago and during 4 years prior to that
435	Bell	" 28, "	Can't approximate date. Lebo, his clerk, says 4½ years
445	Peabody	" 29, "	5 years or more
478	Willis	Aug. 7, 1916	No date stated
481	King	" 7, "	3 years and 7 months at least
505	Greene	" 8, "	4 or 5 years
515	Kuhn	" 9, "	10 years
523	Blodau	" 10, "	4 years about
530	White, Elzie	" 12, "	5½ years
540	Walker	" 12, "	5 1/3 years

Vol. II of Record Page	*Witness*	*When Examined*	*Period Since Interview*
548	Culver	Aug. 14, 1916	2 years since last call. He called for 8 years.
558	Stuckey	" 14, "	3 to 4 years. Last call 2 yrs.
639	Edmondson	" 14, "	about 3 years,
641	Moise	" 15, "	1 year, 4 months, but Heno says 3 to 4 years
658	Perrine	" 17, "	8¾ years
665	Seegar	" 17, "	Date not stated
679	Sinclair	" 19, "	7 to 8 years
681	Powell	" 19, "	7 years
689	Lavison	Oct. 23, "	8 years
713	Odell	" 26, "	6 years
720	Van Dale	" 26, "	7¾ to 8¾ years
730	Heim	" 26, "	"During 1915"
734	Kissell	" 26, "	3 years and at intervals as to Rogers. 2 years as to Starring
750	Grimaldi	" 28, "	4 to 5 years
757	Peabody	" 30, "	5 years and 7 months
774	Groves	" 30, "	7 years
797	Green, F. E.	Nov. 27, 1916	3 years and 5 months
806	Thurman	" 27, "	9 years
918	McCorkle	Jan. 15, 1917	1 month about
925	James, L. S.	" 15, "	8 months
973	O'Connell	Nov. 8, 1917	2 years
1111	Weldon	Dec. 3, 1917	4 years
1170	Hilton	Dec. 5, 1917	4 or 5 years

The respondent's case itself may be said to have been stale. Enough so to cast discredit on it.

The petitioner began to market Quin-Coco after July, 1908. Before that, for two years, it had been marketed by Searle & Hereth. During that period it came into competition with the numerous sales force of respondent. It is fair to assume that the respondent knew its own business and that its salesmen had become aware of this competition. Lynn, respondent's present general manager, was examined and seemed to deny knowledge, but he was not at that time an officer of the respondent. Mr. Lilly himself, who could have given us the fact, was not questioned about it.

See Lynn, Vol. II, p. 1098, XQ25, etc.

On August 31, 1909, the respondent wrote to the petitioner requesting it to *raise its prices* on this article to correspond with the respondent's prices, while saying "that it would probably be asking too much to make the request that you (the petitioner), discontinue this preparation."

On January 1, 1910, the respondent by letter requested the petitioner to *change the name* of its article and *raise its price.* Nothing resulted from this correspondence. It contained no complaint of "unfair" selling methods.

The bill of complaint was not filed until December 22, 1914. It does not appear that during that period the respondent called the attention of the petitioner to "unfair" selling methods on the part of the petitioner's salesmen. In fact, the bill itself was the first complaint. And in this connection it should be borne in mind that the respondent had 140 travelling salesmen who called on the entire drug trade several times a year. The respondent certainly did not lack the means of investigating thoroughly the petitioner's selling methods.

(These letters will be found in Vol. III, pp. 1214 to 1220.)

A careful analysis of the evidence shows the follow. the facts:*

(a) *Eight retail druggists testified on behalf of Respondent that Petitioner's salesmen represented merely that Quin-Coco was the same as Coco-Quinine, and cheaper in price, which was true.*

(1) KNOWLES, a retail druggist of Saginaw, Michigan, testified that a representative of petitioner stated to him that he was foolish to pay $4.80 for a gallon of Coco-Quinine, when he could use his product at a cheaper price for dispensing purposes and also to sell on call for Coco-Quinine or chocolate quinine, syrup of quinine, or where the syrup of quinine is called for (Rec., Vol. I, p. 66). On cross examination, being asked to state the exact words used by the salesman, he said:

> "A. He took a sample of Quin-Coco from his grip and asked me if I handled that product. I said 'No, I have always used Coco-Quinine for all such calls.' He said 'Well, don't you think you could handle this to your advantage.'"

ROGERS expressly denied Knowles' statements. "I will say that I never had that conversation with Knowles" (III, Qs 65 to 68).

As Knowles was uncertain as to the name of the salesman, Starring was called and said that he sold Knowles one gallon "but no special mention was made of Quin-Coco" (III, p. 1433, Qs 61-70).

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*HOW THE PROOFS WERE TAKEN:
The plaintiff's case in chief constitutes Vol. I.
The defendant's answering proofs appear in Vol. III, down to p. 1564.
The plaintiff then put in rebuttal proofs which appear in Vol. II from the beginning to page 940. So far as they appeared to be testimony that properly belonged in the plaintiff's opening case, leave of Court should have been obtained, but was not.
The defendant below then obtained leave of Court to introduce sur-rebuttal proofs. These are in Vol. III, from page 1564 to page 1646.
The leave of Court to introduce sur rebuttal is in Vol. II, p. 941.
Then the plaintiff, without leave of Court, introduced further proofs which appear in Vol. II, pp. 945 to the end.

(2) WRIGHT, a retail druggist of the same place, testified that the representation made to him by petitioner's salesman was that Quin-Coco

> "was a preparation of quinine the same as Coco-Quinine and it was cheaper and we would make more money out of it." That "Warner & Company's representative told me I could sell it the same as Coco-Quinine, there was no distinction" (Rec., Vol. I, pp. 68-69).

The fact that even this statement was made, was denied by the salesman, Rogers (Rec., Vol. III, p. 1448). Wright himself testified that he had sold Quin-Coco when Coco-Quinine was called for in his drug store, but not on prescriptions (Rec., Vol. I, p. 69). He does not state that this was done without explanation to the customer.

(3) BLODAU, a retail druggist of Nashville, Tennessee, testified that the salesman

> "gave me to understand that by the use of this preparation it would be a saving of money for me and why pay the price I did for Coco-Quinine. Naturally the impression to be made on me was that I should use his preparation in place of Coco-Quinine" (Rec., Vol. I, pp. 106-107).
>
> "He did not state that I should use Coco-Quinine dishonestly either on prescriptions or over the counter, but that I could use the same."

This was not "unfair" selling. It was using a certain drug of one make in place of another make.

DE VALL, the salesman, was called (III, p. 1385, Qs 26-32):

> "A. I have never said anything to Mr. Blodau that would leave him under an impression as he states."

(4) MANNING, a druggist of Memphis, Tennessee, testified that petitioner's representative (name not given) introduced Quin-Coco to him

> "as a chocolate quinine identical with the product of Lilly." "That it was the same product as Coco-Quinine." *"That it was much cheaper than Coco-Quinine"* (Rec., Vol. I, pp. 109-110).

(5) ALBRIGHT, a retail druggist of Mobile, Alabama, testified that Quin-Coco had been offered to him "as being the same as Coco-Quinine," the price being considerably lower than Coco-Quinine (Rec., Vol. I, pp. 236-237). This witness never had sold Quin-Coco at his present stores, but had sold it where he was previously employed in response to demands for Coco-Quinine and on prescriptions for Coco-Quinine. He testified that the customers and physicians were not advised that they were getting Quin-Coco instead of getting Coco-Quinine when these transactions were made. This, however, was before 1910 and before his interview with petitioner's salesman, testified to on his direct examination (Rec., Vol. I, p. 241).

JONES, the Warner salesman (III, p. 1320, Q44), had Albright's statement read to him and was asked to state whether "he ever made any proposition to Albright to buy the Quin-Coco and use it for Coco-Quinine."

> "A. I did not, absolutely. I never offered him any pharmaceuticals whatever."

(6) PROCHNOW, a retail druggist of San Antonio, Texas, testified that petitioner's salesman (either Richards or Gill, he could not tell which), who solicited his order for Quin-Coco

> "told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper."

He was asked:

> "Q14. Did he say anything about what use you could make of it?
>
> "By Mr. Rawle: Objected to as leading.
>
> "A. He *intended me* to use it instead of Coco-Quinine.
>
> "By Mr. Rawle: The answer is objected to as not stating what the salesman said.
>
> "Q15. What do you mean by 'instead of Coco-Quinine'?
>
> "Same objection as to the last question and as not calling for testimony as to what was said.
>
> "A. When I got a call for Coco-Quinine or a prescription, that it could be used instead." (Rec., Vol. I, pp. 166-167.)

But on cross examination, when asked to give Richards' language, he testified (Rec., XQ21):

> "He (the salesman) said that he had Quin-Coco which was the same thing as Coco-Quinine and he then gave me the different prices * * *.
>
> "XQ22. Do you mean that he didn't say anything more than what you have just stated to me?
>
> "A. He went on and talked about other preparations."

Richards, one of the salesmen referred to, testified he had solicited Prochnow to buy Quin-Coco, telling him that it was the best preparation of its kind on the market (although he never sold him any) but that he had never advised him or any other druggist that he could use Quin-Coco on specific calls for Coco-Quinine or any other chocolate preparation where it is specifically called for (Rec., Vol. III, pp. 1344-1345). On cross examination, Prochnow testified that Gill, one of petitioner's salesmen, said:

> "I would be very foolish for paying the price for Coco-Quinine, that he had an identical preparation and he named the prices, which I don't remember, I don't remember prices" (Rec., Vol. I, p. 168).

GILL, the salesman, had "suffered a lapse of his mental faculties" and could not be called in denial (III, p. 1290, Q94).

(7) NELLIGAR, a retail druggist of Norfolk, Virginia, testified that Moon, one of petitioner's salesmen, in soliciting him to buy Quin-Coco, stated:

> "This is a product identical in composition and physical appearance with 'Coco-Quinine' of Lilly's, but is much more economical."

On cross examination, he stated that Moon exhibited a bottle of Quin-Coco to him each time he visited him, so that he observed the similarity of physical appearance between the two products (Rec., Vol. I, pp. 348-349).

(8) GARNER, a retail druggist of Yoakum, Texas, testified that petitioner's salesman represented Quin-Coco

> "to be the same preparation as Coco-Quinine, at a less price." "That you couldn't tell the difference in the taste, appearance of it, or the color of it, or the action of it."

This witness testified that in response to calls for Coco-Quinine he had labelled Quin-Coco and dispensed it in response to such calls as Coco-Quinine. He did not, however, testify that this was done on the suggestion of petitioner or one of its representatives (Rec., Vol. I, pp. 378-379).

RICHARDS, the salesman, testified (Rec., Vol. II, p. 1345, Qs 60 to 67):

> "A. I have never sold Mr. Garner Quin-Coco since I have been selling goods for the company.
>
> "A. I never said to Garner or in any way gave him to understand that Quin-Coco could be dispensed or used by him for Coco-Quinine."

(b) ***Nine druggists testified on behalf of Respondent that Petitioner's salesmen represented Quin-Coco to be so closely identified with Coco-Quinine that one could be used in place of the other.***

(1) PINK, a retail druggist of Indianapolis, Indiana, testified that a salesman, whose name he did not remember, solicited him to buy Quin-Coco, although he never had bought any.

> "They said that I could use it in place of Coco-Quinine, that there was absolutely no difference, and no one could tell the difference" (Rec., Vol. I, p. 30).

(2) WOLSEY, a retail druggist of Cape Girardeau, Missouri, testified that one of petitioner's salesmen told him

> "he could sell me the Quin-Coco which was the same as Eli Lilly's Coco-Quinine and at a cheaper price. That I could make more money on buying it. That it is the same thing and I could dispense it as the same article" (Rec., Vol. I, p. 78).

On cross examination, when asked to give the exact words of the salesman, he testified:

> "He said 'I would like to sell you a gallon of Quin-Coco. It would be cheaper for you to use than Coco-Quinine and you would make more money off it'" (Rec., Vol. I, pp. 77-78). That is the "entire conversation I had with the Warner salesman."

BROWN, the Warner salesman, denied absolutely Wolsey's statement (Rec., Vol. III, p. 1405, Q16 to end of direct).

(3) KINDER, a retail druggist of the same place, testified that Brown, one of petitioner's salesmen,

> "upon learning that we were using a great quantity of Lilly's Coco-Quinine, he showed us his

> preparation and called our attention to the fact that it was a preparation that we could easily use in the place of Coco-Quinine and save considerable money in our purchases. He stated that his company had by their work on this preparation caused Lilly to thin down their Coco-Quinine syrup in order to meet the efforts Warner & Co. were making. * * * He stated that it had been and was being successfully used wherever Coco-Quinine was having a good sale; that they were identical preparations and could not be distinguished. * * * He simply suggested that we could use it wherever there was a demand for Coco-Quinine, and that it could not be told from Coco-Quinine" (Rec., Vol. I, p. 82).

BROWN, the Warner salesman, denied this statement (Rec., Vol. III, p. 1405). Kinder never received a prescription or call for Quin-Coco (Rec., Vol. I, p. 82), and there was no evidence of any sale.

(4) HENO, a retail druggist of Napoleonville, Louisiana, testified that Mr. Jones, one of petitioner's representatives, had

> "sold me one gallon of Quin-Coco, telling me at the time that it was a cheaper preparation from a financial standpoint than Coco-Quinine, and that physicians were using it all over for Coco-Quinine" (Rec., Vol. I, p. 202).

The witness testified that he had used perhaps three pints out of the gallon he bought, and was stopped by one of his physicians, who objected to his using Quin-Coco, and ordered him to buy Eli Lilly's. Evidently he was not using it without the physician's knowledge.

More than two years later (he testified), Mr. Jones, with another Warner salesman, came on his regular trip and offered the same product, and "said that they had been selling it to physicians and all their trade or customers to take the place of Coco-Quinine."

JONES positively denied the truth of this latter testimony (Vol. III, p. 1328).

(5) RAY, a retail druggist of Brookhaven, Mississippi, testified that he had been solicited to buy Quin-Coco to sell when chocolate quinine was called for and to use in place of Coco-Quinine, if they desired, on prescriptions. He said that Quin-Coco was offered to him, first, by Mr. Howard Smith, and then by Mr. Gonzales, representing petitioner. Being asked to testify to what statements the salesmen made, he said:

> "We were offered the Quin-Coco as an article that we could dispense or sell at a bigger profit than we could the Coco-Quinine by both Mr. Smith and Mr. Gonzales.
>
> "Q11. Was it your understanding of their representations that you could use Quin-Coco to supply the demand for Coco-Quinine?
>
> "By Mr. Rawle: Objected to because the witness has already been asked to state what was said and has answered the question; also as leading; and because the witness' understanding is not evidence.
>
> "A. Yes, sir; that was the understanding."

On cross examination, the witness testified that Smith had said:

> "That we could dispense Quin-Coco when chocolate quinine was called for or when Coco-Quinine was called for at a saving of about a dollar a gallon."

He further testified that he did not believe it would be right for a druggist, when Coco-Quinine was called for, to sell Quin-Coco, without saying anything about it to the customer; that he did not buy Quin-Coco to substitute for Coco-Quinine when Coco-Quinine was called for, but to dispense when chocolate quinine was called for, and to dispense on prescriptions for Quin-Coco.

After further cross examination and re-direct examination, he was finally asked on re-cross:

> "RXQ70. You have said that you always thought that Quin-Coco was put out to take the place of Coco-Quinine. Isn't that what Smith wanted to sell you Quin-Coco for, *to take the place of Coco-Quinine as a chocolate quinine preparation?* A. That is the way I understood it.
>
> "RXQ71. And that is about the substance of what he said to you at these various interviews, isn't it? A. Yes, sir."

On further re-direct, he added that he thought that his statements were as correct as it was possible for him to make them (Rec., Vol. I, pp. 210, 213, 216).

Gonzales, one of these salesmen, specifically denied Ray's statement; said it was contrary to his regular selling methods; and would have been dishonest (III, p. 1363, Qs 79 to 84).

Smith, the other salesman who visited Ray, had left the petitioner's employment and turned up as respondent's witness. We could not call him. Ray said Smith called on him "about 35 or 40 times." As to which call did Ray testify? Of course, Ray's testimony was only as to Ray's *impression.*

(6) Reid, a retail druggist of Union Springs, Alabama, testified that his first knowledge of Quin-Coco came from Mr. McCarthy, one of petitioner's salesmen, some three years previously.

> "Q13. As near as you can recall what did Mr. McCarthy say to you on this subject? A. To the best of my memory, it was about something like this: He asked me if I used very much Coco-Quinine. I told him that I used a good deal. He then said that he could save me some money on the product. He showed me the sample of Quin-Coco and made me a price of $3.50 a gallon, and I bought one gallon.

"Q14. Did he tell you how you could sell it or dispense it, and if so, what did he say?

"By Mr. Rawle: Objected to as leading.

"A. He simply sold it to me as a product to take the place of Coco-Quinine, said that it contained the same amount of quinine and would take the place of Coco-Quinine.

"Q15. In what way would it take the place of Coco-Quinine?

"By Mr. Rawle: Objected to as incompetent.

"A. It would have the same effect, that is Quin-Coco would have the same effect as Coco-Quinine.

"Q16. You have already testified that you never had any demand for Quin-Coco; how did you expect or he expect for you to dispose of Quin-Coco if you had no demand for it?

"By Mr. Rawle: Objected to as leading and as calling for an opinion, and as incompetent.

"A. I gathered from his conversation at the time that I bought it, that I bought Quin-Coco, that I would have to sell it as a substitute for Coco-Quinine.

"By Mr. Rawle: Answer is objected to as incompetent, and also because what the witness gathered from a conversation is not evidence.

"Q17. Do you mean to supply the demand for Coco-Quinine?

"Same objection and as leading.

"A. I do.

"Q18. Did you sell Quin-Coco in accordance with this understanding?

"By Mr. Rawle: Objected to as incompetent and as leading.

"A. Not entirely.

* * * * * * * *

"I sold Quin-Coco usually when I had calls for 'chocolate quinine,' and on a few occasions when I had calls for Coco-Quinine" (Rec., Vol. I, pp. 273-274).

The witness testified that he bought one gallon; that believing Mr. McCarthy's statement that Quin-Coco was

exactly the same as Coco-Quinine, he dispensed it as such. The bottle which he furnished when he did so was labelled "chocolate quinine" (Rec., Vol. I, pp. 276-277).

But when asked to give McCarthy's exact words the witness testified (XQ38):

> "A. I can't give the exact words. Mr. McCarthy asked me if I sold much Coco-Quinine and I replied that I sold a good deal. Mr. McCarthy then asked me if I wouldn't buy a preparation of chocolate quinine at a price considerably lower than that of Coco-Quinine, which contained the same amount of quinine in the same form and would answer every purpose of Coco-Quinine. Mr. McCarthy then made me a price on five gallons of this preparation which I think was about $3.25 a gallon. He also made me a price in single gallon quantity of $3.50 per gallon delivered. I gave Mr. McCarthy my order for one gallon.
>
> "XQ39. Have you now stated the entire conversation between you that day on Quin-Coco?
>
> "A. To the best of my recollection I have.
>
> "XQ40. And you can't think of anything else he said.
>
> "A. I cannot."

McCarthy (III, p. 1372, Q49) testified that when he made that call on Reid, he had "never mentioned Coco-Quinine at all."

(7) Moseley, a retail druggist of Geneva, Alabama, testified that McCarty told him his preparation was a similar and just as good a preparation as Coco-Quinine; that other people were using it; that there was a saving in the price; that it was used on physicians' prescriptions and dispensed on calls. He admitted that he did not buy any Quin-Coco.

The cross examination very clearly brought out the fact that the witness did not consider that Mr. McCarthy had suggested that he use Quin-Coco in place of Coco-Quinine without the consent of the doctor on a prescrip-

tion or of the customer over the counter (Rec., Vol. I, pp. 278-279).

He testified:

> "A. A conversation having taken place as long ago as that would be right hard to repeat verbatim.
>
> "XQ37. Repeat it as nearly as you can?
>
> "A. Well, Mr. McCarthy solicited me to buy Quin-Coco or their preparation of chocolate quinine; I don't know as he used the word 'Quin-Coco.' He told me that there was a saving in price and that other druggists were buying it.
>
> "XQ38. What else did he say?
>
> "A. In regard to Quin-Coco. He said it was as good a preparation as Coco-Quinine. I don't remember all that was said. We talked about business in general. I couldn't tell everything that Mr. Carthy said to me or that I said to him.
>
> "XQ39. I have been asking you to search your memory and state the entire conversation on the subject of Quin-Coco. Is there anything else that you can remember on that subject?
>
> "A. I think that I have given during my examination practically all that is connected with the subject.
>
> "XQ40. I read you Q19 and your answer. I take it that you hardly mean that there is no way to sell Quin-Coco except to fill prescriptions and calls for Coco-Quinine, dishonestly.
>
> "A. No, I don't say that.
>
> "XQ41. And you don't mean to say, do you, that Mr. McCarthy suggested to you that you should dispense Quin-Coco dishonestly and sell it to customers dishonestly?
>
> "A. He didn't suggest to me to do anything he called dishonest."

Reid's testimony was read to McCarthy, the salesman, and he was asked if what Reid said was true. He replied (Vol. III, p. 1372):

> "A. to Q54. At the time I called on Mr. Reid and showed him this Quin-Coco I never mentioned

> Coco-Quinine at all. He was familiar with the Quin-Coco preparation before and I never made any suggestions whatever as to how he was to dispense of it or sell it."

And on cross examination McCarthy testified:

> "XQ197. Can you recall what you did say to Mr. Reid?
>
> "A. The usual sales talk of the Quin-Coco, the consistency of the preparation; that is, the quality and the quantity of quinine it contained, and it could be handled easily and dispensed in small-necked bottles.
>
> "XQ198. That is all?
>
> "A. That is all."

(8) JOLLY, a retail druggist of Marshallville, Georgia, testified that Nottingham, one of petitioner's salesmen, represented

> "that this product, this Quin-Coco, is the same as Coco-Quinine, and it comes much cheaper. I think that is about all there was to it. There may have been some few other words like that."

Plaintiff's counsel then asked (Vol. I, p. 293):

> "Q20. Did he say anything about whether or not you could use it to supply the demand for Coco-Quinine?
>
> "By Mr. Rawle: Objected to as leading because the only proper question is as to what was said.
>
> "A. He did.
>
> "Q21. What did he say as near as you can remember? A. All he said was that it is the same as Coco-Quinine and you can supply your trade accordingly."

He bought one gallon on these representations, and had given it to customers calling for chocolate quinine, quinine syrup, etc. (Rec., Vol. I, pp. 286-287).

NOTTINGHAM, the salesman (Vol. III, p. 1454, Qs 30 to 39), having had Jolly's testimony read to him, denied Jolly's statements positively. He said there were a dozen Chocolate Quinine preparations on the market (XQ69). I never suggested, as he says, to use Quin-Coco in the place of Coco-Quinine (XQs 78, 79). I never represented to Mr. Jolly or to anyone else that Quin-Coco could be used to supply the demand for Coco-Quinine; or could be subsituted for Coco-Quinine.

(9) E. B. ALLEN, a pharmacist of Norfolk, Virginia, testified that Moon, one of defendant's salesmen, on several occasions had offered him a preparation which he called Quin-Coco, which he stated he could use the same as Coco-Quinine, and that it would be almost impossible to tell it from Coco-Quinine. He could not remember his exact words. On cross examination, the witness stated that about a year previously Moon had called his attention to Quin-Coco, "elaborating upon its pharmaceutical qualities and stating the same was a product practically identical with Lilly's Coco-Quinine, and that the same could not be distinguished from it. On the visit during May of this year (1915), in talking of chocolate quinine syrups, he again stated that he had as good a piece of goods as Lilly's, and one that could be used for all purposes that 'Coco-Quinine,' could be used." The witness further stated that he did not believe that Mr. Moon meant to suggest a dishonest substitution of Quin-Coco for Coco-Quinine (Rec., Vol. I, pp. 343-344-345). There was no evidence that he bought or dispensed any.

MOON, the salesman, denied Allen's statements (Vol. III, p. 1466, Qs 29 to 43):

> "Q43. He testified that he had not made any suggestion to Allen that he could use Quin-Coco for Coco-Quinine without detection" or (XQ51) "that Quin-Coco could be used in place of Coco-Quinine."
>
> "Q11. He also testified that there were 12 or 14 other makes of Chocolate Quinine on the market."

(c) ***Five druggists testified that improper representations were made to them by Petitioner's salesmen but admitted no "passing off" actually was practiced by them. Four of these witnesses made no purchases after these alleged representations. On cross examination they entirely modified their statements.***

Such testimony as to improper representations in each case was positively contradicted by the salesmen charged to have made such representations.

(1) MERITHEW, a druggist of Highland Park, Michigan, testified that Starring, one of petitioner's salesmen,

> "offered to sell me a preparation known as Quin-Coco, stating that it could be dispensed as Coco-Quinine, when Coco-Quinine was called for. He exhibited a sample from his sample case, and stated to me that in both taste, physiological action and appearance it could not be distinguished from the original Coco-Quinine."

On cross examination, he stated the conversation thus:

> "XQ29. Wasn't what he said that Quin-Coco was a similar preparation to Coco-Quinine and lower in price?
>
> "A. I cannot state his exact words, but he inferred to me that Quin-Coco was lower in price than Coco-Quinine, and therefore several of the druggists were dispensing it in the cities of Michigan which I heretofore named.
>
> "XQ30. And that is the substance of what he said to you?
>
> "A. No, it is not. He spoke about the similarity of the preparation both in quality of quinine contained in each ounce, the physiological action and appearance. Now I am through.
>
> "XQ31. Have you finished your answer to that question?
>
> "A. I have."

He said that he did not accept this proposition, nor purchase Quin-Coco (Rec., Vol. I, pp. 60-61).

STARRING, under oath, emphatically denied this testimony (Rec., Vol. III, p. 1431). He further testified that Merithew had never bought any Quin-Coco from him; that he had called upon him four or five times for the purpose of collecting a past due account from him amounting to about $15, which he finally did collect, but that on none of these visits did he attempt to sell him any drugs (Rec., Vol. III, p. 1432).

(2) SCOTT, a druggist of Memphis, Tennessee, testified that DuVall, representing petitioner, called on him and stated that Quin-Coco could be dispensed and sold as Coco-Quinine, Lilly's; that on another occasion Du Vall called on him and stated that he could put up and dispense Quin-Coco on specified prescriptions for Lilly's Coco-Quinine; that it was the same thing as Coco-Quinine, Lilly's, and was much cheaper (Rec., Vol. I, p. 114).

On cross examination he was asked:

> "XQ26. You have testified that it is dishonest and unethical for a druggist when receiving a prescription which specifies Coco-Quinine, to fill it without the consent of the physician by using Quin-Coco. It appears to me from your answer that Mr. DuVall, if your memory is correct, was proposing to you, as a druggist, that you should do or commit this dishonest and unethical act. Is that not so? A. If I may be allowed to express this, I don't think Mr. DuVall intended that reflection upon me, as according to Mr. DuVall's statement so many were using and substituting this so called Quin-Coco, and my opinion was that Mr. DuVall wanted to let me in on a close substitute. That is the way I felt about Mr. DuVall's suggestion to me in regard to Quin-Coco. I feel sure that Mr. DuVall never had any reason to reflect upon me, and would not have done so.

"XQ27. But have you not testified that he suggested to you that you should use Quin-Coco in prescriptions calling for Coco-Quinine? A. He did not suggest that I should use them. He said it could be done, and was being done.

"XQ28. Didn't he mean that you could do it? A. I didn't take it that way. I took it that it could be done if I was disposed to do so, that is the impression the interview had on me.

"XQ34. But wasn't he suggesting to you that you do a dishonest thing?

"A. *He was not,* and I did not feel that he was.

• • • • • • •

"It didn't impress me as being an immoral suggestion, and I feel sure that Mr. DuVall would not have any cause to offend me in any way. I considered his suggestion in regards to Quin-Coco being substituted for Lilly's Coco-Quinine as a matter of gossip and more so than suggestion, no reflection upon my being ethical or my honesty as a pharmacist or man.

"XQ37. How could an honest druggist, as you are, handle and dispense both Coco-Quinine and Quin-Coco?

"A. My explanation is that I never, when I was in the retail drug business for myself, handled but one preparation of Coco-Quinine, that being Lilly's. When I was employed by other houses that had this Quin-Coco in stock I used same upon consent of physicians only. I have called the attention of several physicians to this Quin-Coco asking them to prescribe same to enable me to dispose of it so I could buy the original Lilly's Coco-Quinine to use on their prescriptions."

The witness further stated that he did not buy any Quin-Coco from Mr. DuVall (Rec., Vol. I, pp. 114, 117-118).

DeVall testified that he never had solicited Scott's trade when he was in the drug business for himself, and categorically denied the statements attributed to him by

Scott as above set forth. He had never had any conversation with Scott on the subject of the sale of Quin-Coco (Rec., Vol. III, pp. 1387-1389). Evidently, Scott was mistaken in his recollection as to the person with whom he had talked on this subject.

(3) BARNES, a retail druggist of McComb City, Mississippi, testified that Quin-Coco had been offered to him by Gonzales, one of petitioner's salesmen,

> "to be used as a substitute for Coco-Quinine and said that it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quinine without any one being the wiser."

On cross examination he repeated this statement and added: "Besides, it is cheaper" (Rec., Vol. I, pp. 180, 181, 183). He did not buy any (I, 180).

GONZALES categorically denied these statements (Rec., Vol. III, pp. 1361-1363).

On cross-examination, he testified:

> "XQ110. You deny in toto everything that Mr. Barnes testified to on this subject? A. Absolutely so, yes, sir.
>
> "XQ111. You charge Mr. Barnes with lying in this testimony that he has given? A. Yes, sir.
>
> "XQ112. What object do you suppose Mr. Barnes might have had in so doing? A. I don't know of any object that he had. I couldn't possibly tell. There was never any conversation of that kind between him and I, positively not * * *" (Rec., Vol. III, p. 1366).

(4) W. S. AMES, a retail druggist of Laurel, Mississippi, testified:

> "Quin-Coco has been offered to me for sale as a similar preparation to Coco-Quinine, and I have been told that I could dispense it on calls for Coco-Quinine, without detection, and that it was the same goods exactly. That's about the only representations I have had. * * * It was quoted at a cheaper price to me than Coco-Quinine."

He could not remember who made this representation to him. A Mr. Jones, representing petitioner, had called upon him, but he did not remember whether he was the person who offered him Quin-Coco or not. He could not remember verbatim the words used (XQ45) (Rec., Vol. I, pp. 218-221). *He did not testify that he bought any Quin-Coco.* He did not keep it, and had no knowledge about it from actual experience in handling it (Rec., Vol. I, p. 219).

When asked for the salesman's exact words, he testified (p. 221):

> "XQ43. Please state the exact words which Mr. Jones used in offering you Quin-Coco, as far as you can remember them?
>
> "A. To begin with, I won't state that Mr. Jones was the salesman that offered me Quin-Coco positively. But Quin-Coco has been represented to me as being identical with Coco-Quinine and offered to me at a cheaper price.
>
> "XQ44. Did that salesman offer it to you at that time as being identical with Coco-Quinine and cheaper?
>
> "A. Yes, sir.
>
> "XQ45. What else did he say?
>
> "A. Not anything of any importance other than that it was just chocolate quinine, chocolate syrup of quinine in it and that it was identical with Coco-Quinine. He probably said something else but I don't exactly remember verbatim.
>
> "XQ46. Please try to remember what else he said, if anything, and give the exact words in which he said it?
>
> "A. It is hard to answer that question, because he didn't say anything more than any other salesman would say when he is offering a similar preparation to one that is already on the market."

Jones testified that he had never made to Mr. Ames such statements as those quoted, nor to anyone else (Rec., Vol. III, pp. 1328-1329).

(5) McMillan, a retail druggist at Pritchard, Alabama, testified that he heard of Quin-Coco through McCarthy, one of petitioner's salesmen, who asked him

> "if I didn't want some of their preparation Quin-Coco. I told him 'No, we couldn't substitute.' He told me it was all right, that it was the same thing as Coco-Quinine, that you couldn't tell the difference. And that it was the original preparation, brought out by a doctor who didn't have the money to back it up with advertising. And that in the meantime Lilly had put Coco-Quinine on the market and that then Warner brought out this Quin-Coco and put it on the market. He told me it wouldn't be substituting at all, that you couldn't tell the difference between it and Coco-Quinine. That is about all."

He was then asked:

> "Q6. In what way did he tell you that it could be used or dispensed, that is, in response to what character or calls or demands?
>
> By Mr. Rawle: Objected to as leading and because the witness has already answered as to the conversation.
>
> A. As 'Coco-Quinine.'
> Q7. What kind of calls for Coco-Quinine?
>
> (Same objection.)
>
> A. Either prescriptions or calls over the counter.
> Q8. How are prescriptions written received at your store for 'Coco-Quinine'? A. 'Coco-Quinine,' just the name and the amount.
> Q9. Whose product do you understand is intended by the physicians when they write prescriptions just 'Coco-Quinine'? A. Lilly & Company's" (Rec., Vol. I, p. 244).

On cross examination he testified that McCarthy told him that Quin-Coco was a similar preparation to Coco-

Quinine, and cheaper in price, and could compete in the market with Coco-Quinine, and that that was about the substance of what he said to him. He said that he had had quite an argument with McCarthy as to the merits of Quin-Coco as compared with Coco-Quinine; that McCarthy said it was the same as Coco-Quinine, and could be dispensed without the doctor or patient detecting it, and that it cost less money (Id., p. 246).

McCarthy testified that the only true part of McMillan's testimony was that he, McCarthy, had asked McMillan if he wanted some of the Quin-Coco; that the rest of his answers were untrue; that it was a fact that an argument over the merits of Quin-Coco as compared with Coco-Quinine had taken place between them, and that

> "he wanted to know what kind of preparation we had. I told him I considered we had the best preparation on the market of its kind and we sold it on a straight guarantee, and if it did not come up to what he thought it should, why to return it and get credit for it."

He specifically denied that he had said that Quin-Coco was the same as Coco-Quinine, and could be dispensed without the doctor or patient detecting it (Rec., Vol. III, pp. 1370-1371). *It does not appear that McMillan bought any Quin-Coco or handled it.*

(d) ***Several discharged employees of Petitioner testified on Respondent's behalf to representations made by petitioner's salesmen to induce sales, which, in effect, were that Quin-Coco was the same as Coco-Quinine, could be used in its place and was cheaper; all of which was true.***

Groves, who for four years and three months had been employed by respondent, for five years and two months previously had been in petitioner's employ, first, in the

laboratory as general helper, and for the last two years of his employment as traveling salesman, produced and testified to a comparative sheet showing the goods manufactured by petitioner which could be sold against goods manufactured by other pharmaceutical houses, the purpose of it being to enable him to sell goods of petitioner's manufacture against goods manufactured by other houses at a much cheaper price. He further testified that he sold Quin-Coco as a substitute for Coco-Quinine,

> "as identical in appearance, containing the same amount of quinine; and said it could be sold on prescription as 'Coco-Quinine'";

that on calling on a druggist, if he found he was a user of Coco-Quinine, he used his best efforts to sell him Quin-Coco,

> "pointing out to him that the product was equally as good as Coco-Quinine and cost him less money and could be dispensed on prescriptions and sold over the counter as 'Coco-Quinine'";

that these statements and representations were made on the authority of the petitioner, pursuant to instructions given by either Mr. Hagaman or Mr. H. Pfeiffer. He could not recollect the words used by those gentlemen, or that either of them told him that Quin-Coco was an exact duplicate of Coco-Quinine (Rec., Vol. I, pp. 358-359).

Groves referred to a date nine years and five months previously to testifying. Could he remember what was said to him that long before? Is not his statement quite too stale to depend upon?

On re-direct examination, he was asked whether or not Mr. Hagaman told him what statements he made to druggists to induce them to buy Quin-Coco, to which he answered:

> "Yes, he told me that by pushing 'Quin-Coco' we were pushing as good an article as 'Coco-

Quinine,' Lilly, the therapeutic action being the same and containing the same amount of quinine, and on subsequent trips with me after he was made assistant sales manager we pushed 'Quin-Coco' along with other things.

"We sold 'Quin-Coco' as a substitute for 'Coco-Quinine,' telling the druggists that it was a similar product to 'Coco-Quinine' in appearance and taste, containing the same amount of quinine as 'Coco-Quinine,' and much cheaper in price, one gallon costing $3.75 and 'Coco-Quinine' would cost them in five pints $3.30."

That he stated to druggists in Bristol that they could use Quin-Coco for Coco-Quinine; that Mr. H. Pfeiffer gave him comparative lists, samples, catalogue, etc., before he began working as salesman for petitioner (Rec., Vol. I, pp. 366-367).

This means nothing more than selling Quin-Coco in competition with Coco-Quinine to take the place of Coco-Quinine.

But his re-cross examination rendered him innocuous (p. 368):

"RXQ93. Will you swear that you ever heard Hagaman say to a druggist that he could buy 'Quin-Coco' and substitute it on calls for 'Coco-Quinine'? A. I have heard him tell druggists that 'Quin-Coco' could be sold as 'Coco-Quinine,' but where I cannot say.

"RXQ94. Can you swear that you ever heard Hagaman advise a druggist to buy 'Quin-Coco' and substitute it on calls for 'Coco-Quinine'? A. Yes.

"RXQ95. What did he say to them? A. That 'Quin-Coco' *was a similar product to 'Coco-Quinine'* containing the same amount of quinine and was like it in appearance. * * * *That was our only method of selling it.*

"RXQ97. And that is what Hagaman said? A. He could say nothing else.

"RXQ98. And that is what you used to say? A. Yes, it being the only selling point we had" (Rec., Vol. I, p. 368).

While Groves formerly was employed by petitioner, he later entered the employment of respondent as a traveling salesman. In this testimony, the statement of instructions from Mr. H. Pfeiffer or Mr. Hagaman to the witness is so weak as hardly to require denial, but Mr. HENRY PFEIFFER denied specifically that he ever gave Robert J. Groves instructions or authority to make the statements to druggists to which he testified (Rec., Vol. III, p. 1238).

Mr. HAGAMAN also testified he had never authorized a traveling salesman to suggest to retail druggists that they could sell Quin-Coco on prescriptions or over the counter, when Coco-Quinine was called for (p. 1278).

GROVES, being recalled in rebuttal, testified further concerning instructions given by Mr. H. Pfeiffer and Mr. Hagaman as follows:

a. Statement of or instructions by Mr. H. Pfeiffer: Witness denied that he was told by Mr. Pfeiffer that it was a reprehensible act and dishonest to advise druggists that they could substitute preparations for preparations of other houses; that it was unethical and a violation of confidence (Rec., Vol. II, p. 777).

The witness' attention was called to the alleged instructions of H. Pfeiffer on this subject, when it is clear that counsel intended G. A. Pfeiffer's instructions (Rec., Vol. III, p. 1205).

b. Statements of or instructions by Hagaman: The witness was asked what he had to say as to the statement of Hagaman that it was dishonest to suggest to a retail druggist that one product can be sold when the product of another house is called for.

> The witness stated that Mr. Hagaman was selling goods every day in the week as a substitute or replacer for highly advertised goods of other houses (Rec., Vol. II, p. 778).

It is perfectly evident that this testimony of Groves is no denial in rebuttal, for Hagaman was referring to substitution of one article for another, when there is a specific call for the latter, while the witness Groves was referring to the sale of preparations sold by all manufacturers in common.

What Groves meant by "selling Quin-Coco as a substitute" appears from his own evidence (Vol. I, p. 359):

> "Q16. What did either of them (Hagaman or H. Pfeiffer) say to you, if anything, as near as you can recall, in regard to Quin-Coco? A. That Quin-Coco was an exact duplicate of Coco-Quinine."

That was all and that was true.

These statements as to H. Pfeiffer's instructions must be rejected, as on cross examination Groves testified (Vol. I, p. 365):

> "XQ77. Do you swear that out of these ten or thirty thousand items you were to sell Mr. Henry Pfeiffer *picked out 'Quin-Coco'* which the company had just begun to sell and gave you special instructions as to how to sell 'Quin-Coco'? [Italics ours.]
>
> "A. I do not."

Hagaman, the petitioner's sales manager, referred to by Groves, categorically denied Groves' statement when read to him from the Record (III, p. 1488, Q24). He further testified that his instructions to Groves were thus (Q19):

> "A. I instructed Mr. Groves always to be honest and fair and not to mention the names of our competitors, as our line was very large and it would keep one salesman busy selling our goods."

Again it may be asked, as Groves had been petitioner's salesman for two years, and if he really did practice "unfair" methods, where are the druggist on whom he practiced these methods. Not one of them has been produced. And yet, Groves' territory, when he was a Warner salesman, was Southeastern Pennsylvania (Rec., Vol. I, p. 366, RDX78), and when he became respondent's salesman he worked the same territory (Vol. I, p. 358, Q1)—the very territory in which this suit was instituted.

Only one witness, a discharged employee of petitioner, testified explicitly that an officer of petitioner instructed salesmen to represent that Quin-Coco could be substituted for Coco-Quinine without the knowledge of either prescribing physician or patient. This testimony was specifically denied by two witnesses.

This witness was one THURMAN, who, from 1903 to 1908, was a salesman for the Pfeiffer Chemical Co., and from 1908 to 1912 for the petitioner, from whose employ he was discharged for cause two and a half years before he testified. He had an obvious bias. As to his discharge, see Merner (Vol. III, p. 1290, Q93) and Thurman (Vol. II, p. 812). He travelled twice from Omaha to Indianapolis to testify against his former employer (Vol. I, p. 391).

Being asked to explain the methods and arguments he employed in soliciting orders for Quin-Coco, and from what source he obtained authority for the same, he answered:

> "Quin-Coco was sold under the Searle & Hereth label. The preparation of Quin-Coco was put on the market by the Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co., but was not pushed to any extent until after the purchase of the Searle & Hereth Co. We were instructed principally by Mr. Garwin who had charge of the pharmaceutical laboratory for the Pfeiffer Chemical Co. at that time. We were instructed by

> Mr. Garwin to recommend to the trade that the preparation of Quin-Coco was exactly the same as the preparation of Coco-Quinine put out by Eli Lilly & Co.; to tell the trade that Quin-Coco was identical with Coco-Quinine and our argument to get business on this preparation was to explain to the trade that our preparation of Quin-Coco was much cheaper and would answer every purpose of Coco-Quinine and to explain to them how much money could be saved by buying Quin-Coco instead of Coco-Quinine. We were also instructed by office managers, circular letters to salesmen,* etc., to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin.† This Quin-Coco was one of the best selling specialties of the company." (Rec., Vol. I, p. 392.)

These instructions, he stated, he got from Mr. Merner, manager of the St. Louis Company, and Mr. H. Pfeiffer, president of the Pfeiffer Chemical Company, who had traveled with him on the road at numerous times. He said that Mr. Pfeiffer knew very little about pharmaceuticals, and left the selling of them to the witness when he was with him, his instructions being always given to him privately. Being asked:

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*He did not produce or identify any such letters.

†"Pushing as a substitute" can mean nothing more than correct competitive selling. Thurman explains his meaning of "substitute" (Vol. I, p. 398):

> "XQ50. You have just used the word 'substitute.' Do you use that in the same sense in which you have just been using the word 'replacer'?
>
> "A. Yes, sir.
>
> "XQ51. And I take it that you mean by both of those words an article which you were selling which was in competition with a similar article of another house? Is that correct?
>
> "A. No, not exactly.
>
> "XQ52. Then in what sense have you used those two words?
>
> "A. As a substitute and replacer for original preparations made by the different companies.
>
> "XQ53. Don't you mean by 'substitute' and 'replacer,' articles which you were offering and which were in competition with similar articles of other houses?
>
> "A. Yes, I guess that's right."

That is, both words as he understands them, mean plain trade competition.

> "Q12. Did your representations to the retail druggists include instructions to them as to how they could dispense it and if so, what did you tell them on that point?"

he answered (over objection by petitioner's counsel):

> "We were instructed by the company to tell the trade that this preparation of Quin-Coco could be used and dispensed on calls for Coco-Quinine; and, that it could also be used on prescriptions for Coco-Quinine *without the knowledge of the physician or the patient,* as the preparation of Quin-Coco was exactly the same as Coco-Quinine." (Rec., Vol. I, p. 393, italics ours).

This statement, which differs entirely from his lengthy reply to Q7, just quoted, was his only bit of evidence directly connecting the petitioner corporation with unfair selling methods.

HENRY PFEIFFER, above referred to, positively denied the truth of this last quoted testimony (Rec., Vol. III, p. 1239). Merner also denied it, and stated that Garwin never had had any authority from him as manager of the business, or from the Company, to give instructions to salesmen as to the sales policy of the house, and that none of the circular letters referred to by Thurman in his testimony contained any instructions of any kind to his salesmen as to pushing the sale of Quin-Coco as a substitute for Coco-Quinine; that he did not instruct Thurman to sell Quin-Coco as a substitute for Coco-Quinine; that to the best of his belief he had not talked to him on that subject; that he never gave him instructions to tell the trade that Quin-Coco could be used and dispensed on calls for Coco-Quinine, and that it could also be used on prescriptions for Coco-Quinine without the knowledge of the physician or the patient, as the preparation of Quin-Coco was exactly the same as Coco-Quinine; and that he is emphatic in stating that if, as it was possible,

he did discuss Quin-Coco with Mr. Thurman, he never instructed him that Quin-Coco could be used on doctor's prescriptions where Coco-Quinine was specified, and that he did not instruct him that "these preparations" were exact substitutes for the original preparations made by the other companies (Rec., Vol. III, pp. 1387-1389).

Thurman, himself, on cross examination, admitted that the methods of sale which he employed were dishonest, but he claimed that he was compelled to follow the instructions of his employers. He was then asked:

> "XQ79. Then from 1903 to 1912 you systematically played the part of a dishonest salesman, did you? A. I do not know whether you would term it that way or not.
>
> "XQ80. How do you term it, in view of just what has been said? A. It is simply following the instructions of the house. If the salesman was dishonest, the house was certainly more dishonest in instructing the salesman to do this.
>
> "XQ81. When did Garwin give you instructions? Was it when you started in 1903? A. Well, it was a little later that they began putting out this list, probably 1905.
>
> "XQ82. And was that the time Merner talked with you? A. Yes, and later than that.
>
> "XQ83. How much later? A. Well, up to the time I left the employ of the company, December, 1912.
>
> "XQ84. What did he say to you? A. Well, his instructions to us were about the same as Mr. Garwin's: that these preparations were exact substitutes for the original preparations named by the other companies. He also instructed us that Quin-Coco could be used on Doctor's prescriptions where Coco-Quinine was specified and for us to show the druggist how much he could save by buying this substitute and replacer preparation from our company and that there was no use of a druggist paying the price for these original preparations when he could buy something that would answer all purposes and save him quite a little money" (Rec., Vol. I, p. 402).

Now, Thurman sold Quin-Coco for over four years. He testified that his selling methods were "unfair," but not a single druggist on whom he practiced his "unfair" methods has been produced—not one, with all the detective force of the respondent's 140 salesmen working up for five years the proofs in this case.

HENRY PFEIFFER positively denied that he gave the instructions testified to (Rec., Vol. III, pp. 1239, 1240), as did also Mr. Merner (Rec., Vol. III, p. 1289). On cross examination, Thurman admitted that he had been discharged from petitioner's employ by a letter written December 13, 1912, by Mr. Merner (Rec., Vol. I, p. 403).

Mr. G. A. PFEIFFER declared that he had never directly or indirectly authorized or suggested to any one of his salesmen that he should or might suggest to any retail druggist that he could dispense Quin-Coco on prescription or on calls over the counter when Coco-Quinine was specifically called for (Rec., Vol. III, p. 1213).

THURMAN sold Quin-Coco for six years. He says his selling methods were "unfair" and that he was so instructed by petitioner. The instructions are categorically denied. No druggist to whom he sold by "unfair" methods was called to corroborate him.

Thurman was called again in rebuttal.

> His attention was directed to the testimony of Mr. Henry Pfeiffer, who stated that if any salesman had suggested to druggists that they should buy Quin-Coco and supply it on prescription or sales when Coco-Quinine was called for, it would be contrary to his orders and his teachings and in violation of the selling rules of the house. (Rec., Vol. II, p. 806.)
>
> He was asked to state occurrences when traveling with Mr. Pfeiffer inconsistent with this statement. Mr. Thurman then stated that Mr. Pfeiffer had recommended to Snyder of Bennett Co. in Omaha that the perfume Vogue was exactly

like Jickey and could not be told from the Jickey odor and that Snyder bought a gallon of Vogue (Rec., Vol. II, p. 807).

The difficulty about this evidence is that Thurman admitted that the transaction "could have taken place a year before the petitioner was chartered" (Vol. II, p. 813, XQs26-28). The incident was also stale—about nine years old.

Thurman's testimony given on his direct examination admitted the dishonesty of his methods of selling. His testimony is unworthy of credence where contradicted by any other witness.

PERRINE, who had been employed by petitioner approximately 2½ years as a salesman, told of instructions given him by petitioner's special representative, Nowlin, who gave him a list of products manufactured by petitioner which would replace special preparations manufactured by other companies, and particularly stated that Quin-Coco would replace the product known as Coco-Quinine. Letters produced showed that this witness had a grievance against the petitioner for its apparent intention to change his territory (Rec., Vol. II, pp. 658-663).

GREEN, a retail druggist at Atlanta, who had been traveling salesman for petitioner from 1913 to 1915, testified to instructions given him on behalf of petitioner by Mr. McNulty, who gave him a "replacer list" which was used as showing items similar in character to items of other houses "but sold to the retailer under the individual firm's own title or name," on which list was "Quin-Coco, Part 3 S. & H.," which also gave a comparative price, the Lilly price and the price of Quin-Coco. He said that the inference from Mr. McNulty's statements to him, "if not his direct suggestion," was that certain items be sold as replacers for certain other items; that he drew this inference from

"his showing of the items; sometimes comparing its general appearance, and the formula in many instances, as compared with other formula; as being the same in medicinal consistency and therapeutic value, and more profitable to the retailer or dispenser.

Q16. You mean that this was Mr. McNulty's practice in selling the Warner line in your presence? A. Yes, in many instances" (Rec., Vol. II, pp. 798-800).

On cross examination, this witness admitted that his services had been dispensed with by Warner & Company, who had trouble in collecting an account due by him (Rec., Vol. II, pp. 802-805).

McNULTY testified for petitioner that his instructions to salesmen were

"to sell our preparations on the merits of the various preparations, not to mention a competitor at all, to be strictly honest and adhere to the truth at all times."

That he never had, acting for his house, authorized or suggested to any retail druggist to dispense Quin-Coco, S. & H., when Coco-Quinine, Lilly, was called for by prescription or over the counter, and that he had no personal knowledge of a retail druggist doing that, except so far as he had heard it in this case (Rec., Vol. III, pp. 1252-1253). That he never had instructed any salesman specifically in reference to pushing Quin-Coco, although he had himself personally sold it (Rec., Vol. III, p. 1257). He further testified that he had never suggested that a product of his house should be used as a substitute for another specified preparation (Rec., Vol. III, p. 1570).

(e) ***Two druggists, witnesses for Respondent, admitted their own practice of dishonest substitution, but did not testify to any representations made by salesmen of Petitioner to induce those acts.***

(1) Bowden, a druggist of Jennings, Louisiana, testified that he had purchased Quin-Coco from Mr. Jones, one of petitioner's salesmen; that he supplied Quin-Coco usually on a call for Coco-Quinine, simply because he got a better price on it, and dispensed it to save a little money; that that was not the act of an honest druggist; that in such cases he gave the customer to understand by implication that he was getting Coco-Quinine, "in fact it was labelled 'Coco-Quinine'" (Rec., Vol. I, pp. 138-139).

(2) Turner, a retail druggist of Mt. Vernon, Texas, testified that he had used Quin-Coco on a physician's prescription which called for Coco-Quinine, Lilly; that he also dispensed Quin-Coco over the counter when Coco-Quinine was called for, labelling the bottles "Coco-Quinine." There was no suggestion that this was done at the instance of petitioner or one of its representatives (Rec., Vol. I, pp. 384-386).

In addition to these two, one Bell, a traveling salesman employed by respondent, testified that in one particular instance, he saw the clerk in a certain drug store bottling Quin-Coco and labelling it Coco-Quinine; that he was pouring it out of a Quin-Coco bottle into bottles for retail, and labelling those bottles "Coco-Quinine." Witness was allowed, over petitioner's objection, to testify that he had purchased on one occasion a package labelled "Coco-Quinine," which, on presentation to the druggist, "he reluctantly admitted" was Quin-Coco.

> "This druggist also admitted that such labeling was customary with him" (Rec., Vol. I, pp. 312-313).

The druggist was not produced, nor was there any suggestion that he had been induced to this dishonest practice by petitioner or one of its representatives. The testimony clearly was hearsay, was objected to, and should have been excluded.

The foregoing evidence, even if uncontradicted, would be insufficient to sustain the findings of the Circuit Court of Appeals; but as a matter of fact it was flatly contradicted, not only by the salesmen of petitioner charged by the witnesses named with making the representations inviting to fraudulent action, but by other testimony of officers and employees of petitioner.

(f) ***Five other former employees of petitioner, two of them in respondent's employ, were called to support respondent's contention. Their testimony failed to show any complicity on petitioner's part in suggesting the "passing off" of its goods for those of respondent.***

1. KELTON, one of respondent's witnesses, had been a salesman with the Pfeiffer Chemical Co. for five and a half years; then four and a half years with the petitioner. He had been discharged for a gross cause over two years before he took the witness stand. (MCNULTY, Vol. III, p. 1254, Qs 23 to 35). Kelton was afterwards on the witness stand, but he did not deny what McNulty said about the cause of his discharge.

Kelton testified (Vol. I, p. 95):

> "Q7. What were your usual representations to the trade when soliciting orders for Quin-Coco? * * * "A. I always demonstrated Quin-Coco as a preparation similar to Coco-Quinine, showing to them that the Pfeiffer Chemical Company (or the Searle Hereth Company) product was even a better preparation to my mind than the Coco-Quinine which the trade had formerly sold. I demonstrated this by showing that Quin-Coco would not coagulate in the bottom of the container as easily as the Coco-Quinine.

"I also showed the difference in price, invariably quoting our gallon price against the Eli Lilly & Co. five pound price. In big buyers I tried to induce them to take advantage of our five gallon deal, thus reducing the price to five cents lower per gallon than the Coco-Quinine is in five pound lots. This, of course, was only to dealers who could handle that quantity and always to retail druggists only.

"I made a specialty of Quin-Coco from the fact that I found it to be the very best 'repeater' we had in the pharmaceutical line. When a customer began buying this product in five pound lots he invariably bought it later in larger quantities, almost invariably" (Rec., Vol. I, p. 95).

"By the term 'repeater' in the sense used concerning Quin-Coco," witness stated, "I have reference to the fact that it would be reordered time and again. I also used the word 'replacer' which is a phrase used by pharmaceutical houses and salesmen when placing an article on the market at a cheaper price than the one which is called the 'original.' Quin-Coco therefore was a 'replacer' in the salesman's mind (I speak of my own experience) for Eli Lilly & Company's former manufactured product known to the trade the country over as Coco-Quinine." (Rec., Vol. I, p. 96).

Witness also stated that he considered, when he began the sale of Quin-Coco to the trade, and did now consider Quin-Coco as a superior preparation to Coco-Quinine (Rec., Vol. I, p. 96).

Witness further stated:

"I invariably sold Quin-Coco with the idea that it was to give the retail druggists, whose profits are few and far between anyway, a larger profit, demonstrating as above stated that if Coco-Quinine was called for to *influence the customer* to take the *Quin-Coco* instead. If the consumer gets a better product in my mind and the druggists

make a better profit, both are thereby benefited. * * * I would most positively state that in my long experience in selling Quin-Coco that it was resold as it was bought—to replace Coco-Quinine, and that in almost every instance, at my suggestion and demonstration, it was bought for the purpose of replacing Coco-Quinine. Therefore, it was almost in toto, according to various letters and personal talks with druggists, sold as a substitute for Coco-Quinine" (Rec., Vol. I, p. 97).

On cross examination, witness testified to his meaning of the words "repeater" and "replacer," and stated that the element of a lower price was an essential element of the term and one talking point he always used to induce the trade to buy the replacer instead of the original; that in making sales of Quin-Coco to retail druggists, his effort invariably was to induce them to influence their customers to use Quin-Coco, Searle & Hereth, in place of Coco-Quinine, Lilly. He said:

"I have previously stated that I believed then and believe now that Quin-Coco was and is a superior preparation to the Coco-Quinine manufactured by Eli Lilly & Co. The price also, as above stated, was the chief club I used with which to hammer against Coco-Quinine."

He was then asked:

"XQ35. I hope you will excuse me for asking you this question. I will ask you whether it was your practice to suggest to retail druggists that when they received a physician's prescription specifying Coco-Quinine, Lilly, they could without the physician's consent, or knowledge, fill that prescription with Quin-Coco, S. & H.? A. *Not for one instant did I suggest anything clandestine.* If the druggist could induce the physician to permit the said substitution I always suggested that this was right so to do. But there were so many instances where the customer came in and called for Coco-Quinine and the druggist could show him

> the large bottle S. & H., the color being the same, and he would usually say, 'Yes, that is what I want.'" (Rec., Vol. I, p. 100).

KELTON said he certainly did not suggest anything clandestine to a druggist in retailing over the counter Quin-Coco for Coco-Quinine. He always suggested to a druggist to show the customer what he was buying, telling him that this preparation would not coagulate.

> "At the same time the customer called for Coco-Quinine, but if he succeeded in showing him that he had a better preparation whether the customer knew it to be Coco-Quinine or not, that I do not consider clandestine. It is a matter of business, pure and simple and the poor retail druggist needs all the extra cash he can get. As stated several times I have always believed that when a man buys a better article than the one for which he calls he is none the loser. * * * If the druggist obtained the consent of the physician to substitute Quin-Coco when the physician had written Coco-Quinine that would be a matter entirely between the druggist and physician, for by mutual consent the Quin-Coco, as in this instance, could be substituted for Coco-Quinine. * * * *But at no time as above stated did I ever suggest to 'palm off' said Quin-Coco instead of the original product known to the trade as Coco-Quinine*" (Rec., Vol. I, pp. 100-102).

This testimony, it should be noted, was given by a witness called by respondent. Its failure to sustain respondent's contentions and the conclusions of the Circuit Court of Appeals is obvious.

Indeed, Kelton was, in effect, a most excellent witness for the petitioner, both as to the correctness of his selling methods and as to his ethical teaching by his former employers.

2. HOOPER (Rec., Vol. I, p. 15), a former employee of petitioner, testified as to alleged instructions from F. C.

Stevenson, representing the Pfeiffer Chemical Company, that he was

> "to sell Quin-Coco as a substitute product for Coco-Quinine, that being the only way that we could sell Quin-Coco as there was no demand at all for that article."

But on cross examination, after saying (XQ85, 94) that he "had so many things to learn as I (he) was just starting on the road and everything was new" to him, and that he "could not remember just what Stevenson said to him," he testified:

> "XQ96. The instructions given me by Mr. Stevenson were so emphatic that I am absolutely certain that Mr. Stevenson told me not only once but several times, that Quin-Coco was the same as Coco-Quinine."

Hooper, at the time of the taking of his deposition in the employment of the respondent, testified with a natural bias in favor of his present employer. He stated what his selling methods were without testifying that these selling methods were the direct result of the instructions given by Mr. Stevenson.

Hooper confessed that he "told the druggist that on a physician's prescription for Coco-Quinine he could use Quin-Coco, the products were so similar; that he need not be afraid of detection. In this manner we disposed of quite an amount of the Quin-Coco" (Rec., Vol. I, p. 15).

By this confession, Hooper stamps himself as dishonest and unscrupulous and he reaped the benefit of his fraudulent practices by increasing the magnitude of his sales.

STEVENSON denied that he instructed Hooper to sell Quin-Coco as a substitute for Coco-Quinine or that Quin-Coco could be sold as Coco-Quinine (Rec., Vol. III, p. 1411). He further denied that the "nut" of his instruc-

tions to Hooper was to sell Quin-Coco for Coco-Quinine (Rec., Vol. III, p. 1412). Stevenson stated that it would be dishonest, against the moral code of the drug business, and against his own personal moral code, if a retail druggist had a prescription or a call for the preparation of one maker and dispensed a similar preparation of another maker and that it would be dishonest for a drug salesman to suggest that he could dispense one article on prescriptions or calls over for the counter for a similar preparation of another maker. Hooper did not admit his conduct was dishonest in making such a suggestion, but he confessed that he perpetrated the fraud.

In weighing the evidence of these two witnesses, one an unscrupulous (discharged) salesman, *now in the employment of the respondent*, and the other a manager of the petitioner, who has not been impeached, the Circuit Court of Appeals was not justified in accepting as true the testimony of a man admittedly guilty of unfair practice and disregarding the denial of another whose character for credibility had not been assailed. The Court also failed to take into account the fact that the salesman was biased and prejudiced, that he was not disinterested and that his conduct was prompted by the desire to increase his sales and profits.

The witness was not corroborated; it is a case of oath against oath and under well settled rules of all courts and juries in determining the weight of evidence, the respondent did not sustain the burden of proof.

No druggist was called to show that Hooper had solicited his trade in Quin-Coco by "unfair" representations, although when he testified he had been for nearly three years a traveling salesman for respondent on the Western Coast, in which part of the country he had sold drugs for the petitioner for a year previously.

3. Groves (Rec., Vol. I, pp. 358-9), a former discharged employee of petitioner, testified as above set forth (*supra*, pp. 66-69).

4. HARDY (Rec., Vol. I, pp. 369-70) testified:

> He told the druggists when soliciting orders that they could use Quin-Coco as a substitute for Coco-Quinine, from the fact that it contained both quinine and cocoa and that he made such statements by authority of Mr. McNulty and Mr. H. Pfeiffer (p. 370); McNulty told him he could say to the druggists that they would have a right to sell Quin-Coco on doctor's prescriptions for Coco-Quinine as both contained quinine and cocoa *(ibid.)*.

Hardy was a former salesman of petitioner; when he testified he was employed by Atlas Oil Company.

MCNULTY positively denied that he ever authorized or suggested to any salesman that he should suggest to a retail druggist that he could supply an article of Warner's in place of one of another house, when the latter was called for by prescription or over the counter (Rec., Vol. III, p. 1252).

Mr. HENRY PFEIFFER specifically denied that he ever gave Hardy any such instructions or authority, his attention being called to the testimony of Hardy on the subject (Rec., Vol. III, p. 1238).

5. THURMAN (Rec., Vol. I, pp. 391-2), formerly a salesmen for petitioner, testified as above set forth (*supra*, p. 71).

POINT VII.

There was a market for Quin-Coco and petitioner offered its product for sale in that market.

The respondent argued very urgently that there was no market for Quin-Coco, and called various druggists to testify that they had never seen a prescription for it. From that erroneous assumption, it argued that Quin-Coco could not have been marketed except by "unfair" methods. But the evidence does not sustain the assumption. On the contrary, there were the dispensary physicians who bought it.

G. A. PFEIFFER testified that there were about 65,000 of them (Vol. III, p. 1209, Q128), and that one-sixth of the Warner drug sales are made to them (Q129).

The Circuit Court of Appeals draws a distinction between different classes of physicians by saying that the petitioner in placing its product on the market

> "did not send its salesmen to prescribing physicians presenting to them the merit of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but sent its salesmen directly to druggists, to retail dealers * * * ."

All physicians prescribe remedies for their patients. Some physicians (mostly in the country) also dispense their own drugs. Probably no physician outside of large cities can be put absolutely in one category or the other. The testimony above referred to shows that petitioner's salesmen went to many physicians, principally dispensing physicians (65,000), because they were naturally the prospective buyers of any drug. It appears to us to be a strained argument to dwell upon the fact that petitioner's salesmen went to the obvious market for drugs to offer their wares, instead of devoting their efforts to

a campaign of education among physicians who did not buy or dispense their own drugs.

Various salesmen said they called on the dispensing physicians *(e. g.,* Brown, p. 1403).

Again, many of *respondent's* witnesses testified that there was a market for a chocolate quinine, a sweet syrup of quinine, or the like. Thus, Vol. I:

T. B. Dunham (p. 29, RDQ14): "Lots of people come into the store and call for preparations of that kind *under different names."*

E. H. Walsdorf (p. 207, XQ25): *"About fifty per cent., about one-half,* call for a 'chocolate quinine' preparation or similar words."

Sol Ray (p. 212, XQ36): "I would say about half the people call for chocolate quinine."

Fred R. Daly (p. 257, XQ18): "Sixty per cent. of the calls over the counter are for 'chocolate quinine.'"

John M. Moseley (p. 277, Q9): "About fifty per cent., I believe, call it 'chocolate quinine.'"

W. A. Cunningham (p. 283, Q13): "Nearly all of them [customers] ask for 'chocolate quinine.'"

Harry S. Arrington (p. 350, XQ17): "One-quarter to one-third of the calls are for 'chocolate quinine' or 'tasteless syrup of quinine.'"

Albert F. Knowles (p. 66, Q12): "The counter calls are for 'coco-quininé, chocolate quinine, and syrup of quinine brown color.'"

Max Samson (p. 188, XQ17): "A very considerable minority call for 'chocolate quinine' or similar words."

Will J. Bryant (p. 89, Q9): "We occasionally receive orders for chocolate quinine."

C. W. Jennings (p. 93, Q7): "Sometimes customers call for chocolate quinine."

V. B. Richard (p. 144, Q11): "They ask for a chocolate quinine and sometimes for coco-quinine."

R. L. Grigsby (p. 150, Q9): "I see it (quin-coco) in *dispensing physicians'* offices."

A. C. Fancher (p. 266, Q9): "I believe seventy-five per cent. of the druggists in my territory handle Quin-Coco."

W. A. Jolly (p. 287, Q25): "They called for 'Coco-Quinine,' 'chocolate quinine,' 'quinine syrup,' etc."

W. S. Ames (p. 219, XQ16): "They call for chocolate quinine quite frequently."

To the same effect were:

Nottingham, petitioner's salesman (Vol. III, p. 1451, Q70).

Wilson, petitioner's salesman (Vol. III, p. 1624, Q15).

G. A. Pfeiffer (Vol. III, p. 120, Q63).

Again, a druggist can always create a market by good business methods; by persuading his customers to buy*; by advertising or displaying the article; by urging prescribing physicians to prescribe it and dispensing physicians to buy it. Thus:

G. A. Pfeiffer (III, p. 1210, Qs 134 to 139).
H. Pfeiffer (III, p. 1237, Q29).
Richards (III, p. 1340, Q19).
Gonzales (III, p. 1358, Q23).
Moon (III, p. 1464, Q14).
Dr. Beringer (III, p. 1536, Q114).

*In *Walter Baker & Co.* v. *Gray,* 192 Fed., 921, it was held that a retail dealer can properly persuade a customer to buy one make of Baker's Chocolate in place of another.

POINT VIII.

The Circuit Court of Appeals erred in finding that the alleged unlawful practices of petitioner's salesmen were fully established by "an unusual number of witnesses," or that such practices were followed by salesmen with the sanction of their superiors so generally as to make petitioner chargeable with knowledge of them, or that the fraudulent substitution of Quin-Coco for Coco-Quinine was extensively practiced by druggists.

A careful analysis of the evidence completely refutes this conclusion, as the District Judge correctly held.

To sum up, a brief reference to the whole record shows that out of 137,760 physicians (Rec., Vol. III, p. 1209) and 53,773 druggists (Rec., p. 1211), and with 150 to 160 representatives of the respondent who scoured the country over a period of six years prior to December, 1917, when the case was closed (Rec., Vol. II, p. 876), and involving hundreds of thousands of calls upon druggists and physicians, the respondent was able to produce only *five* witnesses (out of one hundred and twenty-nine called in chief), who testified to definitely improper representations on the part of petitioner's salesmen made to induce sales of Quin-Coco. These witnesses weakened on cross examination and all of these representations were denied categorically by the petitioner's salesmen, and the druggists who testified to them, with one exception, did not act upon such representations by buying or selling Quin-Coco.

Classification of Respondent's Witnesses.

The witnesses who testified for respondent may be classified as follows:

Class A. Druggists to whom no representations were made, who testified to knowledge and sale of Coco-Quinine and knew of no other similar preparation.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
Jesse E. Wilson.....	41	Frank Austin Fitch..	193
Rockwell Roman	53	Ralph G. Persell.....	194
Robert A. Hevenor...	72	Edward H. Walsdorf.	205
Cornelius P. Van Schaak	73	Floyd I. Ames.....	216
Harry W. Schuh.....	85	Samuel H. Colvin.....	235
Will J. Bryant.....	89	Quintus S. Adams....	243
Chesley W. Jennings.	92	Don J. Barber.....	260
Jerome B. Sand.....	103	Merrill P. Northington	264
Chas. L. Koellein....	104	Terry T. Greil.....	266
John R. Bond, Jr.....	122	Wm. A. Cunningham.	282
Carl Bordeaux	123	J. Johnston Moore...	284
Samuel V. Bracy.....	124	R. H. Greene.....	295
Walter L. Bolden.....	126	Joseph B. Riley.....	302
Alfred L. Soulier.....	127	E. G. Jacobs.....	302
Camille F. Gravel....	130	Wm. B. Franklin.....	304
Robt. L. Grigsby.....	149	Thos. C. Marshall....	305
John S. Foster.....	151	Lynn Fort	308
Bryan B. Gilmer.....	161	J. C. Ridenour, Sr. ..	319
Max Samson	187	G. W. Burton	321
Lucien E. Lyons.....	190	Wm. S. Cavedo.....	326
		Harry S. Arrington..	349

Total 41 witnesses.

Class B. Physicians to whom no representations were made, who testified to knowledge and prescriptions of Coco-Quinine and knew of no other similar preparation.

Names of Witnesses	Rec., Vol. I Page
Walter D. Hoskins...	76
Geo. W. Walker.....	84
R. L. Randolph.....	128
Field V. Gremillion...	129
Allen J. Perkins.....	132
Berna C. Fry.....	141
Edward C. Ferguson.	152
George H. Spurlock..	153
O. N. Arrington.....	209
Ezra H. Walker.....	258
Coleman F. Pearson..	271
Wm. C. Pumpelly....	301
E. C. Fisher.....	324
Edward T. Hargrave.	351
Frank L. Eskridge...	375

Total 15 witnesses.

Dr. Hoskins testified that he knew of Coco-Quinine and of no other chocolate quinine preparation. He prescribed Coco-Quinine and no other liquid Quinine preparation (Rec., Vol. I, p. 76).

Class C. Druggists and physicians who testified to perfectly proper representations by petitioner's salesmen that Quin-Coco was the same—or about the same—as Coco-Quinine, had same ingredients and formula and sold at a lower price.

Names of Witnesses	Rec. Page
D. B. Dunham.....	28 (Vol. I)
Stephen D. Knox.....	125 (Vol. I)
Wm. C. Chestnutt.....	147 (Vol. I)
Jeptha C. White.....	649 (Vol. II)
Amos L. Vaughan.....	254 (Vol. I)
Hill W. Howell.....	262 (Vol. I)
Wm. Heim	730 (Vol. II)
Walter S. Lindsay.....	332 (Vol. I)
Herbert N. Henckell.....	87 (Vol. I)
Michael R. Willis.....	478 (Vol. II)
Jesse E. Greene.....	505 (Vol. II)
David J. Kuhn.....	515 (Vol. II)
O. S. Mayfield.....	234 (Vol. I)
Wm. Seeger, Jr.	665 (Vol. II)
A. Homer Sinclair.....	679 (Vol. II)
Wm. J. Powell.....	681 (Vol. II)
H. D. Ashton.....	789 (Vol. II)

17 witnesses.

Class D. Druggists, one physician and three traveling salesmen whose testimony was trivial and unimportant, relating to sale of other specialties and indefinite and proper representations by petitioner's salesmen.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. II Page
Raoul R. Haas	71	Carl H. Ege	418
John R. Tague	110	John H. Weber	422
Robert L. Winchester	112	Chas. S. Lebo	429
Wm. O. Schuler	162	Sam'l H. Bell	435
Fred A. Burns	170	Henry B. Smith	443
Howard S. Smith	171	H. W. Dunn	475
Fred R. Daly	256	Francis M. King	481
Avington C. Fancher	265	Wm. C. Dirmeyer	546
Stephen D. Coleman	298	Solomon R. Hamilton	547
John H. Vinson	297	John Van Dale	720
		Maurice W. Watson	773
			21 witnesses.

For example. John R. Tague, Rec., Vol. I, p. 110, testified only that he had stocked Quin-Coco four or five years ago at the solicitation of one of the Warner salesmen to fill such orders as might be turned over to his drug firm by the Warner salesmen.

Class E. Seven respondent's salesmen, and two other witnesses, who testified to alleged wrongful substitution by druggists *without representation or request* of petitioner's salesmen.

Names of Witnesses	Rec., Page	
William H. Martin	54	(Vol. I)
Otto H. Kessell	70	
John B. Messenger	90	
Chas. O. Broussard	134	
Walter L. Griffin	163	
Harry W. Lyle	204	
C. C. Tisdale	248	
LeGrand B. Wetzel	335	
Dr. H. H. Brown	670	(Vol. II)
		9 witnesses.

The testimony of all of these witnesses but Martin and Kessell was merely hearsay.

Martin (Rec., Vol. I, p. 55) testified:

> That he saw a prescription for Coco-Quinine handed in at one store and the druggist filled it with Quin-Coco. Kessel (id., p. 70) was present and testified that the clerk said it was the only Coco-Quinine he had in the house.

Comment: There was no evidence of any representation by Warner salesmen.

Class F. Druggists who testified that Warner salesmen represented that Quin-Coco was the same as Coco-Quinine and cheaper in price.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
William A. Schaefer..	155	Edwin R. Albright...	236
Bertram A. Wright..	68	Julius R. Prochnow..	165
Ellis B. Stovall.....	233	F. D. Nelligar.....	347
Gus A. Blodau.....	105	A. J. Garner.....	377
Carl O. Manning.....	109		

9 witnesses.

The testimony of these witnesses is so bare of the slightest imputation of fraud, as to lead the Court wholly to disregard it and eliminate these witnesses as not proving anything of value on the issue of unfair competition.

Class G. Druggists who testified that Warner salesmen represented that Quin-Coco was identical with Coco-Quinine and could be used in place of Coco-Quinine.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
Louis Pink	30	John B. Reid.....	272
James A. Kinder....	81	John M. Moseley....	276
Charles Heno	201	William A. Jolly.....	285
Sol C. Ray.....	210		

7 witnesses.

In this class, seven witnesses testified to representations that Quin-Coco was the same as Coco-Quinine and could be used in its place or as a substitute for Coco-Quinine. These representations were consistent with fair dealing, as a competitive and identical article may properly be sold at a cheaper price to supplant another in legitimate competition, when the plaintiff had no superior rights entitled to protection.

We have thus analyzed the evidence of witnesses in classes:

	Witnesses
A	41
B	15
C	17
D	21
E	9
F	9
G	7
	119,

out of a total of 129 witnesses called on respondent's direct case and by a process of elimination the testimony of these 119 witnesses should be wholly disregarded as absolutely insufficient to sustain the burden of proof.

There remain, however, the following witnesses forming:

Class H. Druggists who testified that representations were made that Quin-Coco could be used in place of Coco-Quinine on prescriptions and calls for Coco-Quinine.

1st: The evidence is contradicted by the petitioner's salesmen whose names are given.

2nd: No evidence is presented that such representations were authorized, sanctioned or approved by any of the petitioner's officers and managing agents, or known to them or any of them.

CLASS H.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
Albert F. Knowles...	65	William M. Merithew.	60
Joseph N. Wolsey....	77	William M. Scott....	113
Valleix B. Richard...	143	Edmund F. Barnes...	179
John F. Whitley.....	387	Wesley S. Ames.....	217
Charles A. Noiret....	406	Oscar J. McMillan...	244

10 witnesses.

The testimony of the last five named witnesses in Class H has been abstracted above (pp. 44-49) and the specific denials of the salesmen named quoted. We will now consider the other five of them.

KNOWLES (Vol. I, p. 65), a druggist in Saginaw, on cross examination, testified that this was what the salesman said:

Answer to XQ28: "He took a sample of Quin-Coco from his grip and asked me if I handled that product. I said, 'No, I have always handled Coco-Quinine for all such calls.' He said, 'Well, don't you think you could handle this to your advantage?'"

ROGERS (Vol. III, p. 1449, Q67 to XQ77), the Warner salesman, denied that such a conversation had taken place.

STARRING (Vol. III, p. 143, Qs61 to 74), another Warner salesman in the same territory, also denied the conversation. He had sold Knowles one gallon of Quin-Coco, but had not discussed it.

WOLSEY (Vol. I, p. 77), a retail druggist in Cape Girardeau, testified as to what the salesman said to him (RXQ35): "I could buy a gallon of it and use it for the same purpose as Coco-Quinine for less money. *I think that is the exact words.*"

BROWN (Vol. III, p. 1405, Qs16 to end), the Warner salesman mentioned by Wolsey, denied Wolsey's statement.

RICHARD (Vol. I, p. 143, Q6), a druggist of Jennings, La., testified that Jones, a Warner salesman, had asked him to buy Quin-Coco and "show it to his doctors and ask them if they would use this instead of Coco-Quinine and that it would be more money in it for me."

Again, at XQ23, Jones "asked me to use Quin-Coco. It is like Coco-Quinine. You can't tell the difference."

At XQ24, "* * * he advised me to show it to physicians and ask them to prescribe it."

At XQ32, asked whether Jones made him any dishonest proposition, Richard said, "I am positive he did not."

JONES (Vol. III, p. 1326, Q22) testified as to his regular "sales talk." Richard's testimony was read to him (Qs 31, 32). He denied the statements.

WHITELEY, a druggist of Winfield, La. (Vol. I, p. 389), testified that Wilkins, a Warner salesman, told him that Quin-Coco "was the same thing, two grains of quinine to the drahm, put up in chocolate" (XQ42).

> "The very words he used were: 'Well, he said it was precisely the same thing and could be used just as we were using the Coco-Quinine' " (XQ43).

He added (XQ64): Wilkins is "a mighty good man."

WILKINS (Vol. III, p. 1318, Q60) denied that he said to Whiteley that he could dispense Quin-Coco the same way on calls for Coco-Quinine.

NOIRET (Vol. I, p. 407, Q7), a traveling salesman for a third party (but after he testified here taken into respondent's employ), testified that he happened into drug stores in three Mississippi towns and heard Jones and Smith (Warner salesmen) say to the druggists that "the two products were so much alike you could not detect the

difference" (a fact shown by ordinary inspection of the articles).

But counsel for respondent visited two of these same towns and took testimony but he did not examine the said druggists in corroboration. The third town was near those two, but counsel called no witness from it.

JONES (Vol. III, p. 1329, Q49), one of these Warner salesmen, denied that "he had ever sold a bill in the presence of Noiret" or talked to him about Quin-Coco.

SMITH, the other salesman, had left the petitioner's employ and was called as a witness by the other side and could not be called by petitioner.

We have thus disposed of all of the 129 witnesses called on the plaintiff opening case—druggists and physicians whose testimony seems to require consideration. We submit that but half a dozen testified on direct that "unfair" statements had been made to them by a Warner salesman and that these on cross examination so modified their testimony that it failed, in any substantial degree, to sustain the respondent's case.

If Smith's selling methods were improper, no druggist whom he solicited has been called by respondent.

The Salesmen's Records.

During the period in question, July, 1908-1916, the petitioner employed a sales force of about 75 travelers. In those years they had 313 different men on the road, taken on and laid off (Vol. III, p. 1645, by stipulation).

Of this number, only 11 were referred to by any of respondent's witnesses in the opening case. This is one salesman out of 28, on a bill charging the broadest "unfair" methods.

A Consideration of the Impugned Salesmen.

NOTTINGHAM, when he testified (Vol. III, p. 1422), had been with the company for seven years. He had about 800 druggists on his list, on all of whom he called several times a year. But just one druggist (a young man of 22 in a Southern village) was the only witness who impugned Nottingham, and he, we submit, broke down on cross examination. Nottingham denied Jolly's statements explicitly (Q30).

MOON had been with the petitioner since it was chartered, and for seven years before that with the old Warner Company (III, p. 1462). He visited 600 drug stores 3 or 4 times a year. Only a single druggist, E. B. Allen, was called to impugn Moon's methods, while 4 (or if we include the rebuttal, 5) of respondent's witnesses gave testimony which showed that his methods were correct.

RICHARDS had been with the Pfeiffer Chemical Company for 5 years and after that with the petitioner, with whom he was when called (III, p. 1339). He visited about 1,500 drug stores from 2 to 6 times yearly. Only 2 of respondent's witnesses gave testimony tending to show that his methods were unfair, and one of those was 5 or 6 years stale; while one witness called by respondent (or if the rebuttal is included, 3) testified to correct methods.

JONES visited 500 drug stores 4 times a year. He had traveled for petitioner from its organization, and before that for 6 years with one of its affiliated companies (Vol. III, p. 1325). Four druggists were examined by respondent to prove that his methods were unfair. One was 3 or 4 years stale, another went "4 or 5 years back." But 3 others of respondent's witnesses gave evidence which showed that Jones's selling methods were correct.

GONZALES, with 4 or 5 years of service with the petitioner, had 300 drug stores at which he called 4 times yearly (III, p. 1356). Two of the druggists were called to impugn him.

ROGERS had had over 3 years of service with the petitioner. He had 1,300 druggists and made 3 calls a year (III, p. 1444). But a single one of them was called and referred to his methods.

DE VALL, with 3 years' service, had about 450 druggists on whom he called from 3 to 6 times a year (III, p. 1383). Two of them referred to him and another of them attributed correct selling methods to him.

MCNULTY (III, p. 1251) had been with the petitioner since it was organized. He was referred to by a single druggist called by respondent.

MCCARTHY was a Warner salesman for about 4 years (III, p. 1367). He called on druggists and on 75 per cent. of the dispensing physicians. He was referred to by 3 druggists and by 1 called in rebuttal.

ROGERS (III, p. 1444), when he testified, had been a salesman for over 3 years. He visited some 800 drug stores, formerly about 500, calling on each from 1 to 4 times a year. He was referred to by 3 druggists as having solicited their trade.

RITAYIK (III, p. 1301) had been with petitioner 9 years, as a traveling salesman for 2 years and then assistant sales manager for 5 years. He was mentioned by one druggist called by respondent.

STARRING (III, p. 1428) began as a salesman in 1913. He was examined two and a half years later. His territory included about 800 drug stores; he visited them 3 times a year. Three druggists referred to him.

WILSON (III, p. 1621) was referred to by 2 of the druggists called by respondent.

O'CONNELL (III, p. 973) had been a Warner salesman for 3 years. Not a single druggist was called to impugn his selling methods. He was a witness for the *respondent*. If his selling methods were "unfair" no druggists upon whom he practiced them have been called to corroborate him.

BROWN, E. R. (III, p. 1403), was a graduate in medicine of Washington University, St. Louis, a practitioner of medicine and a registered pharmacist. He visited 1,000 drug stores about 3 times a year and all the dispensing doctors as many times. Two of these druggists referred to his selling methods.

We have shown elsewhere that all the charges against these salesmen were specifically denied by them respectively.

We have thus disposed of all of the 129 witnesses called on the plaintiff's opening case—druggists and physicians—whose testimony seems to require any consideration. We submit that but a half dozen testified on direct examination that unfair statements had been made to them by a Warner salesman and that, on the other hand, these, on cross examination, so modified their testimony that it failed, in any substantial degree, to sustain the respondent's case.

We contend that we have shown conclusively that there is no ground for the statement in the opinion of the Court below that the practice of improper selling methods was "fully established by the evidence of an unusual number of witnesses" and that it "was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law" (275 Fed., 755).

The testimony in rebuttal was improperly offered and should have been excluded by the trial court and, we submit, should not have been considered by the Circuit Court of Appeals. This testimony was given over specific objection on petitioner's behalf that it was part of respondent's prima facie case and not rebuttal* (Rec., Vol. II, pp. 416-17). *The testimony was contradicted in essential particulars by the respective salesmen, whose selling methods had by respondent been impugned.

1. E. H. WHITE (Rec., Vol. II, pp. 531-532), called on behalf of respondent, testified:

> that in the spring of 1910, Wilkins, petitioner's salesman, showed Quin-Coco to Mr. Whitley, druggist for whom witness worked, and witness, stating he "could sell this preparation to us to be used as Coco Quinine at a less expense and a saving on the original Coco Quinine" * * * that it contained two grains of quinine sulphate to the teaspoonful and that he was selling only to the trade in general for the Coco Quinine preparation and that he could sell it to us in gallon lots at about the same cost as we had been paying for the five pints of Lilly's Coco-Quinine" (Rec., Vol. II, p. 532). White further testified that Gonzales, defendant's salesman, solicited his business for Quin-Coco, "that it was a saving in price over Lilly's Coco-Quinine * * * and he knew I could use it at the place where I was now for Coco-Quinine * * * he could sell me his preparation, Quin-Coco, in gallon lots, to take the place of Coco-Quinine, as Lilly had taken their Coco-Quinine off the market in gallon lots, * * * ." (Rec., Vol. II, p. 532.)

Comment: WILKINS by stipulation denied the statements attributed to him by witness White (Rec., Vol. III, p. 1643). White confessed that the Whitley store, with which he was connected, dispensed Quin-Coco on

calls for Coco-Quinine (Rec., Vol. II, p. 533), but there was no evidence that this practice had been induced by any representations.

2. WALKER (Rec., Vol. II, p. 541) testified:

> that Wilkins, petitioner's salesman, said it (Quin-Coco) was much cheaper than Coco-Quinine, as you could buy a gallon for what five pints of Coco-Quinine would cost, and that it could be dispensed on a doctor's prescription when Coco-Quinine was specified and was being dispensed all over the country as Coco-Quinine.

WALKER, also, was called in rebuttal to corroborate Whiteley's testimony in chief. It was not proper in rebuttal and was objected to.

Comment: WILKINS, it was stipulated, would deny the statements of Walker as the witness could not be produced (Rec., Vol. III, p. 1644). The witness Walker admitted that Quin-Coco, previous to this time, had been carried in the stock regularly and prescriptions for Coco-Quinine had been filled with Quin-Coco, but there was no evidence that this practice was the result of any previous representations.

3. CULVER (Rec., Vol. II, pp. 549-550) testified:

> that Jones, petitioner's salesman, said it (Quin-Coco) was absolutely identical with Coco-Quinine and could be used in its stead and solicited the business on it on the strength of the difference in price between the Quin-Coco and Coco-Quinine. He sold it to be dispensed in place of Coco-Quinine on the representation that neither the doctor nor any one else could tell the difference between that and Coco Quinine.

But he entirely modified this on cross examination, when he testified (p. 554, XQ28):

"A. The substance of Jones' remarks to me * * * were (was) that the two preparations were identical, and that Quin-Coco could be used in place of Coco-Quinine, and that it was to our advantage to use it inasmuch as the price was much lower than Coco-Quinine."

Comment: JONES positively denied these statements of the witness (Rec., Vol. III, pp. 1611-12). It is a fair deduction from this testimony that Culver dispensed Quin-Coco improperly (Rec., Vol. II, p. 553).

4. STUCKEY (Rec., Vol. II, p. 558) testified:

that McCarthy, petitioner's salesman, said "he had a preparation called Quin-Coco, which was the very same thing, and he could save me some money on it. * * * He said I could put it up and people would not know the difference between his and Lilly's. * * * I could put it up on prescriptions [for Coco-Quinine], that I would not be doing anything wrong, as it was the very same thing as Coco-Quinine. * * * I could put it up and label it Coco-Quinine; that I could sell it under the label of Coco-Quinine" (p. 559).

On cross examination, when asked to give the salesman's words "verbatim," he said only this:

"XQ27. How did he say it to you? In what words?

"A. He said Quin-Coco was the same thing as Coco-Quinine and I could save money on it, about the same thing every time he talked about it.

"XQ28. What were the words he used? Have you given them all in answer to my question?

"A. I think I have."

Comment: MCCARTHY in substance denied this accusation (Rec., Vol. III, p. 1371). He had left the petitioner's employ and could not be recalled; but his evidence earlier

in the case in denial of any improper selling methods sufficiently traverses the statements of Stuckey.

5. Edmondson (Rec., Vol. II, p. 639) testified:

> that Jones, petitioner's salesman, said it (Quin-Coco) was a chocolate quinine that could be sold and dispensed in place of Coco-Quinine and that it was the same kind of preparation and could be used for the same purpose as Coco-Quinine. That he did not remember what Jones said the first visit—after that Jones merely asked if he wanted any Quin-Coco (Qs 9, 10).

Comment: Jones denied that he ever stated to any one that he could substitute (Rec., Vol. III, p. 1612).

6. Moise (Rec., Vol. II, p. 643) testified:

> that Jones said that he backed Ritayik in the latter's statement that everybody along the road was using it when the doctors prescribed Coco-Quinine and that they could not tell the difference.

Comment: Ritayik declared Moise's statement "an absolute falsehood." Jones' general denial of "unfair" selling methods will serve as a denial of Moise's statement (Rec., Vol. III, p. 1613).

7. Lavison (Rec., Vol. II, p. 690) testified:

> that Kelton, petitioner's salesman, afterwards employed by respondent, represented Quin-Coco to be exactly the same in every respect as Coco Quinine and that it could be used as a substitute on physicians' prescriptions written for Coco-Quinine without anyone knowing the difference.

He also testified that Kelton had, the next day, brought Mr. H. Pfeiffer to his shop, and as to what was then said.

What Lavison said in chief he modified on cross examination. Thus (Rec., Vol. II, p. 695):

> XQ34. Can you give the language of Mr. Pfeiffer in the words in which he spoke?
> "A. * * * I know that he told me it was the same as Coco-Quinine, identically the same, and the difference could not be told, and that it could be used in any way that Coco-Quinine was used.
> "XQ35. That they were the same preparation in every way.
> "XQ36. And cheaper.
> "XQ37. That is the substance of what they both told me."

Comment: KELTON, who had left petitioner's employ and was examined at great length on behalf of *respondent*, testified that he sold Quin-Coco to take the place of Coco-Quinine, and if Coco-Quinine was called for to influence the customers to take Quin-Coco instead (*id.*, p. 96). Kelton emphatically denied that he ever suggested to a druggist to palm off Quin-Coco for Coco-Quinine (*id.*, p. 102). His testimony is considered, *supra*, p. .

8. MCCORKLE (Rec., Vol. II, p. 925) testified:

> that Wilson, defendant's salesman, said it (Quin-Coco) could be used for Coco-Quinine to fill calls for Coco-Quinine, to be used as a substitute for it.

On cross examination:

> "RXQ51. State what words he used, etc.
> "A. I understood it by him stating that it had the same appearance and was the same formula as Coco-Quinine."

This was put in as re-rebuttal and was objected to for that reason. It belonged in the opening case.

WILSON denied these statements (Rec., Vol. III, p. 1623).

9. L. S. JAMES (Rec., Vol. II, p. 925) testified:

> that Wilson said that "we could dispense it (Quin-Coco) on orders for Lilly's Coco-Quinine, either on prescriptions or over the counter."

XQ40—When asked to give the salesman's exact words he answered: "He asked if we sold Lilly's Coco-Quinine. I told him we did. He said, 'I have it,' and reached into his sample case * * * and said it would cost us about half as much as Lilly's Coco-Quinine."

"XQ41. I think that is all."

This witness also was called in re-rebuttal under objection.

WILSON denied these statements (Rec., Vol. III, pp. 1621, 1626-7).

POINT IX.

Even if the Circuit Court of Appeals were right in finding petitioner guilty of using unfair selling methods in selling Quin-Coco, it was error to deprive petitioner of the exercise of its admitted right to duplicate respondent's product by a preparation of its own, by enjoining it from using chocolate in such preparation.

The evidence shows that chocolate is used, not merely for its color, but because of its taste, and that it was used to disguise the flavor of quinine long before respondent made its preparation Coco-Quinine *(supra,* pp. 25-27).

The "unfair" competition, if any, consisted of representations made by the petitioner's salesmen to druggists that they could "pass off" Quin-Coco for Coco-Quinine in filling prescriptions and on customers over the counter.

Even assuming that the Circuit Court of Appeals was justified in finding from the evidence that the petitioner's salesmen had made such representations, the injunction should have been so framed as only to prohibit the petitioner and its salesmen from hereafter making such representations to the druggists in soliciting their trade in Quin-Coco.

The Circuit Court of Appeals transcended its powers in making a decree which would take away from petitioner its right to put up chocolate and quinine under a name and label not infringing the trade-mark rights of the respondent, while expressly in its opinion disclaiming any intimation that the manufacture and sale of a chocolate and quinine preparation similar to Coco-Quinine, of which there were a dozen different makes on the market (Rec., Vol. III, p. 1207), is not open to all the rest of the world.

The following authorities support the proposition that where both parties have rights in a particular name, the injunctions should be so framed as to preserve the rights of each as far as possible:

In *Hygeia Distilled Water Co.* v. *Hygeia Ice Co.*, 70 Conn., 516, the trial court enjoined the defendant from engaging in any way or manner in the business of selling distilled water and products made therefrom so long as it retained the word "Hygeia" as a part of its corporate name, and from using its corporate name conspicuously or otherwise in such business. On appeal the Court held that the facts did not warrant such a sweeping decree and that for this error the entire judgment must be set aside and a new trial ordered basing its decision upon the concession

> "that the plaintiff has no monopoly of the business of making and selling distilled water and products made therefrom, as a beverage, and that any one may engage therein; the only claim is that any person engaging therein must not use the word

> 'Hygeia' in such a way as to constitute an infringement of the plaintiff's rights in that word" (p. 536).

In *Meriden Brittania Co.* v. *Parker,* 39 Conn., 450, the Court held that the defendant should be enjoined from the use of a stamp "1847 Rogers Bros. A-1" and the use of the words "Rogers Bros.", saying (p. 461):

> "But the use of the name 'Rodgers' ought not to be prohibited. We cannot say that every use of that name will necessarily infringe upon the petitioners' trade-mark. If it may be so used as not to infringe, it would be manifestly unjust to forbid such use by the respondent, inasmuch as his title to the mere name is as good apparently as the petitioners'."

In *Jergens Co.* v. *Woodbury,* 197 N. Y., 66, it was held that where a contract authorized the purchaser of a business to use a certain proprietary or trade name when applied to several commodities expressly specified therein, the purchaser may have an injunction against the vendor prohibiting the sale of a preparation resembling an article specified in the contract, but that an injunction goes too far when it forbids the vendor from using the proprietary name on other articles, where such use is not deceptive. The injunction prohibited the use of the name "Woodbury" on any soap under any name which contains "Woodbury." The Court held that the injunction was too broad in forbidding the use of the name Woodbury on other soaps or in connection with other articles, where such use was not deceptive or misleading.

In *Stark Bros. Nurseries & Orchards Co.* v. *Stark,* 248 Fed., 154, the head-note is, in part, as follows:

> "Defendants, though they bore the name 'Stark,' which was part of the corporate name of complainant, which had long been established in the nursery business, while entitled to do business under

> their own name will be enjoined from using an infringing trade-mark, or the word 'Stark,' on their labels *save in such a manner as would not indicate to the trade that their goods were those of complainant, or that they were complainant's successors.*" (Italics ours.)

On appeal, the decree was modified as to the form of the injunction (257 Fed., 9), by giving the defendants the right to use their surname, accompanied by information that they were not the original Wm. Stark Nurseries nor connected with the Stark Bros. Nurseries & Orchards Co., or their predecessors, under whatsoever name their business was conducted and that their trees were not the product of any of these concerns or their successors, and directing them to insert in their circulars, catalogues and advertisements a notice stating the rights of the defendant, his family, history, connection with the nursery business and affirmatively stating that he has no connection with the nursery business of the Stark Bros. Nurseries & Orchards Co. The Court on appeal also modified the decree by limiting the right to recover profits from the time of giving notice of infringement under the Trade Mark Act. This notice was given only a few days before the institution of this suit.

The plaintiff secured a writ of certiorari in the U. S. Supreme Court (250 U. S., 657), presumably on the ground of limitation of the right to recover profits. The Supreme Court affirmed the decree of the Circuit Court of Appeals that an account for profits could only be taken from the date of the notice under the Trade Mark Law. (255 U. S., 50.)

The Circuit Court of Appeals largely bases its decision upon that of the Court of Appeals for the Sixth Circuit in *Coco-Cola Co.* v. *Gay-Ola Co.*, 200 Fed., 720; 211 Fed., 942.

That case was one of barefaced fraud and yet the Circuit Court of Appeals of the Sixth Circuit did not go so far as to prohibit the use of the color of the liquid absolutely, but declared that *so far as defendant could not safeguard or prevent confusion it could not use the color.*

On the second appeal, in 211 Fed., 942, the Court directed an injunction to issue in the following form:

> "* * * that the said defendant, its directors, officers, agents, servants, employees and assigns, and each and every one of them be and they are hereby perpetually enjoined, restrained and prohibited from selling, or disposing of Gay-Ola of the same or substantially similar color to Coca-Cola, except when the same is sold by it in bottles, receptacles or packages marked or labeled prominently with the name of the defendant's product and designed and intended to be sold and delivered to the ultimate consumer in said original bottle, receptacle, or package, with said mark or label still remaining thereon." (211 Fed., 942, 944.)

In settling the form of the decree the Court said:

> "We think the decree should absolutely prohibit sales by the Gay-Ola Company *unless in the form prescribed for ultimate use*" (p. 943; italics ours.)

The facts in the case cited established a clear case of fraud.

The defendant used the formula of Coca-Cola, adopted caramel as a coloring agent *only to produce a liquid of the same appearance as Coca-Cola;* used the same script in printing its trade-mark as used by the complainant, painted its barrels and kegs red as did the complainant, which first adopted this color for its bulk containers, and boldly issued circulars and letters to bottling companies, engaged in bottling Coca-Cola, suggesting that the bottlers could substitute Gay-Ola for Coca-Cola, and patrons would never know it, and the defendant

would ship Gay-Ola to soda fountain proprietors in plain unmarked packages so that his dealings with them would not be discovered and consumers would not know that he was selling Gay-Ola for Coca-Cola.

The Court, on the first appeal, after referring to the evidence showing that defendant's business had a substantial basis in a contemplated fraud and stating that wherever it could and as the easiest way of getting a large business, it intended to have its product sold as and for Coca-Cola, said:

> "Under these circumstances, we need not consider what the rule would be if the color was the incidental result of an ingredient used for some other purpose, nor yet what the rule would be if the defendant had adopted even a wholly unnecessary identity in color in connection with a good faith effort to sell its own goods on their own merits. This Court has not yet said that a case of fraudulent competition can be made out solely by proof of identity in a nonfunctional particular (*Rathbone Co.* v. *Champion*, 189 Fed., 26). * * * We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and *that, so far as defendant cannot safeguard this result it may not use the color.* There is here marked—indeed, close—analogy to the rule of *Westinghouse Co.* v. *Wagner Co.* (225 U. S., 604) and to the rule which requires an article which is likely to deceive as to its origin to be distinctly tagged with the name of the real producer." (200 Fed., 720, 724, italics ours.)

In the case of *Lever* v. *Goodwin*, 57 L. T. N. S., 583, which was another case of palpable fraud, the Court issued an injunction restraining the defendants from sell-

ing, offering for sale or disposing of, any soap in the wrapper and of the form of any one of the three exhibits admitted in the action to have been issued by the defendants, *or in any form calculated or intended to pass off or enable others to pass off such soap as and for the goods of the plaintiff.*

It was contended by counsel for appellant in that case that as there was no trade-mark in "Self-Washing" or "Self-Washer," there was no monopoly in parchment paper or in the spaced printing, and that the defendant therefore should not be restrained from using those things as to which the plaintiff cannot claim a monopoly.

The Court overruled this contention by saying (at p. 584):

> "That is an obvious fallacy. There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old common law doctrine, in respect of which equity will give to the aggrieved party an injunction, in order to restrain the defendants from passing off their goods as those of the plaintiffs."

Nims on Unfair Competition, 2nd Ed., p. 648, says:

> "The injunction should, however, be no broader than is necessary to give adequate protection to the plaintiff. Where the case involves a name that is *publici juris,* the injunction should not be too general in terms but should show that it is the trade meaning of the word or name and not its general meaning that is involved. Where the plaintiff possesses full rights to a trade use of a fanciful word or term, the injunction may be absolute."

In *Meyer* v. *Dr. B. L. Bull Vegetable Medicine Co.,* 58 Fed., 884, the injunction finally granted in the Circuit Court of Appeals was broad, enjoining the defendant

from selling or disposing of any remedy or preparation to which shall be applied in any form or manner the words: "Dr. B. L. Bull's Cough Syrup," or the words "Bull's" and "Cough Syrup," with or without other words, and from making use of wrappers like that marked "Defendant's wrapper" or those substantially like it, and from using any name or designation calculated to cause its article to be known in the market, and sold as "Dr. Bull's Cough Syrup." *But it was expressly declared, that "the writ of injunction thus to be issued shall not (except as to the name or part of the name thereof, as aforesaid) prohibit the defendant from in every fair and lawful manner stating in the wrappers or labels by it used and otherwise that its article is by it manufactured and sold, and from so fairly and lawfully stating any other fact which it may elect or desire to state"* (p. 886).

In *Von Faber* v. *Faber*, 124 Fed., 603, the Court held that the complainant was entitled to a decree

> "enjoining and restraining the defendant from using the name 'Faber' alone as applied to pencils or rubber stationer's goods, and from using the name 'Faber Pencil Company,' or 'E. Faber Pencil Company,' and from making, selling, or causing to be made or sold, or advertising, or causing to be advertised, any lead pencils, erasive rubber, or rubber bands, bearing thereon, or on the labels, wrappers, boxes or other coverings affixed thereto, or in which the same are contained, the name 'Faber' or 'Faber Pencil Co.' or 'E. Faber Pencil Co.' or any like or similar designation in which the name 'Faber' is used without the prefix 'Eberhard,' or 'John E.,' or 'J. Eberhard,' *but the defendant may use the word 'Faber' with either of said prefixes as he may elect*" (p. 614. Italics ours.)

In *N. K. Fairbank Co.* v. *R. W. Bell Mfg. Co.*, 77 Fed., 869 (C. C. A., 2nd Circuit), it was held that

> "injunction should issue against putting up and selling or offering for sale 'the particular form of package * * * put in evidence as "Defendant's Second Package," or any other form of package which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling the "Complainant's Package," referred to in the bill and marked in evidence, as does the said "Defendant's Second Package."' *This injunction shall not be construed as restraining defendant from selling packages of the size, weight, and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor* from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser" (pp. 878-879; italics ours).

In *Hall's Safe Co.* v. *Herring-Hall-Marvin Safe Co.*, 146 Fed., 37; affirmed 208 U. S., 554, the Circuit Court of Appeals in the 6th Circuit, modified an injunction issued by the U. S. District Court so as to read as follows:

> "The defendant * * * its servants, agents, officers, and employees, are perpetually enjoined from carrying on the safe or vault business in the name of Hall's Safe Company, or any other name having similarity to the name Hall's Safe & Lock Company, without also giving information to the public that it is not the business formerly carried on by the Hall's Safe & Lock Company, and from marking, advertising, or otherwise designating its safes and vaults as the products of the Hall's Safe & Lock Company, or its successors in business, or pretending that it is carrying on the business started by Joseph Hall, and continued by the

> Hall's Safe & Lock Company, and from interfering in any manner with the exclusive right of the complainant to possess and enjoy the good will acquired by the Hall's Safe & Lock Company, and from using the trade-mark of said last named company without at the same time so qualifying such trade name as to show that the trade name used is not the one formerly used to designate the products of the Hall's Safe & Lock Company."

In the case last cited, on appeal to the U. S. Supreme Court, HOLMES, J., said that the injunction against the Company should be made less broad and more specific:

> "It should forbid the use of the name Hall either alone or in combination, in corporate name on safes, or in advertisements, *unless accompanied by information that the defendant is not the original Hall's Safe & Lock Company, or its successor,* or, as the case may be, that the article is not the product of the last named company or its successors. With such explanations the defendants may use the Hall's name, and if it likes may show that they are sons of the first Hall and brought up in their business by him, and otherwise may state the facts" (p. 560; italics ours).

POINT X.

For the reasons above set forth it is respectfully urged that the judgment of the Circuit Court of Appeals be reversed and that of the District Court affirmed, or that at least the judgment of the Circuit Court of Appeals be modified so as to relieve petitioner from the injunction against the use of chocolate in the manufacture of its product Quin-Coco.

August 31, 1923.

FRANCIS RAWLE,
GEORGE W. WICKERSHAM,
ROGER S. BALDWIN,
JOSEPH W. HENDERSON,
Of Counsel for Petitioner.

FILED
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WM. R. STANS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 32.

WILLIAM R. WARNER & COMPANY, *Petitioner*

vs.

ELI LILLY AND COMPANY, *Respondent.*

BRIEF FOR RESPONDENT.

E. W. BRADFORD,
Counsel for Plaintiff.

Washington, D. C.,
April 4, 1924.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appended hereto are photolithographic copies of three of plaintiff's documentary exhibits as follows:

"Document No. 1"—a copy of a part of the page in Mr. Eberhardt's journal showing his original record in his own handwriting of the result of his efforts in devising the formula for the medicine "Coco-Quinine."

"Document No. 3" (page 1) being the document referred to throughout the record and brief as defendant's "Blue List."

"Perfume Card A," being a copy of the card with its front and rear faces shown side by side, used by some of defendant's salesmen in selling perfumes.

"Perfume Card B," being a later edition of the card similar to Card A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 32.

WILLIAM R. WARNER & COMPANY, *Petitioner*

vs.

ELI LILLY AND COMPANY, *Respondent*

BRIEF FOR RESPONDENT

STATEMENT.

The following modifications in the statement for petitioner, (pp. 1-10 of petitioner's brief) are required, it is thought, in the interest of accuracy; otherwise there is no substantial disagreement as to the statement of the case:

Counsel for petitioner in Paragraph 2 of their statement, referring to defendant-petitioner's product, say that it was "known as" Quin-Coco. It should be ex-

plained that while it may have been "known as" Quin-Coco in immediate transactions relating to the product between defendant and its direct customer-distributors, it was not known by this name "Quin-Coco" to the consumers, except to a very limited extent, if at all.

The statement on page 2 of petitioner's brief that in the District Court plaintiff's bill was dismissed on the ground that the plaintiff had established no trade-mark rights in the name, color, physical appearance, or the formula of plaintiff's product known as Coco-Quinine, should, it is thought, be modified to state that the District Court found that "Coco-Quinine," the name by which plaintiff's product is known, is not an arbitrary name disclosing the derivation of the product from plaintiff, and that the defendant therefore has the right to use a combination name indicating the same facts in relation to its product, as for example, the name "Quin-Coco," and that plaintiff's formula not being patented, defendant had a lawful right to reproduce plaintiff's preparation, if it could, and to tell plaintiff's customers that it was the same thing as plaintiff's product, and to sell it as substitute for plaintiff's product.

ALL MATTERS IN ISSUE BEFORE THIS COURT.

Respondent agrees that the entire record is before this Court with the same power to decide all questions at issue which were presented to the Circuit Court of Appeals as that Court had.

THE ISSUES.

Respondent would submit that the questions presented to this Court for its determination are not fully

stated under Paragraph VII, page 5, of petitioner's brief but should be substantially as follows:

First. Whether or not, in view of the evidence, the imitation of the color and flavor of plaintiff's product by defendant, by using cocoa or chocolate as the coloring and flavoring medium, was necessary in order to enable defendant to enjoy the right it could fairly claim to manufacture and sell a medicine to compete with plaintiff's.

Second. Whether or not, in view of the evidence, the Court of Appeals was justified in its conclusions that:

> "Its (defendant's) efforts were expended not so much in making a compound that would act like the plaintiff's as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); and that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.' Salesmen would at

> times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper."

and that such practices constitute fraud for which defendant is responsible.

Third. Whether or not the evidence shows such long, continued, and exclusive use by plaintiff of the name "Coco-Quinine" as the name for its product that said name, (even though this Court may agree with the Circuit Court of Appeals and the District Court that the name itself is not an arbitrary one but, rather, one that is descriptive of its ingredients) has acquired a secondary meaning as indicating the origin of plaintiff's product, and that plaintiff is therefore entitled to exclusive right to said name or any such near resemblance thereto, such as "Quin-Coco," as might be likely to cause confusion in the trade.

However, the defendant might as well use any other name so long as the retail druggist knows that that name spells "substitute for Lilly's Coco-Quinine." This is all "Quin-Coco" means to the retail druggist. He has no calls for "Quin-Coco," receives no prescriptions for "Quin-Coco" and consequently can not sell "Quin-Coco" except to sell it to supply the demand for Coco-Quinine, and as Coco-Quinine. This he does and he does it because he makes a little more money on the counterfeit, the substitute, than he can on the original.

DEFENDANT'S CALL FOR HELP.

Its Entire Force Instructed.

The bill of complaint in this case was filed in the District Court on December 22, 1914, and defendant's answer filed on January 29, 1915.

Shortly after the bill of complaint was filed, defendant in an effort to obtain evidence to disprove the allegations of plaintiff's bill, sent to its sales force a letter advising all its salesmen of the suit by plaintiff, setting out the chief allegations of said bill, instructing them what was needed as evidence to disprove the allegations of the bill, and calling upon them to help in obtaining proofs to refute these allegations.

A coppy of said letter was introduced in evidence as exhibit *"O'Connel Letter No. 4,"* and is printed in Vol. II, p. 983 of the record.

In this letter each salesman was told:

> "We need the help of the dispensing and prescribing doctor, the druggist, and yourself. A part of what we desire to establish is:
>
> (1) That you and all our travellers offered and solicited orders for Quin-Coco, as Quin-Coco, or a sweet chocolate quinine mixture or syrup.
>
> (2) That you did not suggest, urge, advise or instruct the trade to dispense Quin-Coco upon calls or prescriptions for 'Lilly's' Coco-Quinine.
>
> (3) That the druggists who purchased Quin-Coco differentiates between Quin-Coco and 'Lilly's' Coco-Quinine, dispensing each when specified on calls or recipes, and dispensing either upon calls or prescriptions specifying chocolate quinine or syrup of quinine or sweet quinine.
>
> (4) That general knowledge of 'Lilly's' Coco-Quinine is limited to the physician and drug trade, and that 'Lilly's' Coco-Quinine is not generally

known either by name or package to the general consumer or laity.

(5) That Quin-Coco is used and dispensed by the dispensing doctor.

(6) That Quin-Coco is prescribed under the name 'Quin-Coco' by the prescribing doctor.

(a) *We desire to locate and put in original prescriptions for Quin-Coco.*

(7) That Quin-Coco has been sold to parties who had never previously used 'Lily's' Coco-Quinine.

(8) That druggists dispense Quin-Coco labeled 'Quin-Coco' or labeled 'Syrup Quinine,' 'Syrup Chocolate Quinine,' or 'Sweet Chocolate Quinine.'

The purpose of such evidence is in part to prove a legitimate market for Quin-Coco and a sweet Chocolate syrup of quinine, and that neither Quin-Coco nor other chocolate quinine mixtures depend upon dispensing these on calls or receipes for 'Lily's' Coco-Quinine for their sale.

We desire this information as soon as possible and we will appreciate:

(1) Names of doctors who dispense Quin-Coco, or chocolate quinine mixtures other than 'Lilly's' Coco-Quinine.

(2) Names of doctors who prescribe Quin-Coco or chocolate quinine mixtures, other than 'Lilly's' Coco-Quinine.

(3) Names of druggists who have filled prescriptions for Quin-Coco or chocolate quinine mixtures other than 'Lilly's' Coco-Quinine.

(4) Names of druggists who have called for Quin-Coco or other chocolate quinine mixtures other than 'Lilly's' Coco-Quinine.

(5) Also whether you know or have reason to believe such parties would be willing to testify to these facts.''

The plan of defense decided upon and the evidence necessary to defeat plaintiff's case, as acknowledged

by defendant, is thus seen; and, further, it is shown that defendant's entire sales organization was instructed in this and put to work to help produce the character of evidence required and to establish such defense and "prove a *legitimate* market for Quin-Coco." Note that defendant thus admitted the need of proving a "*legitimate*" market and, by inference, that failing in obtaining such proof, that its market is *not legitimate.*

Defendant's entire sales force, traveling throughout the United States and visiting practically every drug-store in the country (Merner, pp. 1286-87, Qs. 58-62), was thus appealed to and instructed promptly after plaintiff's bill was filed.

Nearly two years were consumed in taking proofs in this case. An unusually large number of witnesses were examined on behalf of both parties, and from various sections of the country.

Notwithstanding all of the opportunity afforded and the large number of salesmen employed by defendant, it is interesting and suggestive to note that in the entire record defendant failed to produce a single witness or a single item of proof, other than the testimony of its own salesmen, in its employ at the time of giving testimony, and forming a part of the organization that had been working to obtain the needed evidence, in support of any of the points which it sought to obtain evidence to establish by its instructions in the Exhibit O'Connell letter No. 4, above quoted.

Defendant failed to locate and put in evidence a single original prescription written for Quin-Coco.

It failed to produce any evidence that Quin-Coco was ever sold to anyone who had not previously used Coco-Quinine.

It failed to produce the names of any doctors who dispense Quin-Coco or who prescribe Quin-Coco.

It failed to produce the names of druggists who have filled prescriptions for Quin-Coco or who have calls for Quin-Coco.

And it failed to produce as a witness a single druggist or physician in support of the points they hoped to establish to refute plaintiff's allegations.

On cross-examination of the numerous witnesses called by plaintiff one druggist in Brook Haven, Miss., and one in Richmond, Va., was found who had seen a prescription for Quin-Coco. All defendant's effort to otherwise secure such evidence was apparently an utter failure.

ARGUMENT.

Facts Proved by the Evidence.

Respondent contends that the evidence shows beyond any doubt facts as follows:

(*a*) That plaintiff was the first to produce and offer for the use of the medical profession a permanent medicine, or pharmaceutical preparation, in the form of a liquid preparation containing quinine sulphate in definite proportions with the bitterness of the quinine disguised;

(*b*) That the formula for such preparation was developed and perfected in plaintiff's laboratories by long experimentation;

(*c*) That the use of chocolate syrup in said preparation is of absolutely no consequence from a medicinal or therapeutical standpoint, was not any part of the medicinal formula and was only added after said formula was perfected to give a distinctive color and

flavor to the preparation and in order to readily identify its origin.

(*d*) That prior to the use of chocolate by plaintiff in this preparation no liquid medicine of permanent form, or ready to be administered, had ever been known to the drug trade or medical profession colored and flavored with cocoa or chocolate.

(*e*) That a multitude of other coloring and flavoring syrups or mediums were available for the use of defendant and others who might wish to manufacture and sell a medicine of identical therapeutic value to plaintiff's Coco-Quinine and offer it to the medical profession in legitimate competion;

(*f*) That defendant discovered plaintiff's formula for Coco-Quinine and reproduced the same as nearly as possible, not only as to its medicinal characteristics but also as to its non-essential color and flavor;

(*g*) That defendant having, as it believed, a perfect imitation of Coco-Quinine, then through its sales organization offered it to the trade to be sold as a substitute for Coco-Quinine, representing to the drug trade that it was identical with Lilly's Coco-Quinine not only in therapeutic value but in color and flavor, and that it could be dispensed on physicians' prescriptions written for Coco-Quinine, as well as in response to calls over the counter for Coco-Quinine, "without detection" or "without any one being the wiser," holding out as the inducement for the perpetration of the suggested fraud, that the druggist could make more money by handling Quin-Coco as defendant was selling it at $1.30 per gallon below the price of Coco-Quinine;

(*h*) That many retail druggists yielded to the persuasion and to the temptation for larger profits, purchased from defendant the product Quin-Coco, and

used it as suggested by defendant's salesmen in supplying the demand for Coco-Quinine, which demand had been created by plaintiff at great expense through extensive "detail" work with the medical profession;

(*i*) That defendant's product in many instances was shown to be inferior and that plaintiff was blamed for the unsatisfactory results which followed its use and to this extent the value of its good-will was impaired, and, moreover, the physicians and their patients imposed upon;

(*j*) That the sales policy of the defendant and the practices followed by its sales organization were directed and controlled by its officers and sales managers, and that the practices, as above outlined, as followed by its sales force were in direct response to instructions from headquarters and in line with the policy established by defendant's officers;

(*k*) That the same "Coco-Quinine" had become thoroughly established in the drug trade and medical profession by at least seven years' exclusive and extensive use by plaintiff before defendant entered the field, and that with a large number of users the name was synonymous with Chocolate Quinine, which name, in many instances, was used by customers in asking for the product and that calls for "Chocolate Quinine" always meant plaintiff's product as truly as when asked for by the name "Coco-Quinine";

(*l*) That in supplying Quin-Coco when Coco-Quinine was called for, retail druggists were "passing off" on their customers defendant's product when plaintiff's product was called for, thus committing a fraud, and this in accordance with the teachings and suggestions of defendant's sales organization, by direct authority from defandant;

(*m*) That the name "Quin-Coco" is little more than a mere reversal of the words composing the name "Coco-Quinine," is so similar to "Coco-Quinine" in significance that its use, if general, must inevitably cause confusion in the trade, and that the two names are so similar that they are readily used one for the other even by those perfectly familiar with both.

EVIDENCE SUPPORTING PLAINTIFF'S CONTENTIONS

(a) *Tasteless Liquid Quinine Preparation Original with Plaintiff.*

The history of the preparation of the formula which resulted in the product Coco-Quinine is told by Mr. Eberhardt, the chemist in plaintiff's laboratories who did the work. Mr. Eberhardt stated that he was instructed by Mr. J. K. Lilly, president of the plaintiff, to prepare a syrup containing quinine which would be palatable, to be put upon the market as a liquid preparation of quinine, and that he finally worked out the product which afterwards became known as Coco-Quinine. (Vol. I, p. 8, Q. 3.)

Mr. J. K. Lilly testified (p. 42, Q. 2) that prior to Coco-Quinine he had felt an urgent demand for a palatable liquid preparation of quinine and that to meet this demand Coco-Quinine was developed.

Prior to Coco-Quinine, both plaintiff and defendant had a preparation on the market which druggists used for preparing extemporaneous mixtures of quinine sulphate in liquid form, the Lilly preparation being known as "Yerbazin" and the defendant's preparation as "Quinamel."

The disguising agent in these preparations is Yerba-Santa as in Coco-Quinine, but neither is colored or flavored with chocolate, they were of different colors

(Hereth, p. 357, Q. 34) and both are used merely as a vehicle for the use of the druggist in putting up prescriptions for extemporaneous use and not for a permanent quinine mixture.

Coco-Quinine was the first medicine of permanent character consisting of a mixture of liquid syrups, preservatives, Yerba-Santa for disguising the bitterness of the quinine, and quinine sulphate. That no other such preparation was known to the drug trade prior to the time the product Coco-Quinine was put upon the market by plaintiff is shown by the testimony of many witnesses, comprising retail druggists, wholesale druggists, and physicians among whom are the following:

Knowles, p. 66, Q. 14.
Havenor, p. 72, Q. 4.
Van Schaak, p. 74, Q. 4.
Wolsey, p. 77, Q. 7.
Kinder, p. 81, Q. 3.
Schuh, p. 86, Q. 15.
Jennings, p. 94, Q. 18.
Blodau, p. 107, Q. 8.
Tague, p. 112, Q. 12.
Scott, p. 114, Q. 11.
Knox, p. 125, Q. 6.
Dr. Perkins, p. 132, Q. 5.
Dr. Fry, p. 141, Q. 4.
Richard, p. 144, Q. 13.
Chestnutt, p. 147, Q. 45.
Grigsby, p. 150, Q. 10.
Dr. Ferguson, p. 153, Q. 7.
G. A. Pheiffer, p. 1226, X-Q's. 210 and 211.
C. H. LaWall, p. 1274, X-Q's. 59 and 61.
W. H. Stone, p. 1251, Q. 38.
F. S. Hereth, p. 353, Q. 7.
Schaefer, p. 156, Q. 8.

Prochnow, p. 166, Q. 6.
Porter, p. 172, Q. 4.
Samson, p. 189, Q. 27.
Lyons, p. 190, Q. 7.
Heno, p. 201, Q. 5.
Walsdorf, p. 206, Q. 5.
Dr. Arrington, p. 209, Q. 7.
Ray, p. 210, Q. 4.
Ames, p. 218, Q. 5.
Fly, p. 225, Q. 6.
Albright, p. 236, Q. 4.
Vaughan, p. 254, Q. 3.
Northington, p. 254, Q. 6.
Cunningham, p. 282, Q. 4.
Arrington, p. 350, Q. 8.
Hereth, p. 353, Q. 7.

(b) *Coco-Quinine an Original Preparation Developed in Plaintiff's Laboratories.*

The testimony of Dr. Eberhardt (Vol. I, pp. 8-9) and the testimony of Mr. J. K. Lilly (Vol. I, pp. 42-43) fully substantiates plaintiff's claim in this respect.

(c) *Chocolate Non-Essential to Therapeutic Value of Preparation.*

Dr. Eberhardt testified that the idea of adding chocolate to the preparation come to him as a means of giving to it a distinctive color and an elegant flavor. He also produced the original record in his own handwriting in which he recorded the history of his experimental work, the record being written at the time. In this record under date of March, 1900, is the following:

"A series of experiments was made, using as a base Yerbazin (uncolored); Yerbazin, 3 & syp. 1; and Yerbazin 1 & syrup 1 with quinine alkaloid,

quinine sulphate, and quinine tannate, respectively. It was found that the alkaloid was the most and the tannate the least bitter. Also diluting the Yerbazin tended to develop the bitterness. To give a distinctive color both Cudbear and Carmine were used. It occurred to the writer that a syrup containing chocolate would give both a distinctive color and an elegant flavor. Eberhardt, p. 9, Q. 10.

A photographic copy of the page of the record in the witness' own handwriting was introduced in evidence and is one of plaintiff's exhibits (Document No. 2) in this case.

The non-essential character of the chocolate, in so far as the medicinal virtues of the preparation are concerned is thus clearly emphasized by the fact that the man who originated the formula and did the original experimental work in the developing and perfecting of the preparation completed his work in so far as the medicinal virtues of the preparation were concerned before giving any consideration to what color or flavor should be given to it. He then tried substance commonly used in medicinal preparations for such purpose—Cudbear and Carmine—and it is apparent that either might have been used or any one of many others, as will be presently shown, without in any way modifying or impairing the virtues of the preparation as a medicine. Dr. Eberhardt, however, on further consideration, decided to try chocolate to give to the preparation a distinctive color and a pleasant flavor.

Dr. Eberhardt was asked (p. 10, Q. 14) to state as a chemist whether or not other syrups than chocolate might be employed for the same purpose as the chocolate syrup was employed in Coco-Quinine. He replied:

"There is no question about that, because the preparation as a syrup was made up in an experimental way before the chocolate idea developed. That is to say, that a liquid preparation in which the bitterness of the quinine was disguised was made up before the chocolate idea was developed."

He was then asked to name other syrups which in his opinion might be employed for the purpose of giving a distinctive color and a distinctive flavor to the preparation. He replied:

"You could flavor it with orange or you might flavor it with any syrup or flavor that you might desire. Yould could add any coloring matter that you might desire. You might color it brown with caramel or red with carmine, or any other desirable color. The essential point is that Yerba-Santa be present in order to disguise the bitterness.

Witness produced samples of preparations, one made by the formula for Coco-Quinine omitting the cocoa or chocolate and the other made by the Coco-Quinine formula omitting the Yerba-Santa but containing the chocolate. These were introduced in evidence as complainant's "exhibit bottle No. 1" and complainant's "exhibit bottle No. 2," and are available to support the witness' opinion that the one without the chocolate is a perfect medicine in so far as being a palatable liquid medicine containing two grains of quinine sulphate to the dram, while the other containing the chocolate is absolutely impossible because of its bitterness, the chocolate in no degree serving to disguise the bitterness of the quinine.

Mr. J. K. Lilly under whose direction Dr. Eberhardt did the work, also testified (Vol. I, p. 42, Q. 2):

"We saw the necessity of giving our new preparation a characteristic color and flavor so that it

would be different from anything that had been previously used. We found a satisfactory color and flavor in chocolate and after considerable experimentation and having overcome many difficulties, the preparation was perfected and placed upon the market under the name 'Coco-Quinine.' * * * *Depending upon the characteristic color and flavor and the distinctive name, we expended considerable sums upon promoting its sales until it became one of our most important specialties.*"

Mr. Lilly also testified (p. 45, Q. 17) in respect to the purpose of the chocolate or cocoa in the preparation:

"It was selected as a color and a flavor for this preparation because there was not on the market a liquid preparation of quinine that contained cocoa, so it was selected to make it different from any other like preparation and to designate it as the Lilly product. Its presence is not essential to its palatability or quinine-disguising power."

JOHN M. FRANCIS, chief chemist of Parke, Davis & Company, one of plaintiff's largest competitors, testified (p. 57, Q. 4) in reference to the purpose of the chocolate or cocoa in the preparation:

"My opinion as to the utility of chocolate or cocoa in such a preparation would be that it serves the purpose of imparting to such preparation a distinctive flavor and a distinctive color. The use of such substance does not, in my opinion, impart to the mixture any characteristic medicinal action, nor does it modify the medicinal activity of the other ingredients involved."

CLIFTON H. BRIGGS, one of the research chemists employed by Parke, Davis & Company, testified in respect to the use of cocoa or chocolate in this preparation (p. 59, Q. 4):

"It is used as a flavor and in my estimation does not lend any particular properties as to covering up the taste of the quinine, and it also gives the color to the product."

In answer to Q. 5, Dr. Briggs also stated that:

"Other syrups of other colors and flavors might be used in the product instead of the chocolate and for the same purpose."

WITNESS HERETH, formerly one of the owners of the Searle & Hereth Company, the label of which concern is used by defendant on its product, and a chemist of many years' experience, was asked if in his judgment it would be possible to make a preparation to compete with Coco-Quinine as a medicine and flavored with other syrups than chocolate and of a different color. He replied:

"I think other preparations might be made to compete with it as far their ability to disguise the taste of quinine is concerned and at the same time retain the therapeutic efficiency of the quinine."

(d) *Chocolate Original with Plaintiff as Coloring and Flavoring Medium for Pharmaceuticals.*

MR. J. K. LILLY testified (p. 42, Q. 2) that cocoa was selected as a color and flavor because there was not on the market a liquid preparation of quinine that contained cocoa.

See also testimony of same witness, p. 894, Q. 5.

CHARLES H. LAWALL, one of defendant's experts, testified (p. 1275, X-Q. 61) that he knew of no other liquid medicinal preparation containing chocolate prior to the time he learned of plaintiff's preparation Coco-Quinine, which was shortly after the year 1900.

S. H. Hilton, a pharmacist of long and extensive experience and national reputation, testified (p. 1178, Q. 18) that Coco-Quinine was the first medicinal preparation with which he became acquainted in which cocoa or chocolate was used as the coloring and flavoring agent.

William H. Stone, assistant superintendent of H. K. Mulford & Co., and a man of long and extensive experience in the manufacture of pharmaceuticals, testified (p. 1251), X-Qs. 38-43) that he knew of no other liquid medicinal preparation using chocolate or cocoa as the flavoring syrup, and another later product of plaintiff, known as "Coco Emulsion."

A number of similar statements by other witnesses throughout the record prove conclusively that in so far as medicines of a permanent character in liquid form are concerned, cocoa or chocolate was an entirely new thing as a coloring or flavoring medium at the time it was adopted by Dr. Eberhardt and Mr. Lilly to characterize and indicate the origin of plaintiff's product which they named "Coco-Quinine."

It is a matter of common knowledge that most liquid medicines have from time immemorial been colored with different substances and that in many instances such substances also impart a flavor to the medicine. Many substances which had been and are still used for such purposes have been named by witnesses for both parties in the record. Perhaps Carmine, Cudbear, and caramel are most common. So far as the record shows, however, for all time prior to the year 1900 manufacturers of pharmaceuticals had been content to use other substances than chocolate to color and flavor their liquid products. This is stated with full knowledge of the fact that there are in the record certain

statements relative to attempts by retail druggists to mix quinine in chocolate syrup at the soda fountain for immediate administration, and of the single instance testified to by witness Blair (p. 1559, Qs. 16-20) that he at one time received at his retail drugstore an order by Dr. Samuel K. Ashton calling for a mixture of chocolate, Yerba-Santa, and quinine, which mixture he made up, but (X-Qs. 1-3) he could not say whether it was used, and said that the quantity made up was only about four ounces.

Such testimony does not negative the fact that plaintiff's product Coco-Quinine was the first pharmaceutical in liquid form of permanent character which was ever identified to the trade by chocolate or cocoa as the coloring and flavoring medium.

IDENTIFYING MEANS IN PREPARATION ITSELF NECESSARY.

The necessity of some medium in the preparation itself to distinguish it and identify its origin is seen from the fact that the preparation is sold "naked," as stated by the Court of Appeals. It is dispensed by druggists both when prescribed by physicians and when called for by customers, in small quantities in the usual drugstore prescription bottle, bearing the druggist's own label. The preparation is sold by the manufacturer to the drug trade in bulk packages and the druggist dispenses the same in his own prescription bottles, filled out of these bulk packages, usually pint, five-pint, and gallon bottles.

A large number of witnesses have testified that the preparation is dispensed as just stated.

The testimony of the witnesses is well summed up by witness Arrington (p. 350, Q. 13) where he states in answer to the question as to how the preparation is dispensed:

"In the amounts the physician usually writes for, in our own bottles under our own labels."

That this is the common practice, see also the testimony of many other witnesses among whom are the following:

Merithew, p. 60, Q. 4.
Knowles, p. 65, Q. 5.
Wright, p. 68, Q. 5.
Wolsey, p. 77, Qs. 4 and 5.
Kinder, p. 81, Qs. 5 and 6.
Schub, p. 86, Qs. 9 and 10.
Henckel, p. 87, Q. 4.
Jennings, p. 92, Q. 3.
Sand, p. 103 Qs. 5 and 6.
Manning, p. 109, Q. 3.
Scott, p. 114, Q. 7.
Bond, p. 122, Q. 11.
Bordeaux, p. 123, Q. 3.
Bracy, p. 124, Q. 6.
Knox, p. 125, Q. 7.
Bolden, p. 126, Q. 4.
Soulier, p. 128, Q. 5.
Bowden, p. 138, Q. 5.
Chestnutt, p. 147, Q. 6.
Foster, p. 152, Q. 3.
Schaefer, p. 155, Q. 5.
Porter, p. 172, Q. 5.
Banes, p. 180, Qs. 5 and 7.
Samson, p. 187, Qs. 4 and 7.
Heno, p. 201, Q. 6.
Walsdorf, p. 206, Q. 4.
Ames, F. I., p. 217, Q. 3.
Ames, W. S. p. 217, Q. 3.
McMillan, p. 244, Q. 3.
Vaughan, p. 254, Q. 4.
Daly, p. 256, Q. 4.
Barber, p. 260, Q. 5.

Reid, p. 272, Q. 5.
Moseley, p. 277, Q. 7.
Cunningham, p. 282, Q. 6.
Moore, p. 284, Q. 5.
Garber, p. 329, Qs. 5-8.
Garber, p. 332, X-Q. 31.
Lindsay, p. 332, Qs. 4 and 5.
Whitley, p. 387, Q. 7.

The evidence thus clearly justifies the conclusions of the Court of Appeals that the preparation is sold "naked" and without the protection of the manufacturer's label and that the only means of identifying the origin of plaintiff's product is by the color and the flavor imparted thereto by the use of the non-essential ingredient cocoa; and therefore *the public can be protected against having imitation products palmed off upon it only by the identifying color and the identifying flavor of the preparation itself.*

(e) *Other Substances Available for Use of Defendant as a Coloring and Flavoring Medium for its Product.*

The testimony of Dr. Eberhardt (p. 9, Q. 10) already referred to shows that Cudbear and Carmine might have been used.

That it is entirely feasible for a competitor to manufacture and sell a palatable qūinine medicine in liquid form in competition with plaintiff's Coco-Quinine and without using chocolate in the preparation is shown by the testimony of witness Thorburn, chief chemist for the Pitman Moore Company, manufacturing pharmacists and a direct competitor with plaintiff.

Witness Thorburn was asked to state, as a chemist, whether or not it is possible to make a liquid quinine

preparation without the use of chocolate or cocoa that would be successful from a therapeutical and commercial standpoint (p. 32, Q. 15). He replied that it was and (Q. 16) that he did not regard the chocolate as essential to any therapeutic value of Coco-Quinine. He was then asked (Q. 17) if it would not be possible to make liquid quinine preparations flavored with other syrups than chocolate and, if so, to suggest some such syrups. He replied that quinine syrups are often made with Yerba-Santa and flavors added, such as anise, coriander, and other sweet essential oils. In answer to X-Q. 20, he explained that his Company sells a competing medicine flavored with lemon and another similar preparation flavored with peppermint, one a white and the other a yellow color, saying:

> "Each meets every demand made on us by customers for a tasteless quinine preparation. We consider it one of our successful preparations."

He also stated (X-Q. 21) that they frequently made similar preparations using anise, coriander or licorice and sold them in retail drug stores.

Witness Jennings (p. 94, Qs. 19-22) testified respecting another tasteless quinine preparation called Febriline, of a nearly white color and flavored with orange.

Witness Franklin (p. 305, X-Q. 13 and RDQ. 15) also testified concerning other makes of liquid quinine preparations not containing chocolate or of a chocolate color.

Witness Cavedo (p. 328, RDQ. 35-37) testified that he handled Sharpe & Doehme's syrup of quinine and also Febriline, and that neither of these products was colored or flavored with chocolate, the Sharpe & Doehme product being light straw color.

Witness Arrington (p. 351, RDQ. 19) testified as to the same products.

Dr. George M. Beringer, one of defendant's experts, when questioned on this subject, while contending that chocolate plays an essential part in the preparation admitted (p. 1509, Q. 28) that the medicinal properties of the preparation would not be altered if syrups or other colors and flavors were used, but that its "physical properties" would be altered.

Dr. Charles H. La Wall, defendant's other expert witness, testified (p. 1275, X-Qs. 65-67) that it is common practice in many preparations to add an ingredient for coloring purposes, such as caramel, cochineal, Cudbear and coal tar colors.

He also testified (X-Q. 61) that he knew of no other liquid medicinal preparation containing chocolate and (X-Q. 60) that at the time he first learned of the preparation known as Coco-Quinine, made by El Liilly and Company, he knew of no other similar preparation on the market.

Bibbin's Experiments.

In order to demonstrate beyond dispute the practicability of making a palatable liquid medicine containing quinine sulphate in the preparations commonly prescribed as required by the Coco-Quinine formula, plaintiff had one of its research chemists make up a number of samples, using the Coco-Quinine formula except to omit chocolate as the coloring and flavoring medium and substitute other substances to obtain different flavors and different colors for the various samples. Ten of such samples were made up and bottles containing quantities thereof were introduced in evi-

dence and marked "Plaintiff's exhibits, Sample Syrup No. 1 to No. 10, inclusive." (Vol. II, pp. 826-830, Qs. 5 and 6.)

Mr. Bibbins had previously testified as a chemist (p. 825, Q's. 3-4) that he had made many experiments and found that it was not necessary to use chocolate to disguise the taste of quinine sulphate or to aid in suspending it in a syrup medium, and that other substances can be used equally as well.

In explaining the mediums used in his samples Nos. 1 to 10, inclusive, he explained that instead of chocolate he used other mediums, as follows:

No. 1: Ginger and mucilage of quince seed and tragacanth.
No. 2: Tolu and gelatine and mucilage of quince seed.
No. 3: Orange and gum acacia.
No. 4: Coffee and dextrine.
No. 5: Peppermint and mucilage of quince seed.
No. 6: Benzaldehyde and mucilage of Irish moss and quince seed.
No. 7: Peppermint and wintergreen with mucilage of tragacanth and acacia.
No. 8: Compounded spirit of orange with starch of mucilage of tragacanth.
No. 9: Peppermint and wintergreen with gelatine and tragacanth.
No. 10: Peppermint, sassafras and wintergreen with acacia and mucilage of quince seed.

He testified (p. 830, Q's. 78) that any and all of them would make a satisfactory marketable product and that they are in all respects the same as Coco-Quinine except that other syrups have been substituted as the coloring and flavoring medium.

These samples were made in March, 1916, and are still in evidence.

The witness further testified (p. 831, Qs. 19-20) that still other coloring and flavoring mediums might be employed as he had not exhausted his resources in making up syrups for these samples.

Dr. James H. Beall, director of pharmacy research at the University of the State of Illinois, called as a witness for plaintiff, after stating his qualifications to testify as an expert (pp. 1030-1031, Qs. 2-3) testified (p. 1031, Q. 4) that he had examined the several Bibbins samples and had known of the existence of Coco-Quinine and Quin-Coco for some years; and (pp. 1032-1040, Qs. 5-16) in respect to these samples, that he found them satisfactory as pharmaceutical preparations, and (p. 1041, Q. 17) that he regarded all of these Bibbins experiments as successful. While he regarded some as better than others, the chief differences were in the matter of palatability. In four samples out of the ten he found the bitterness of the quinine well disguised; in two of the others sufficiently well disguised to be satisfactory as pharmaceutical preparations, and (Q. 18) these being mere experiments, it would be possible by further experimentation to perfect the formulas of the others found deficient so as to make them entirely satisfactory.

Dr. Beringer had contended for defendant that the chocolate served an essential purpose in the preparation as a suspending medium and necessary in order to insure a uniform distribution of the quinine content throughout the syrup. It is significant that the bottles containing both plaintiff's preparation and defendant's preparation bear around the necks of the bottles a label with the words "Shake Well" in large type.

Dr. Beal testified (p. 1042, Q. 20) that such labels were necessary in such preparations in order to insure an even distribution of the midicine throughout the liquid, and (Q. 22) that he could not agree with Dr. Beringer for, in his opinion, separation must take place in such preparations and it is necessary to correct such separation by means of the "Shake Label" employed.

Dr. Beal further testified (p. 1053, RXQ. 57) that the suspending powers of chocolate are not equal to many other well known substances.

Mr. Charles E. Caspari, of St. Louis, a chemical expert of wide reputation, was called as a witness for plaintiff and after stating his qualifications (pp. 1061-1062, Qs. 2-4) was questioned respecting the Bibbins sample syrups, Nos. 1 to 10, respectively, and (pp. 1062-87, Qs. 5-42) testified respecting his examination of said samples, and his chemical tests of the same in view of the criticisms thereof by Dr. Beringer, refuting completely all of Dr. Beringer's reasons for contending that such preparations would not be satisfactory as pharmaceuticals and good competitors with Coco-Quinine as liquid quinine medicines.

Mr. Caspari pointed out (Qs. 38-40) a glaring misstatement made by Dr. Beringer in his testimony for defendant respecting the use of coal tar dies as coloring substances.

He also pointed out (p. 1088, Q. 45) that neither Coco-Quinine nor Quin-Coco is a homogeneous preparation but upon standing only a comparatively short time, the quinine sulphate separates out of the syrup, thus making it necessary to use a "Shake Label" on the bottles to insure uniformity of doses in dispensing.

He testified further (Q. 46) that each and every one of the ten Bibbins samples is far more homogene-

ous than either Coco-Quinine or Quin-Coco, and that the quinine sulphate is much more uniformy and permanently distributed in the Bibbins samples than in either Coco-Quinine or Quin-Coco, and that least four of the samples, Nos. 2, 4, 5, and 6, are just as free from bitterness as are Coco-Quinine and Quin-Coco.

The witness further testified (Qs. 48-49) that he had examined exhibit bottle No. 1 and exhibit bottle No. 2, containing the samples prepared by Mr. Eberhardt, introduced as evidence during the taking of his testimony on March 22, 1915, had tasted said samples, and found that No. 1 with the chocolate omitted was entirely free from bitter taste, proving that the chocolate or cocoa has nothing to do with masking the bitterness of the quinine, and that he had tasted the contents of exhibit bottle No. 2 made according to the Coco-Quinine formula with the Yerba-Santa omitted, and found it extremely bitter, again showing that the chocolate has nothing to do with masking the bitterness of the quinine.

The witness further testified (p. 1093, Q. 70) that the unqualified success of four experiments in ten and a somewhat less success with the other six, is a very high percentage of successful experiments in making pharmaceutical and chemical preparations, it being a frequent experience that a great many experiments are required before even a single pharmaceutical article is obtained.

F. C. Atkinson, a chemist of large experience, called as a witness for plaintiff, after stating his qualifications to testify as an expert (p. 1114, Q. 2) testified (Qs. 3-4) completely refuting certain of Dr. Beringer's criticisms of substances used by Mr. Bibbins and showing that they were unfounded and ridiculous.

ANDREW L. WINTON, another chemist and microscopist of large experience, called as a witness for plaintiff, after stating his qualifications to testify as an expert (pp. 1123-1124, Qs. 2-4) was asked to testify concerning his examination of the Bibbins samples, Nos. 1 to 10, in the light of certain criticisms thereof by defendant's expert Beringer, and showed conclusively in his testimony (pp. 1125-1160, Qs. 5-50) that Beringer's criticisms were unfounded, completely answering all of Dr. Beringer's criticisms respecting the substances used in the Bibbins samples as undesirable for pharmaceuticals, and pointing out wherein in many instances the substances used were even more desirable for certain purposes than chocolate. It is hardly necessary to quote from the elaborate answers of this witness, but sufficient to say that he takes up in detail every criticism or objection made by Dr. Beringer to the ingredients used in the Bibbins samples and shows conclusively that Dr. Beringer in his testimony for defendant was either testifying without knowledge of his subject or giving most prejudiced testimony, and further by elaborate experiments and charts showing the results thereof that Dr. Beringer's opinions on the question of suspension were clearly unfounded.

SAMUEL L. HILTON, a pharmacist of national reputation and long experience, called as a witness for plaintiff, after testifying as to his qualifications to testify as an expert (p. 1170, Qs. 2-3) was asked to testify as to his opinion respecting the Bibbins samples as pharmaceutical preparations. He was asked in respect to samples Nos. 2, 4, 5, and 6, and stated (last paragraph of answer to Q. 8):

"Collectively I consider all four samples elegant marketable preparations that would enjoy a large sale if they were properly exploited."

He testified further (Q. 9) that he could not agree with Mr. Beringer that either of the four samples developed any more bitterness than Coco-Quinine, and expressed the opinion that in appearance these four samples show up as "better pharmaceutical preparatins than Coco-Quinine."

In respect to the other samples he stated (Q. 10) that No. 1 was, in his judgment, but little inferior as a pharmaceutical preparation to the others and would, no doubt, be acceptable to a majority of users; that as to sample No. 9 he could see no objection to it as a phamaceutical preparation, having a decidedly pleasant flavor and that he believed both samples No. 1 and No. 9 to be marketable preparations such as would enjoy a large sale if proper exploited and superior to many preparations on the market at the present time.

In respect to samples Nos. 3, 7, 8, and 10, he testified (Q. 11) that they could all probably be improved with experimentation, but that he considered them marketable preparations in their present conditions and "far better than many preparations that are sold by the retail pharmacist today."

He testified further (Qs. 12-13), that it is not necessary to have perfect homogeneity in a medicine and that it is practically unobtainable and that "Shake Well label" on the bottle is necessary when the medicine contains a medicament held in suspension.

The witness also testified in respect to complainant's exhibits Bottles No. 1 and No. 2, introduced in the Eberhardt testimony, that No. 1, containing all of the constituents of Coco-Quinine except cocoa, he

found in good condition, pleasing odor, and no more bitter than Coco-Quinine or the preparations, Bibbins' samples Nos. 2, 4, 5, and 6, and he could see no reason why it was not a marketable preparation the same as the other samples; that as to sample Bibbins Bottle No. 2, containing all of the ingredients of Coco-Quinine except Yerba-Santa, that the bitterness develops instantly. Witnesses testifying that they thought chocolate an essential ingredient admitted that they never tried to make a competing medicine without it.

Stone, p. 1251, Q. 37.
King, p. 1263, X-Q. 34.
LaWall, p. 1274, X-Q. 56.

The record does not show that the defendant ever made any experiments to ascertain if there were any other substances than chocolate or cocoa which could be used to impart a distinctive color and taste, so that the consumer would recognize its product as distinctive from that of plaintiff, but rather than all its efforts were directed to *duplicate* the color and flavor of plaintiff's product.

Thus plaintiff has established by abundant proof its contention that cocoa or chocolate is non-essential in the preparation and that the field of competition was wide open to defendant without using chocolate had it desired to enter on a fair basis and build up a demand for its own product at its own expense and by its own efforts.

(f) *Defendant's Efforts to Reproduce Plaintiff's Product in Physical Appearance as well as in Medicinal Virtue.*

That defendant, as stated in the opinion of the Court of Appeals, conducted experiments with chocolates of

different kinds in an effort to get the precise color and taste derived from the chocolates used by plaintiff is shown by the testimony of witness Groves, who, although employed by plaintiff at the time he testified, had for a number of years been in the employ of the defendant concern.

Mr. Groves testified (p. 360, Qs. 20 et seq.) that during the latter part of 1908 defendant's superintendent (Harry Fritsch) was experimenting in its laboratories in Philadelphia endeavoring to produce Quin-Coco but was unable to make a satisfactory product because he had not at that time received the working formula from defendant's laboratories in St. Louis. He stated (Q. 25):

> "In the latter part of 1908, the superintendent in charge of the wet room department was experimenting on Quin-Coco to get it as near the product manufactured by Eli Lilly and Company as possible. He made several samples but none of them came up to the consistency or *color* of the product manufactured by Eli Lilly and Company, and it was not until the formula came from St. Louis that they found the chocolate they were using in Philadelphia was different from what they were using in St. Louis."

He explained (Q. 26) that during these experiments they had samples of Coco-Quinine manufactured by plaintiff before them and that the results of their experiments were compared with plaintiff's product as the experiments progressed. He explained further (Q. 28) that the superintendent "did his utmost to make a product similar in color to that of the Lilly product."

He also explained (Q. 31) that these experiments were submitted to the General Manager, and (Q. 34) that the General Manager was Mr. G. A. Pfeiffer, the same G. A. Pfeiffer who is Treasurer and General Manager of the defendant concern. The said G. A. Pfeiffer was present in the room while the witness was testifying, as appears on the record.

William S. Garvin.

It appeared from the statements of witnesses during the taking of the testimony that one William S. Garvin was the chief chemist in charge of the St. Louis laborataries of the defendant concern and that Mr. Garvin was supposed to be the man who had developed the formula for Quin-Coco. Although Mr. Garvin's name was frequently used in connection with events incident to the manufacture and sale of Quin-Coco, he was not called as a witness by defendant and it being desired to question him respecting his connection with and work upon the Quin-Coco formula, he was subpoened as a witness for plaintiff.

The subpoena being served only in time for the witness to get to the place designated for his examination at the hour set, he was not given an opportunity for much preparation, but, of course, proved not only an unwilling but a hostile witness, endeavoring as best he could to serve defendant, his employer. He was asked (Vol. II, p. 707, Q. 6) to give a statement respecting the history of the preparation Quin-Coco. He acknowledged that he did the work; that (Q. 7) Mr. Merner gave him instructions on behalf of the company. He could not recall whether either Mr. Henry Pfeiffer or Mr. G. A. Pfeiffer talked with him about it (Qs. 10-11)

and could not remember (Q. 12) when Mr. Merner first brought up the subject. He did remember of seeing Mr. Henry Pfeiffer at the St. Louis laboratories (Q. 13) and also of seeing Mr. G. A. Pfeiffer there (Q. 14) and admitted that he was personally acquainted with both of them (Q. 15). He did not know what Mr. Merner said to him on the subject (Q. 17). After considerable questioning, he said (Q. 21) that Mr. Merner said to him that they would like to have a preparation "generally known" as a chocolate syrup quinine.

It may be observed that plaintiff's Coco-Quinine must have been the preparation thus designated, it being the only "generally known" thing of the kind at that time.

He did not remember (Q. 24) whether anything was said about the Lilly preparation Coco-Quinine. He admitted, however (Q. 25), that they did have a bottle of the Lilly preparation in the laboratory while he was conducting his experiments. He admitted the need of coaching, but when asked what use they made of the sample bottle of the Lilly preparation, he stated:

> *"Looked at it to see if the physical appearance was somewhat similar to Lilly's.*

Here is the admission of Mr. Garvin himself that in his work on Quin-Coco he had before him for comparison a sample of plaintiff's preparation Coco-Quinine and that his efforts were directed, as found by the Court of Appeals, more to reproducing plaintiff's product in "physical appearance," that is, in color and flavor, than in its medicinal properties and virtues.

Groves-Fritsch Testimony.

The testimony of plaintiff's witness Groves relating the efforts made by Mr. Harry Fritsch to duplicate plaintiff's Coco-Quinine in the laboratories of Wm. R. Warner & Company in the fall of 1908, was, of course, denied by Mr. Fritsch who was still employed by the defendant concern and who denied specifically the statements by Mr. Groves (pp. 1494-1496). On cross-examination, however (pp. 1499-1500), witness admitted having done exactly what Groves said he did, but explained that this was before the Pfeiffers obtained control of the Wm. R. Warner & Company and that what he did was for the old Wm. R. Warner & Company and not the defendant concern. He admitted making the experiments, he admitted having the sample bottle of Lilly's Coco-Quinine for comparisons, he admitted consulting with Mr. Groves as to the comparison; in fact, he admitted everything that Mr. Groves alleged except the date. He stated (p. 1503, X-Q. 109) that he depended wholly upon his memory for his statements.

Mr. Groves when recalled to rebut the testimony by Mr. Fritsch (p. 775, Q. 2) testified that Mr. Fritsch did not assume charge of the Warner laboratories for some weeks after the Pfeiffers obtained control. The man in charge of the Warner laboratories was John E. McCambridge. Mr. Groves was very clear and explicit in his answers, stating that the experiments on Quin-Coco by Mr. Fritsch were after Mr. McCambridge had left Wm. R. Warner & Company, and that he was there until the fall of 1908, and that Mr. Fritsch could not have done any experimenting on any preparation while Mr. McCambridge was there without Mr. McCambridge's knowledge and sanction.

The witness explained (Q. 3) definitely where the experiments were carried on and the means employd. He testified further (p. 779, X-Q. 18) that Mr. Fritsch had no authority to make experiments relating to Coco-Quinine in the spring of 1908 without the knowledge of John E. McCambridge, who was the general superintendent. The witness also denied (X-Q. 29) knowledge of any experiments by Warner & Company in 1907 or spring of 1908 on a chocolate quinine preparation.

Mr. John E. McCambridge, called as a witness for plaintiff, testified (pp. 702-704, Qs. 2-11) that he was in the employ of Wm. R. Warner & Company from March, 1877, until August, 1908, when the Pfeiffer Chemical Company took control of the business; that he was in charge of the laboratories of Wm. R. Warner & Company in Philadelphia during 1907 and during the year 1908 up to the time when his connection with the company was severed; that this connection was severed about three weeks after the Pfeiffer Chemical Company took control; that Mr. Harry Fritsch was a part of his force and worked under him making preparations that were called for to fill the stock; that he was personally aware of the work done by Mr. Fritsch day by day and that it was done under his superintendence.

The testimony of Mr. Fritsch relating to experiments which he (Fritsch) claimed were done in an effort to make a preparation similar to Coco-Quinine, Lilly, in the early part of 1908 and in 1907 were called to Mr. McCambridge's attention and the witness stated: (pp. 703-4, Q. 10).

"No such experiments were conducted."

He was then asked (Q. 11) if it would have been like-

ly or possible for Mr. Fritsch to have carried on such experiments in the laboratory without his knowledge. The witness replied:

"It would not."

Mr. McCambridge testified (p. 705, X-Qs. 15-18) that during the years 1907 and 1908 up to the time he left, that no experimenting with new preparations was carried on; that there were none; and that it was a part of his duty (X-Q. 20) to keep a record of all preparations made in the liquid department.

Then Mr. Fritsch was again called by defendant and testified (p. 767, Q. 36) that he received his instructions for the experiments which he says he made in 1907 or early part of 1908 from Mr. George Martin.

An attempt was made to show that the laboratory was quite a large place employing a good many people and that Mr. Fritsch might have carried on the experiments without Mr. McCambridge's knowledge. Mr. Fritsch admits that G. A. Pfeiffer talked with him on the subject after he came to Philadelphia (p. 768, Qs. 37-41).

Mr. McCambridge was again called (p. 833) and testified (p. 835, Qs. 2-4) that the department was 40x48 and employed four people, Mr. Harry Fritsch, Mr. Edward Ryan, a helper to Mr. Fritsch, a young man named Charlie, and Mr. Groves, who also was a helper.

The witness further testified (Qs. 6-12) that new preparations were first referred to him and that they were then passed on to Mr. Fritsch if it was found that he could handle them; that during all his connection with Wm. R. Warner & Company he could not recall that they ever secured a sample of goods of another house to imitate; that any order coming to

the laboratory to reproduce a specialty of any other house would have been a very unusual occurrence; and that Mr. Martin, Mr. Ramsey, and himself would certainly have known all about it and it could not have easily been forgotten; that the former Wm. R. Warner & Company under its established policy would not at any time (Q. 11) "consider the manufacture of a substitute of any other firm's preparation."

On cross-examination counsel for defendant endeavored to obtain from the witness an admission that if so instructed by Mr. Warner, Mr. Fritsch might have done this experimenting in some clandestine way unknown to Mr. McCambridge or at some period when Mr. McCambridge was absent. As to this the witness said (p. 839, X-Q. 17):

> "There would have been no reason for Mr. Warner to have done this if his object was to market the article, and I feel positive that he never so instructed Mr. Fritsch, because everything was done over and above board. The special formulas regarding the preparations of the house were in my own keeping, and if Mr. Warner had wanted this preparation made in secret he would have referred it to me, as he had done with other preparations that we manufactured."

Counsel pursued this line of questioning, asking the witness to suppose that Mr. Warner wanted Fritsch to do this thing and did not want McCambridge to know anything about it. The witness replied (X-Q. 18):

> "Of course, there is nothing that is not possible, if you want to put it down that way, but the personal confidence that Mr. Warner had in me

would not have permitted him to do an underhand trick, as I would call that, because he knew that I was not a man to stand for a thing like that. Furthermore, it would have been impossible, as I said in my previous testimony, for Mr. Fritsch to do any experimenting without my knowledge as I was in that department at least once every hour throughout the day."

JOHN E. MCCAMBRIDGE, JR., was also called as a witness for plaintiff and testified (p. 847, Q. 2) that he was employed by Wm. R. Warner & Company from June, 1901, until the middle of August, 1908, and (Q. 3) that he was a helper in the laboratories from 1901 to 1904 and was then in charge of the analytical department; that (Q. 4) he knew Harry Fritsch, and (Q. 5) Mr. Fritsch was an employee who worked in the pharmaceutical department under the instruction of Mr. J. E. McCambridge, the witness' father; that (Q. 6) he had no recollection of any experiments in an endeavor to make a duplicate of Coco-Quinine, Lilly, during the early part of 1908 or in 1907; and (Qs. 7-8) that such experiments would have been likely to have been called to his attention.

The witness explained (Q. 9) that the laboratory employed about four people, that his pharmaceutical department was very small in size and so concentrated that he knew what was going on at all times and the experiments made from time to time were always compared, the employees conferring with each other on the products.

FRANK M. RAMSEY, a witness called by plaintiff, testified (p. 769, Q. 2) that he was connected with the house of Wm. R. Warner & Company from September, 1871, until about November, 1908, and for the last

ten years of his service was general manager of the concern; that (Q. 3) he knew Mr. John E. McCambridge who was superintendent of the wet laboratory, which position he occupied for a number of years, and was connected with the concern for a long time; that (Q. 4) he knew Mr. Harry Fritsch as an assistant to Mr. McCambridge and up until the time he left. The witness further testified (Q. 7) that he had no knowledge of any experiments made in the laboratories during the early part of 1908 or 1907 for making a chocolate quinine preparation similar to Lilly's Coco-Quinine; and (Q. 8) that he did not authorize anyone to make such experiments; and (Q. 9) the man who would naturally have had charge of such experiments had they been made, would be Mr. McCambridge. Further that (Q. 10) Mr. George Martin was originally a clerk in the drug department but after closing that department his duties were general; that he was under him in authority (Q. 11) and (Q. 12) did not have authority to direct the preparation of a new formula or new preparations.

Mr. George Martin, called as a witness for plaintiff, testified (pp. 790-791, Qs. 2-4) that he was with Wm. R. Warner & Company for about seven years, having left in January, 1909, and was assistant to the manager, Mr. Frank Ramsey; that Mr. Ramsey was the custodian of all formulas; and that he had no recollection of instructing Mr. Harry Fritsch during the years 1907 or the spring of 1908 (as testified to by Mr. Fritsch) to make any experiments in an effort to reproduce Lilly's preparation Coco-Quinine.

On cross-examination counsel for defendant endeavored to make it appear that Mr. Warner might have given the instructions to Mr. Fritsch to make the

experiments and Mr. Martin admitted that this might have been, but it should be borne in mind that Mr. Martin is the man whom Mr. Fritsch finally selected as the one from whom he obtained his instructions.

Considering the enviable reputation of the Wm. R. Warner house under the management of Mr. William R. Warner, and the further fact that the new management dispensed with the services of the former general manager, and his assistant, and the general superintendent and the head of the analytical department shortly after obtaining control, it seems that the "inherent probabilities" are that Mr. Groves' testimony is true. If the testimony of Fritsch himself, one of defendant's employees at the time he testified, is sufficient to cause any doubt as to the truth of the testimony by Groves, that doubt should certainly be dispelled by the testimony of Mr. Ramsey, Mr. Cambridge, Sr., Mr. McCambridge, Jr., and Mr. Martin, all of whom were in a position to know of the fact had the experiments occurred during the period specified by Mr. Fritsch.

Moreover, it should be remembered that we have the testimony of Mr. William S. Garvin, the acknowledged original perpetrator of the Quin-Coco imitation, admitting that during his experiments he had a sample bottle of Lilly's Coco-Quinine to use for comparison and that the use he made of it was to:

> "Look at it to see if *the physical appearance* of the sample on which I was working was somewhat similar to Lilly's" (p. 710, Q. 27).

In view of the testimony it is submitted that the "inherent probabilities" point in the direction of plaintiff's contentions; but plaintiff is not dependent upon

inherent probabilities to support said contentions, the facts relied upon having been abundantly proved.

(g) *Defendant's Methods.*

Plaintiff's allegations in its bill of complaint respecting the methods employed by defendant in the sale of its product Quin-Coco are established beyond question by a multitude of witnesses.

WITNESS HOOPER (Vol. 1, p. 15), a salesman working for plaintiff at the time he testified, but formerly a salesman for the Pfeiffer Chemical Company, one of the defendant associated companies, testified that he was instructed by Mr. Stevenson, in charge of the Pacific Coast business of his employer, to sell Quin-Coco as a substitute for Coco-Quinine, and that this, in fact, was the only way he could sell Quin-Coco as there was no demand for it by its own name; that in making sales of Quin-Coco he told the druggist that it was exactly the same as Coco-Quinine, made by Lilly, and that it would cost less money; and that the druggist could use Quin-Coco on physicians' prescriptions for Coco-Quinine, the products being so similar that the druggist "need not be afraid of detection." (P. 15, Q. 6.)

The witness also identified a document which was offered in evidence as plaintiff's exhibit document No. 3 (afterwards commonly referred to by both sides as the "Blue List"), on which were listed by their well recognized trade names numerous leading pharmaceutical specialties of other concerns with the prices charged for the original preparations by the proprietors and in parallel columns the names of defendant's substitute preparations and its price for such substitutes. Witness stated that this list was given to him

by Mr. Stevenson to post himself in reference to his competitors' items, and that he understood from the document that Quin-Coco was a substitute preparation for Coco-Quinine. (Pp. 17-18, Qs. 12-17.)

WITNESS KELTON, another salesman formerly employed by defendant, testified (p. 96, Q. 11) that in selling Quin-Coco he told the druggists that it could be supplied when Coco-Quinine was called for or to supply the demand for Coco-Quinine; further (Q. 13) that in selling Quin-Coco he sold it with the idea that he was giving the retail druggist a larger profit, and (Q. 14) that Quin-Coco was re-sold

> "as it was bought—to replace Coco-Quinine, and that in almost every instance at my suggestion, and demonstration, it was bought for the purpose of replacing Coco-Quinine. Therefore, it was almost *in toto*, according to various letters and personal talks with druggists, sold as a substitute for Coco-Quinine."

Further (p. 100, XQ. 34) witness Kelton testified that he could never have sold any Quin-Coco "had it not been for the former birth of Coco-Quinine;" and further (XQ. 35) that "the color being the same" when a customer came in and called for Coco-Quinine the druggist could show him Quin-Coco and the customer would usually say "Yes, that is what I want;" and (p. 103, Qs. 47-48) that in order to have a pharmaceutical a good replacer for another "the color and flavor should be as near identical as possible."

WITNESS GROVES, another former salesman for defendant, testified (p. 359, Q. 12) that on calling on the druggist if he found that he was a user of Coco-Quinine

he used his best efforts to sell him Quin-Coco, pointing out that it was as good a product, cost him less money, and "could be dispensed on prescriptions and sold over the counter for Coco-Quinine;" and that he understood from Mr. Hagaman or Mr. H. Pfeiffer that Quin-Coco was an exact duplicate of Coco-Quinine (Q. 16) and they gave him to understand that it was a substitute for Coco-Quinine (Q. 17); that when he was traveling with Mr. Hagaman, they sold Quin-Coco (p. 367, Q. 85):

> "As a substitute for Coco-Quinine, telling the druggists that it was a similar product to Coco-Quinine in appearance and taste, containing the same amount of quinine as Coco-Quinine and much cheaper in price, one gallon costing $3.75 and Coco-Quinine would cost them in five pints $3.30."

Further, that they told the druggists that they could furnish Quin-Coco on calls for Coco-Quinine (Qs. 86-87); and (X-Q. 93) that he had heard Hagaman tell the druggists that Quin-Coco could be sold as Coco-Quinine and had heard Hagaman advise the druggists to buy Quin-Coco and substitute it on calls for Coco-Quinine (X-Q. 94); and (X-Qs. 96-98) that this was their only method of selling Quin-Coco, it being the only selling point they had.

Witness Hardy (p. 370, Q. 5), another former defendant salesman, testified that in offering Quin-Coco to the druggists he stated to them that:

> "It was the same thing in *color* and contents as Coco-Quinine with the exception that it flowed a little more freely, and that they could use it as a substitute for Coco-Quinine from the fact

that it contained both quinine and cocoa and the advantage they had in buying Quin-Coco was the cheapness of the price, cheaper than Coco-Quinine. I demonstrated to them also that it was the same color and I have had them to taste of it to see that it was the same taste."

He further testified that he had traveled with Mr. McNulty, one of defendant's sales-managers (Q. 9), and was instructed by him that he could say to the druggists that they would have a right to sell Quin-Coco on doctors' prescriptions for Coco-Quinine (p. 370, Q. 7).

He further testified that in demonstrating the similarity in color between Quin-Coco and Coco-Quinine, he would pour some of each on a piece of paper and again would let it drain out of the bottle, borrowing the druggist's bottle of Coco-Quinine for the purposes of comparison (Qs. 11-13); that Quin-Coco was not advertised, the doctors did not know of it, and in consequence they wrote no prescriptions for Quin-Coco, so it had to be sold as a substitute for Coco-Quinine (Q. 14).

WITNESS THURMAN, another former salesman of defendant concern, testified (p. 392, Q. 7) that they were taught by Mr. Garvin and the office managers and by circular letters to salesmen, etc., to push Quin-Coco as a substitute for Coco-Quinine, explaining that it was much cheaper in price; and (Q. 12) that they were instructed by the Company to tell the trade that Quin-Coco could be used and dispensed on calls for Coco-Quinine; and that it could be used on prescriptions for Coco-Quinine without knowledge of the physician or the patient; that he did not consider it hon-

est business but stated a salesman is compelled to follow the instructions of the house he represents if he remains in the employ of the house (p. 402, Qs. 74-78); that in his work in pushing Quin-Coco as stated, he was simply following the instructions of the house and if, as a salesman, he was dishonest, the house certainly was more dishonest in instructing him to do this (X-Q. 80); and that Mr. Henry Pfeiffer, president of the defendant concern, was out with him many times and gave him instructions in regard to pushing different preparations as substitutes and replacers (X-Q. 86).

Mr. Thurman explained (p. 405, EDQ. 114) that he testified very reluctantly and only after plaintiff had obtained permission from his employer that he might do so.

Enough testimony has already been reviewed to show beyond doubt that defendant's purpose in duplicating plaintiff's Coco-Quinine, particularly as to its non-essential physical characteristics, imparted to it chiefly by the use of chocolate as a coloring and flavoring medium, was to take from plaintiff and appropriate to itself a large part of the market for Coco-Quinine, which market had been created by plaintiff by great effort and expense by sending qualified and experienced men throughout the United States to visit the physicians, acquaint them with the merits of the preparation, and induce them to prescribe it for those ills for which it is indicated.

However, the record abounds in further evidence of the fact. Numerous retail druggists testified respecting the representations that were made to them by defendant's salesmen in an effort to induce them to purchase Quin-Coco. Many of these druggists did

not buy because they regarded it as an unethical or dishonest thing to pass off substitute preparations.

For example, witness Merithew (p. 60, Q. 7) testified that he did not accept Mr. Starring's proposition to purchase Quin-Coco for the reason that he "always tried to be ethical." Witness Soulier testified (p. 128, Q. 14) that he did not handle Quin-Coco "for the reason I considered it a substitute for Coco-Quinine." Witness Gravel (p. 130, Q. 11) testified that he did not handle Quin-Coco "because we have no demand for it and we consider it a substitute for Coco-Quinine." Witness Chestnutt (p. 148, Q. 12) testified that he did not buy Quin-Coco because "I did not care to substitute."

Other druggists yielded to the temptation held out to make larger profits, and bought the substitute Quin-Coco and passed it off on their physicians and their customers for Coco-Quinine as they were instructed they might do "without detection" or "without anyone being the wiser."

That the methods complained of were freely practiced cannot be doubted when such a multitude of witnesses testify to the same fact, and witnesses having no knowledge whatever of what others have testified to and no interest whatever in the case, and, in most instances, witnesses who from the nature of the conditions were very reluctant to testify at all. The witnesses, both druggisst and physicians, were located and doing business in various sections of the country, territory served by many different salesmen representing the defendant concern, yet the testimony was substantially to the same purport everywhere, showing a uniform method of approaching and persuading the druggist, thus indicating a single source of instruction and authority.

A few quotations selected at random from the testimony will be sufficient to show the arguments generally used by defendant's salesmen and the representations they made to the retail druggists.

WITNESS DUNHAM, a retail druggist of Indianapolis, Indiana, testified that the Warner salesman represented the defendant's product:

> "To be the same preparation as Coco-Quinine and no difference could be detected by the people and costs us less money than Coco-Quinine." (p. 28, Q. 7).

WITNESS PINK, a retail druggist of Indianapolis, Indiana, on the same subject testified:

> "They said that I could use it in the place of Coco-Quinine, that there was absolutely no difference and no one could tell the difference." (p. 30, Q. 3).

WITNESS MERITHEW, a retail druggist of Detroit, Michigan, (p. 60, Qs. 5-7) testified that defendant's salesman offered to sell him Quin-Coco stating that it could be dispensed as Coco-Quinine and when Coco-Quinine was called for, exhibiting a sample from his sample case and stating further that both in taste and physiological action and *appearance* it could not be distinguished from the original Coco-Quinine, and that it would be a good deal more economical in price.

Counsel for defendant, as in many other cases where the testimony of the witness was not to his liking, endeavored by a long series of cross-questions to confuse the witness, to obtain from him a statement which in itself might appear innocent and then ask the witness if that was not the substance of what the sales-

man stated to him. This witness after answering (p. 62, XQ 29) that the salesman told him that it was lower in price than Coco-Quinine and therefore the druggist would dispense it, was asked if this was the substance of what the salesman said, and he replied:

> "No, it is not. He spoke about the similarity of the preparations both in quantity of quinine contained in each ounce and in the physiological action *and appearance.*"

There could of course be no purpose in impressing upon the minds of the retail druggists that defendant's preparation was of the same "appearance" as plaintiff's preparation except to show the druggist that he might pass off defendant's product when plaintiff's product was called for, without detection.

Witness Knowles, a retail druggist of Saginaw, Michigan, on the same subject, testified (p. Qs. 8-11) that the salesman told him he was foolish for paying a higher price for Coco-Quinine when he could use defendant's product for dispensing purposes, and also to sell on call for Coco-Quinine or chocolate quinine or syrup quinine.

Witness Wolsey, a retail druggist of Cape Girardeau, Missouri, on the same subject testified (p. 77-78, Qs. 12-14) that defendant's salesman told him that he could sell Quin-Coco and make more money than in selling Coco-Quinine, that it was the same thing, and that he could dispense it as the same article and when Eli Lilly and Company's Coco-Quinine was called for.

Witness Kinder, a retail druggist of Cape Girardeau, testified (p. 81, Q. 8) that defendant's salesman on learning that he was using a large quantity of

Lilly's Coco-Quinine, sho
owed him defendant's prepar-
ation and told him he co
uld easily use it in the place
of Coco-Quinine and sa
ve considerable money, and
(Q. 12) that they were
identical preparations and
could not be distinguishe
d.

WITNESS SCOTT, a reta
il druggist of Memphis, Ten-
nesee, on the same subje
ct, testified (p. 114, Qs. 2-6)
that he had had experien
ce in a number of retail drug
stores, that at one of then
n defendant's salesman called
on him and stated that C
Quin-Coco could be dispensed
and sold as Coco-Quinine
e, Lilly, and that at another
the same salesman calle
d on him and stated that he
could put up and dispens
e Quin-Coco on specified pre-
scriptions for Lilly's Co
co-Quinine, giving as reasons
that it was the same thin
g as Coco-Quinine and much
cheaper.

WITNESS PROCHNOW, a
retail druggist of San An-
tonio, Texas, testified (p
p. 166-167, Qs. 12-19) that the
defendant's salesman re
presented Quin-Coco as the
same preparation as Co
co-Quinine and that he was
foolish for paying the p
price for Coco-Quinine, that
Quin-Coco could be used
on calls for Coco-Quinine or
on a prescription.

WITNESS PORTER, a reta
ail druggist of Henning, Ten-
nesee, on the same subje
ct testified (p. 174, XQ. 16)
that the defendant's sa
lesman told him Quin-Coco
was an identical prepar
ation with Coco-Quinine and
could be used and sold a
nd dispensed as such.

WITNESS BARNES, a reta
ail druggist of Macomb City,
Mississippi, on the same subject, testified (p. 180, Q.
10) that the defendant's salesman offered Quin-Coco
to him to be used as a sub
bstitute for Coco-Quinine and
said:

"That it was the
only preparation of chocolate

quinine on the market that could be dispensed for Coco-Quinine, without anyone being the wiser.".

This testimony was repeated on cross-examination in answer to XQ 29 (p. 182).

WITNESS HENO, a retail druggist of Napoleonville, Louisiana, testified (p. 202, Q. 12) that defendant's salesman represented Quin-Coco to him as a cheaper preparation than Coco-Quinine and (Q. 20) that they had been selling it all along for Coco-Quinine to be used as Coco-Quinine.

EDWIN R. ALBRIGHT, p. 236, a retail druggist of Mobile, Ala., testified that his store had handled plaintiff's product, Coco-Quinine, for about twelve years (Q. 3); that he did not know of any other syrup of quinine colored or flavored with chocolate before plaintiff's product was introduced; that he had quite a large sale for it, and that it is sold both on prescription and on call over the counter (Qs. 4-8); that they have never had a prescription or call for Quin-Coco (Qs. 9-10); that Quin-Coco had been offered to him by Mr. Jones, defendant's salesman, "as being same as Coco-Quinine" (Q. 12); that he understood Mr. Jones expected him to use it for Coco-Quinine (Qs. 16-17); *that the price was considerably lower than Coco-Quinine* (Q. 18); that where he was previously employed they sold Quin-Coco on demand for Coco-Quinine and on prescription for Coco-Quinine, and without advising the customers or physicians of the substitution (Qs. 19-21).

On cross-examination, defendant's counsel offered to make the witness show that customers in calling for Coco-Quinine referred to it by various other names, such as "chocolate quinine," etc., but while witness ad-

mitted they did have some calls in which the exact name, Coco-Quinine, was not used, yet they were not more than one-tenth of all their calls (Qs. 33-34).

Counsel for defendant also brought out in his cross-examination of this witness the fact that defendant's salesman, Jones, claimed that he was selling a lot of the substitute, Quin-Coco, "all over his territory" (Q. 50). He also made the witness admit that substituting Quin-Coco for Coco-Quinine was not the work of an honest druggist even if he did it himself (X-Q. 54). He also brought out by his presistent cross-examination the fact that Salesman *Jones always told the witness that it (Quin-Coco) was the same preparation as Coco-Quinine, and "that a customer could not tell the difference."* It is submitted that there could be but one purpose on the part of Salesman Jones in telling the witness that "customers couldn't tell the difference," and this purpose was to persuade the witness to substitute the defendant's product when plaintiff's product was called for.

Witness Samuel L. Hilton, of Washington, D. C., had testified (p. 1172, Q. 7) that a defendant's salesman had offered him Quin-Coco as a substitute for Coco-Quinine. Counsel for defendant asked witness to give salesman's exact words and the witness' reply at the time he was solicited to buy Quin-Coco referred to in his direct examination (p. 1183, X-Q. 48). He was then asked (X-Q. 49) if he could say positively that the "speech to the salesman" recited in the previous answer was the one made four or five years ago. The witness replied:

> "I have purposely eliminated a portion of what I used at that time, because I consider the language would not look well in testimony."

He then said that the salesman in presenting the sample said: "Here is Coco-Quinine; we have it perfectly" (Q. 50); also that he not only offered that substitute (Quin-Coco) but several other substitutes for other products so that, as the witness stated:

> "I almost came to the conclusion that he was offering a line of substitute products for well-known pharmaceutical specialties" (Q. 51).

The witness further stated (X-Q. 54) that he definitely understood that the salesman deliberately offered the preparation of Warner and Company as a substitute to be sold for Coco-Quinine.

JOHN F. WHITLEY, a retail druggist of Winfield, Louisiana, testified (p. 387, Q. 12) that the Warner salesman on noting that he had a considerable trade in Coco-Quinine, represented to him (Q. 13) that he had an identical preparation which he could "sell on the same prescriptions as we had been selling the Coco-Quinine;" that (Q. 14) he bought Quin-Coco on these representations, and (Q. 15) did dispense it as he had been dispensing Coco-Quinine on prescriptions and calls; that (Q. 16) the prescriptions were written for Coco-Quinine and when he dispensed it to customers he labeled the bottles Coco-Quinine (Qs. 16-18).

Other testimony to substantially the same purport was given by other witnesses among whom are the following:

Martin, p. 55, Q. 4.
Merithew, p. 62, X-Q. 29.
Knowles, p. 67, X-Q. 28.
Wright, p. 68, Qs. 10 and 12.
Wolsey, pp. 77-78, Qs. 12-13.
Kinder, p. 81, Q. 8.

Henckell, pp. 87-88, Qs. 11-17.
Kelton, p. 95, Q. 7.
Blodau, pp. 106-107, Qs. 4-7.
Manning, p. 110, Q. 10.
Scott, p. 114, Q. 6; p. 115, X-Q. 16.
Richard, p. 143, Q. 6; p. 145, X-Q. 19.
Prochnow, p. 166, Qs. 12-13.
Ray, p. 210, Q. 7; p. 211, Q. 10.
Ray, p. 212, X-Q. 33.
Ames, p. 218, Qs. 10-12.
McMillan, p. 244, Q. 5; p. 246, X-Q. 33.
Vaughan, p. 254, Qs. 9-12.
Reid, p. 273, Qs. 12-17.
Mosley, p. 277, Q. 16.
Jolly, pp. 292-294, X-Qs. 76-83-84.
Garber, p. 330, Q. 18.
Lindsay, p. 333, Q. 17; p. 334, X-Q. 18.
Nelligan, p. 348, Q. 16.
Groves, p. 359, Q. 12.
Hardy, p. 370, Q. 5.
Garner, p. 378, Q. 9-10.
Noiret, pp. 407-408, Qs. 7 and 12.
Kuhn, pp. 521-22, Q. 28, X-Q. 36.
Blodau, p. 524, Q. 4.
White, p. 531, Qs. 5 and 532, Q. 9.
Walker, p. 541, Q. 5.
Culver, p. 549, Q. 4; p. 550, Qs. 8 and 9.
Stuckey, pp. 558-59, Qs. 7-11.
Moise, p. 643, Q. 14.
White, pp. 650-651, Qs. 5-9.
Sinclair, p. 680, Qs. 3-4.
Powell, pp. 682-683, Qs. 5-13.
Lavison, p. 690, Q. 4.
Lavison, p. 695, X-Qs. 32-34. (H. P.)
Lavison, p. 698, X-Qs. 64-65.
Herin, pp. 731-732, Qs. 4-11.
McCorkle, p. 919, Q. 2.
McCorkle, p. 924, Q. 47.
James, pp. 925-26, Qs. 2 and 3.

By the testimony of these witnesses it is shown that the representations of defendant's salesmen in soliciting orders for QUIN-COCO, after comparing defendant's product with plaintiff's COCO-QUININE, were made by statements substantially such as these:

Absolutely no difference.

No one can tell the difference.

Can be dispensed as Coco-Quinine when Coco-Quinine is called for.

In appearance it can not be distinguished from the original Coco-Quinine. More economical in price.

Cheaper than Coco-Quinine and can be used for dispensing on calls for Coco-Quinine.

Same as Coco-Quinine, and cheaper.

The same thing as "Lilly's Coco-Quinine, and cheaper in price."

A preparation that can easily be used in the place of Coco-Quinine, and saves considerable money.

That Quin-Coco was a good substitute for Coco-Quinine at quite a saving in price.

That Quin-Coco is a product identical with the Lilly product, and much cheaper.

Same thing as Coco-Quinine Lilly, also much cheaper.

Can be used to supply the demand for Coco-Quinine, but a much cheaper preparation.

Can be dispensed for Lilly's Coco-Quinine without detection.

Can be dispensed for Coco-Quinine without anyone being the wiser.

That Quin-Coco can be dispensed on a call or on a prescription for Coco-Quinine, and much cheaper.

Identical in color and in taste with Coco-Quinine, and no one can tell the difference.

It is the only preparation of chocolate quinine

on the market that can be dispensed for Coco-Quinine without anyone being the wiser; besides, it is cheaper.

While the expressio s vary somewhat insofar as the actual words are concerned, yet in substance they are practically the same; the burden of the salesmen's song being that Quin-Coco is not distinguishable from Coco-Quinine in physical appearance, and therefore it can be sold when a customer calls for Coco-Quinine,or on physicians' prescriptions calling for Coco-Quinine, without detection; and the lure dangled in front of the eyes of the retailer is the cheaper price and the opportunity for larger gain.

It should be borne in mind that the retail druggists who testified, are in no instance, in any way connected with plaintiff or financially interested in the outcome of this litigation.

It should also be borne in mind that these witnesses were selected from a wide range of territory covering a large portion of the country; and the territory served by a large number of defendant's salesmen, in order to show that the practices followed were general throughout the country and throughout the entire body of defendant's salesmen and not peculiar to any particular individual or any particular locality. This testimony shows the general policy of the defendant company for which its general officers alone can be responsible.

This evidence clearly justifies the conclusions of the Court of Appeals that the practice complained of is "fully established by the evidence of an unusual number of witnesses."

That these methods were successful in building up a large trade in defendant's substitute product Quin-Coco and consequently, in depriving plaintiff of the business of supplying the demand for Coco-Quinine which it had created by its own effort and at its own expense, is shown by the testimony of a large number of witnesses, among which are the following:

Kelton, p. 97, Q. 14.
Grigsby, p. 150, Q. 9.
Griffin, p. 164, Q. 11.
Burnes, p. 170, Q. 11.
Porter, p. 177, X-Q. 45.
Fly, p. 226, Q. 10.
Tisdale, p. 249, Q. 8.
Faucher, p. 266, Qs. 7 and 8.
Vinson, p. 297, Qs. 3-4.
Bell, pp. 311-312, Qs. 3-4.
Wetzel, p. 336, Qs. 4-7.

As to the extensive sales of Quin-Coco by defendant note particularly the testimony of the former defendant's salesman Kelton (pp. 565-586) including the table printed on pp. 568-583, showing the witness' duplicates of actual orders for Quin-Coco sent into his house during the periods stated, with the explanation that these duplicate orders as thus listed were not complete as many of his duplicates had been misplaced and were not available, those listed being only such as he was able to find among his own papers after the lapse of several years between the date of his service for defendant and the date he was testifying.

Please note also the answer by witness Kelton to Q. 13 (pp. 587-588) showing that the St. Louis Laborato-

ries on December 23, 1909, were manufacturing one hundred and sixty (160) gallons per week of Quin-Coco. It is thought not unfair to assume that the Philadelphia laboratories were manufacturing fully as much.

Witness Kelton.

Defendant sought to put of record certain matters relating to Mr. Kelton for the purpose of discrediting his testimony. The only thing that developed was that Mr. Kelton had some trouble about a woman in Memphis, Tennessee, and it is intimated that he also was drinking. For these reasons was discharged. While he may have had a weakness for wine and women there is not the slightest suggestion anywhere by anyone that Mr. Kelton was not reliable and a good salesman. In fact, there is much in evidence to show that Kelton was considered one of the best and most efficient salesmen in defendant's employ. The correspondence between Kelton and Mr. Henry Pfeiffer, and Mr. G. A. Pfeiffer and Mr. G. D. Merner, the officers and owners of the controlling interest in the defendant concern, shows that Mr. Kelton had the confidence as well as the friendship of each of these gentlemen and that his ability as a salesman was appreciated.

The letters from the defendant house to Mr. Kelton signed frequently by H. Pfeiffer, president, sometimes by G. A. Pfeiffer, and sometimes by G. D. Merner, treasurer, and printed on pp. 586-626, show clearly the close relationship between Mr. Kelton and his superiors, the officers of the defendant company, and the appreciation by the company of Mr. Kelton's efforts in pushing the sales of Quin-Coco.

In defendant's letter to Kelton signed by Mr. H. Pfeiffer, dated November 29, 1909 (printed on pp. 586-587) it will be seen that Mr. Pfeiffer was very much pleased "to note the nice business you are doing in Quin-Coco. It only proves that a good article in the hands of a salesman can be sold and will repeat, and the more of them you can get started the larger your orders will become and under our contract with you you will reap the benefit with us because every dollar's extra business means a commission to you."

In the letter from G. A. Pfeiffer (printed on pp. 589-590) it will be noted that "Friend Kelton" was commended for "taking care of Memphis" and assured that he could not please his house better than to give his "competitor a black eye."

William C. Dirmeyer and Solomon R. Hamilton, both of Memphis, Tennessee, and well known as among retail druggists of high standing in that city, both testified (pp. 546-547) that they had known Mr. Kelton for a long time and that his reputation was good, and that he is a man whose word is entitled to be believed.

HOW PLAINTIFF CREATED THE DEMAND.

"DETAIL WORK."

The methods employed by plaintiff in creating a demand for its products is known in the trade as "detail" work. It employs a large number of salesmen—in 1916 from 150 to 160 (testimony of General Manager Lynn, p. 876, X-Q. 48)—and these men are, as a rule, either graduate physicians or graduate pharmacists, their business being to call upon the physician with samples of plaintiff's preparations and "detail" to the physician the preparation, explaining to him its formula, the purposes for which it is in-

tended, and endeavor to enlist his interest to the extent of prescribing the preparation where, in his practice, it may be indicated. The salesman then calls upon the retail druggists and takes their orders for such Lilly products as they may need and these orders are turned in to the jobbing house supplying that particular retail trade. All of plaintiff's products are sold through the jobbers. The house has no direct financial transactions with retailers or physicians.

The importance of detail work is explained by Mr. Lynn (p. 870, Q. 18). In this question he was asked his view of the importance of detail work in the pharmaceutical manufacturing business. He replied:

> "What we call 'detail' work is absolutely essential to the successful exploitation in a large way of any pharmaceutical specialty, and it is frequently essential, as well, in the introduction of general line items under certain conditions. We are doing more and more detail work all the time. Not only are we employing now a number of special detail men who devote all of their time to this sort of work and have plans for increasing the number of such special men, but we are demanding more and more detail work from our regular force of salesmen whose chief business, however, is to visit the trade."

He explained further (Q. 19) that plaintiff's salesmen are, as a rule, what may be termed "combination" men, qualified for both detail work and salesmanship.

JAMES E. BARTLETT, a witness for plaintiff, assistant secretary and treasurer of Parke-Davis & Co., and in charge of the sales department of that concern, was

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asked (p. 742, Q. 2) to explain what is meant by the expression "detail" work. He replied:

> "By 'detail' work we understand the method by which we introduce our specialties with physicians, dentists, veterinarians, hospitals, etc., through the personal solicitation of employees whom we style 'detail' men."

He testified (Q. 3) that his house considered this class of work "indispensable" and (Q. 4) that they were constantly increasing the amount of detail work being done and the number of men employed for that character of work; and stated further (Q. 6) that he believed all the leading pharmaceutical houses employed detail work to a greater or less extent.

It is abundantly proved by the testimony that detail work is the chief method employed by plaintiff for introducing its specialties and pharmaceuticals to the medical profession. It is an expensive method but, as will be readily understood, is the only method by which a manufacturer can create a demand for his medicines and pharmaceuticals intended for use in ethical practice, for unless the physician who prescribes is made acquainted with the therapeutic value and medicinal use of the medicines and pharmaceuticals, it can not be expected that he will prescribe them.

It is such work that was referred to by Mr. J. K. Lilly, president of the plaintiff concern, when he said (p. 42, Q. 2) that after they had devised the formula, and adopted chocolate or coco as the medium for giving to the preparation "a characteristic color and flavor so that it would be different from anything that had been previously used" that "*depending on the characteristic color and flavor and the distinctive*

name, we expended considerable sums upon promoting its sales until it became one of our most important specialties."

The demand for the product was created as a result of this work and these large expenditures by plaintiff. It is this demand which defendant by its substitute product Quin-Coco sought to supply and which to a large extent it succeeded in supplying (until stopped by the Court of Appeals), thereby appropriating to itself the fruits and benefits flowing from plaintiff's labors and expenditures with corresponding damage to plaintiff.

Plaintiff's salesmen in testifying told that it was a part of their work to call upon the prescribing physician and "detail" to him plaintiff's preparations.

For example, see the testimony of the following witnesses:

Hooper, pp. 20-21, X-Qs. 40-43.
Martin, p. 54, Q. 2.
Messenger, p. 90, Q. 4.
Winchester, p. 112, Q. 5.
Fly, p. 224, Q. 3.
Tisdale, p. 248, Q. 1.
Wetzel, p. 335, Qs. 2-3.
King, p. 503, Q. 95.

DEFENDANT NEVER CREATED A MARKET FOR QUIN-COCO

DID NOT DO "DETAIL" WORK.

That defendant's efforts were directed more toward supplying a demand created by others than to creating any demand of its own for its products is shown by the testimony of Mr. G. A. Pfeiffer himself, the treasurer and general manager of the defendant con-

cern. In his direct examination (p. 1200, Qs. 57-60) he testified that at that time defendant was employing 75 to 80 travelers visiting the retail drug trade and dispensing doctors; that they distribute literature to customers through the mails and sample their products in response to requests from the trade; and that they do not advertise in the drug trade journals nor in the newspapers. On cross-examination (p. 1229, X-Qs. 239-241) the witness testified that the detailing of specialties on their part depended upon the traveler, the traveler very largely using his own judgment, saying further:

> "It is only done in his spare time and we feel that he is the best judge of his territory, and the work so done is entirely voluntary on his part. It is not a requirement from the firm."

The witness further testified (p. 1233, X-Q. 283) that formerly "detailing" was considered the only method of introducing new specialties and that it is an efficient method of introducing a new product, and;

> "However, the expense of personal detailing is so high as to, in many cases, make it unprofitable."

In regard to advertising, the witness testified (p. 1230, X-Q. 254) that formerly the house advertised quite largely in the medical journals but the advertising was discontinued because they thought it did not pay.

Further (p. 1232, X-Q. 272) he stated:

> "Not spending any money in advertising in the medical journals it is not necessary to add this to our selling cost."

Without this expense it is easy to see how defendant can undersell plaintiff and probably make even a larger profits on its sales.

EUGENE R. BROWN, one of defendant's salesman, testifying as a witness for defendant (pp. 1404-5, Q. 15) stated that he told Mr. Kinder that "we did not detail the doctors on Quin-Coco" and * * * "I said we do not detail products."

The witness testified further (p. 1409, X-Q. 53):

> "Our house has instructed their salesmen not to detail a physician; that is a loss of time and an expensive proposition and I do not detail a doctor, except when I am in a town and there is no train out and nothing else to do, I might go around to his office and loaf with him and talk about the merits of our products, but I never lose any time in doing it."

This testimony was given with his employer in the room while he was testifying and was evidently intended to emphasize the policy of the house and excuse his admission that he ever did talk to a doctor about their products by saying that he did not "lose any time in doing it."

It is clear that defendant never attempted to create a market for its preparation Quin-Coco either on its merits or under its name. This is shown by the testimony of a multitude of druggist witnesses to the effect that no prescriptions written for Quin-Coco and no calls for Quin-Coco were ever received in their stores. This testimony is uniformly the same from druggists in all of the territory covered, which included a very large part of the territory in the United

States where malaria is prevalent and the use of quinine extensive.

In each city visited, the leading prescription druggists of the town were called to testify on this point in order to show that defendant had never created a demand for Quin-Coco, but in its sales of Quin-Coco was utilizing the market created by plaintiff's efforts and at plaintiff's expense and selling its product merely as a substitute for plaintiff's product and to be dispensed in response to calls and prescriptions for plaintiff's product.

In two or three instances, jobbers testified that they had received one or two calls for Quin-Coco from a retailer and in such instances had obtained the product from defendant and furnished it to the retailer. In nearly all instances, however, the jobbers testified as did the retailers, that no calls for Quin-Coco were ever received at their stores. It is easy to understand how a jobber would occasionally receive an order for Quin-Coco from some retail druggist customer who had been induced by defendant to stock Quin-Coco and substitute it for Coco-Quinine and who by such practice was making a larger profit than he could by handling plaintiff's product. Should he need a new supply before the defendant salesman's next call he would naturally phone his jobber for it.

As indicating the absolute absence of any demand for Quin-Coco as such, the testimony of druggists in all sections that no calls or prescriptions for Quin-Coco were ever received at their stores may be referred to as follows:

Hooper, p. 21, X-Qs. 45-46.
Dunham, p. 29, Q. 13.
Pink, p. 30, Qs. 5-6.

Wilson, p. 42, Qs. 5-7.
Roman, p. 54, Q. 6.
Merithew, p. 61, Qs. 5-10.
Knowles, p. 65, Qs. 6-7.
Wright, p. 68, Qs. 7-8.
Kinder, p. 82, Qs. 10-11.
Schuh, p. 86, Qs. 11-12.
Jennings, p. 93, Qs. 9-15.
Sand, p. 102, Qs. 2-3.
Sand, p. 104, Qs. 10-11.
Blodau, p. 107, Qs. 10-11.
Manning, p. 109, Qs. 4-5.
Scott, p. 144, Qs. 8-9.
Bond, p. 122, Qs. 6-8.
Bordeaux, p. 123, Q. 11.
Bracy, p. 124, Qs. 7-11.
Bolden, p. 126, Qs. 5-6.
Havenor (Jobber), p. 73, Qs. 8-9.
Van Schaak (Jobber), p. 74, Q. 6.
Schuh (Jobber), p. 86, Q. 8.
Koellein (Jobber), p. 105, Qs. 7-8.
Bond (Jobber), p. 122, Qs. 6-8.
Soulier (Jobber), p. 128, Qs. 5-12.
Gravel (Jobber), p. 130, Q. 9.
Bowden (Jobber), p. 138, Q. 9.
Foster, p. 152, Q. 9.
Gilmer (Jobber), p. 161, Q. 8.
Lyons (Jobber), p. 191, Qs. 9-10.
Fitch (Jobber), p. 193, Q. 11.
Persell (Jobber), p. 194, Qs. 6-7.
Chestnutt, p. 148, Qs. 10-11.
Grigsby, p. 150, Q. 8.
Foster, p. 152, Qs. 7-8.
Schaefer, p. 157, Qs. 26-27.
Prochnow, p. 166, Q. 11.
Porter, p. 172, Q. 7.
Barnes, p. 180, Qs. 8-9.
Samson, p. 187, Qs. 10-12.
Heno, p. 202, Qs. 10-11.
Walsdorf, p. 206, Qs. 2-7.

F. I. Ames, p. 217, Qs. 5-6.
W. S. Ames, p. 218, Qs. 7-9.
Colvin (Jobber), p. 236, 5.
Albright, p. 237, Qs. 9-10.
Adams, p. 243, Qs. 2-7.
Shepherd, p. 247, Qs. 6 and 7.
Daly, p. 256, Qs. 5 and 6.
Barber, p. 260, Q. 10.
Northington, p. 264, Q. 8.
Greil, p. 267, Q. 7.
Reid, p. 272, Qs. 8 and 9.
Moseley, p. 277, Qs. 12 and 13.
Cunningham, p. 283, Qs. 8 and 9.
Moore, p. 284, Qs. 10 and 11.
Jolly, p. 286, Qs. 11 and 12.
Greene, p. 296, Qs. 9 and 10.
Coleman, p. 299, Qs. 17 and 19.
Franklin, p. 304, Qs. 2-3 and 10.
Marshall, p. 306, Qs. 8 and 10-13.
Ridenour, p. 319, Qs. 2-3.
Fort (Jobber), pp. 308-309, Qs. 6 and 7.
Ridenour, p. 320, Qs. 9 and 14 and X-Q. 15.
Burton, p. 322, Qs. 14 and 15.
Burton, p. 323, RDQs. 26 and 28.
Cavedo, p. 326, Qs. 4-7 and 10.
Garber, p. 330, Qs. 9 and 10.
Lindsay, p. 332, Qs. 6-8.
Allen, p. 342, Qs. 6 and 7-8.
Nelligar, p. 347, Qs. 2-3.
Arrington, p. 349, Q. 2.
Arrington, p. 350, Qs. 11 and 12.
Whilley, p. 387, Qs. 8 and 9.
Greene, p. 507, Qs. 15 and 16.
Blodau, p. 524, Q. 4.
White p. 533, Qs. 17 and 18.
White p. 537, X-Qs. 49 and 50.
Walker, p. 542, Q. 11.
White, pp. 650-51, Qs. 7 and 8.
Seegar, p. 669, Q. 26.
Sinclair, p. 680, Q. 5.

Lavison, p. 693, Qs. 17 and 18.
Heim, p. 731, Qs. 6 and 7.
Ashton, p. 790, Qs. 4-5.

It is not conceivable, had defendant expended any effort in creating an independent market for Quin-Coco, that some of the druggists here named would not at one time or another, have received a call or a prescription for it. Many of the druggists examined were from the leading prescription stores of the town or city where located and recognized as leading pharmacists receiving prescriptions from physicians in all the surrounding territory. Under such circumstances it is not possible to reach any other conclusion than that Quin-Coco was supplied by defendant to the retail druggists who would buy it not for the purpose of supplying any demand for Quin-Coco but for the purpose of supplying the demand for Coco-Quinine, which demand had been created solely by the efforts and at the expense of plaintiff.

(h) *Some Instances of Actual Substitution Shown by the Proofs.*

Witness Hooper (pp. 16-17, Qs. 7-9) testified that he was behind a prescription case in a drug store in Hillsboro and saw Mr. Paine, the druggist, fill a prescription written for Coco-Quinine with Quin-Coco.

Witness Martin (p. 55, Q. 4 and p. 56, Q. 7) testified that he was behind the prescription case in a drug store when a person handed in a slip of paper calling for Coco-Quinine and the prescription clerk filled the order for Coco-Quinine with Quin-Coco.

Witness Wright (p. 69, Qs. 15-17) testified that he had sold Quin-Coco when Coco-Quinine was called for

in his drug store and that defendant's representative had told him he could sell it the same as Coco-Quinine and that there was no distinction.

WITNESS KESSEL (p. 70, Qs. 3-4) confirmed the testimony of Mr. Martin above referred to.

WITNESS MESSENGER (pp. 90-91, Qs. 4-5) testified that he knew it to be a fact that the druggists in his territory carried Quin-Coco as a substitute for Coco-Quinine and that they used it on the prescriptions where the physicians had written for Coco-Quinine.

WITNESS BROUSSARD testified (pp. 134-135, Qs. 8-10) that he had seen prescriptions calling for Coco-Quinine filled with Quin-Coco.

WITNESS BOWDEN testified (p. 138, Q. 10) that he usually supplied Quin-Coco on calls for Coco-Quinine.

On cross-examination counsel for defendant attempted to obtain from the witness a modification of this statement by having the witness admit that such practice was dishonest and to explain how Quin-Coco might be sold on calls for Coco-Quinine in a legitimate manner. In respect to whether or not the transaction was an honest one, the witness answered (p. 139, XQ. 12):

> "Why, I consider that just as honest as the man who sold it to me."

Being further pressed in respect to the matter (XQ. 13) the witness replied:

> "I consider neither of those transactions honest."

Not being satisfied, counsel for defendant, again

appealing to the witness' pride and natural desire to appear honest, asked:

"XQ. 14. Then, if you don't consider the transaction honest, I shall assume that the transaction you refer to of supplying Quin-Coco 'usually on a call for Coco-Quinine' has not been done by you in any dishonest or unfair way. Am I correct?

A. No, you are wrong. I simply supplied it because I got a better price on it and dispensed it to save a little money. The preparation called for was Coco-Quinine and I should have dispensed Coco-Quinine.

XQ. 15. And you say that was not an act of an honest druggist do you?

A. I must say that.

XQ. 16. Did you give the customer in such cases any understanding at all of what he was getting?

A. I gave him to understand by implication that he was getting Coco-Quinine. In fact, *it was labeled Coco-Quinine.*"

WITNESS RICHARD, who had testified as to representations made to him by the defendant salesman and to the fact that Quin-Coco and Coco-Quinine were similar and that he was told that Quin-Coco could be used to supply the demand for Coco-Quinine, was taken in hand by counsel for defendant and made to testify in respect to his standard of honesty and was then asked (p. 144, XQ. 18):

"Have you dishonestly passed off Quin-Coco for Coco-Quinine with the effect of deceiving the customer?

A. I have sold Quin-Coco when Coco-Quinine was called for not with the intention to defraud the customer but believing I was giving him as good a preparation as he asked for, *which, of course, was wrong.*"

WITNESS SCHAEFER (p. 156, Qs. 14-17) testified that he had dispensed Quin-Coco in response to prescriptions written for Coco-Quinine and (p. 160, Rdq. 65) that he did not inform the physician or the customer or obtain their consent to the substitution.

In Houston, Texas, Witness Schuler, (p. 162) and Witness Griffin (p. 162) testified to circumstances that showed conclusively that Quin-Coco was being sold at the Hardy Street drug store, 2102 Hardy street, Houston, on calls for Coco-Quinine, Witness Schuler testifying and identifying a sample which he bought at that store labeled Coco-Quinine and Witness Griffin testifying that there was no Coco-Quinine in the Hardy street drug store and that there had not been for two years, while, on the other hand, there were large quantities of Quin-Coco in the Hardy Street drug store stock.

WITNESS HENO (p. 202, Qs. 12-15) testified that he bought Quin-Coco and supplied it on prescriptions written for Coco-Quinine, as advised by the representative of defendant and with disastrous results to be hereafter referred to.

It is not necessary to refer in detail to further testimony of individual witnesses on this subject. Attention, however, is called to the following instances of actual substitution, in line with practices suggested by salesmen for defendant:

Stovall, p. 233, Qs. 4-8.
Albright, pp. 237-238, Qs. 19-20.
Albright, p. 241, Xqs. 53-54.
Shepherd, p. 247, Q. 4.
Daly, p. 256-257, Qs. 5-17.
Reid, pp. 273-274, Qs. 16-21.
Bell, pp. 312-313, Qs. 5-10.
Garber, p. 330, Qs. 16-17.

Lindsay, pp. 334-335, Qs. 22-24.
Hardy, p. 371, Qs. 16-18.
Garner, pp. 378-379, Qs. 12-16.
Turner, pp. 384-385, Qs. 4-12.
Whitley, pp. 387-388, Qs. 15-19.
White, pp. 532-33, Qs. 10-12.
Walker, p. 543, X-Q. 26.
Stuckey, pp. 560-61, Qs. 15-19.
Dr. H. H. Brown, p. 670. (stipulation)
Burns, p. 671, Q. 2.
Powell, pp. 682, Qs. 7-9.
(Warner furnished Q. C. on orders sent in for C. Q. p. 686-687.)
Lavison p. 693, Q. 19.
Kessel, pp. 735-6, Qs. 6-9.

It is urged on behalf of defendant that out of the fifty-odd thousand retail druggists in the United States only a comparatively few have been shown to have practiced "passing off" defendant's product when plaintiff's product was called for or prescribed and that the retail druggist is really responsible for this rather than defendant. This point is not entitled to much consideration. The evidence clearly shows that a comparatively large number of druggists in different localities were practicing the fraud as suggested by defendant's salesmen. This is sufficient to justify the presumption that the practice was general in the drug trade and, in fact, it had become a habit with the retailers accustomed to purchase defendant's product. This must have been so because of the large sales of defendant's product, clearly established, and the absolute absence of any market for it on its own merits and under its own name, as shown by the testimony of the numerous druggists testifying that they never had a call or a prescription for Quin-Coco.

(i) *Defendant's Product Inferior.*

WITNESS MESSENGER (p. 90, Q. 4) testified that doctors in his territory had stated to him that in using the substitute for Coco-Quinine, it had caused the patient to become nauseated and for this reason, they had fallen out with Coco-Quinine, but that when the fact was brought to their attention that they were not obtaining Coco-Quinine and they obtained the original Coco-Quinine, the result was satisfactory, stating:

> "I know it to be a fact that this substitution has caused the original article of Eli Lilly and Company, Coco-Quinine, a great loss in favor with the physicians."

It is true that this witness did not identify defendant's product Quin-Coco as the substitute used by the physicians referred to in his testimony, but the testimony is important as showing the tendency of such substitution as practised by this defendant to destroy the valuable good-will built up by plaintiff by great effort and at great cost.

WITNESS HENO (p. 202, Qs. 12-15) testified that he bought a gallon of Quin-Coco from defendant's representative, supplied it in response to prescriptions written for Coco-Quinine, and that after he had used a portion of the gallon he was stopped by one of his physicians because he was not obtaining the required or anticipated results, the physician complaining that he did not understand what was the matter with his Coco-Quinine. He (the witness) then explained to the doctor that he was using Quin-Coco, when the physician ordered him to discontinue such use and to buy Eli Lilly and Company's Coco-Quinine.

Witness Reid (p. 276, RDQ. 43) testified that he had furnished Quin-Coco in place of Coco-Quinine and that a customer came back complaining that it had no effect. He then explained the difference, when the customer secured Coco-Quinine and it proved satisfactory. The witness then changed his opinion as to his belief that the two preparations were the same.

Witness Garner testified (p. 379, Qs. 15-16) that he bought defendant's Quin-Coco and dispensed it on calls over the counter and on prescriptions, labeling it "Coco-Quinine;" and that Dr. H. H. Browne complained of the results.

Witness Turner, the prescription clerk in Mr. Garner's drug store, testifying in respect to the complaint of Dr. Browne (p. 384, Q. 4) stated that he had used Quin-Coco on Dr. Browne's prescription for Coco-Quinine, Lilly; that (Q. 6) Dr. Browne claimed that the Coco-Quinine he prescribed did not give satisfaction; that the babies could not retain it on their stomachs, and that Lilly was evidently doing business on his past reputation, and that he was going to have to give up using it.

The witness further testified that Dr. Browne did quit prescribing Coco-Quinine; that he had never made any complaint about results prior to the time he was given Quin-Coco on his prescriptions for Coco-Quinine (Q. 9) but after he began using Quin-Coco, then Dr. Browne complained about the results several times.

The facts related by Turner were confirmed by a stipulated statement by Dr. Brown printed on pp. 670-671.

Witness Whitley testified (p. 388, Qs. 19-21) that he furnished Quin-Coco, dispensing it as Coco-Quinine,

and that it was returned by his customers as not satisfactory.

Witness White (p. 538, X-Q. 58) testified of a case where Quin-Coco did not give satisfaction and Mr. Whitley said he wanted to take it up with the house and obtain credit for the bottle or have it replaced with a new bottle.

Witness Stuckey (pp. 560-561, Qs. 18-19) testified that he bought one gallon of Quin-Coco, that it was not satisfactory, that he used part of it, but did not use the rest, because his doctors prescribed Coco-Quinine and told him that he could not use this preparation, Quin-Coco, because it was not Coco-Quinine.

The testimony on this subject is sufficient to establish the allegation that defendant's product was at least not uniformly of a quality equal to plaintiff's and that in many instances it failed to give satisfaction where, before its use, plaintiff's product had given entire satisfaction, thus resulting in inevitable injury to plaintiff's business good-will.

(j) *Defendant Responsible for Its Sales Policy and Practices.*

It is boldly claimed on behalf of defendant that it has a perfect right to market its product Quin-Coco by the methods employed; that its customer is the retail druggist; that the retail druggist is not deceived but knows what he is buying and that if any fraud or crime is committed, it is the fraud or crime of the retailer, as it is the retailer who is guilty of the "passing off," or substitution, of defendant's product Quin-Coco when plaintiff's product Coco-Quinine is called for or prescribed.

The District Court substantially agreed with this contention but the Court of Appeals on this point said:

> "The evident purpose in each case was to deceive, not the retail dealer, but the ultimate consumer. For the consumer in this case the preparation was rebottled. To him it came, not in the distinctive dress in which it reached the retail dealer, but naked. The only mark it had was that of color, which (as in the Coco-Cola case) the defendant labored to make non-distinctive. Having counseled fraud upon the ultimate consumer and having put in the hands of the retail dealer the means of committing the fraud, there is no room for the defendant to shift the blame to the retail dealer and no ground for the defendant to say that it is not answerable for the part which it itself played in the deception of the consumer. Certainly the defendant was an accomplice, if not the principal, in the practice."

It is submitted that the conclusion reached by the Court of Appeals on this point is sound and supported not only by the authorities cited in the decision, but by a long line of other authorities and by all rules of equity and justice.

It has already been shown by the testimony of witnesses Kelton, Groves, Hardy, and Thurman, former salesmen employed by defendant, that they not only followed the practices complained of by plaintiff in their efforts to sell Quin-Coco, but they did so by direct instructions and authority of the defendant's officials and sales managers.

That the methods complained of were generally followed by all of the salesmen employed by defendant is shown by the testimony of numerous druggists, doing business in many different and widely separated

localities, which has been heretofore reviewed. This testimony proves beyond question that the general practice in defendant's entire sales organization was to push the sale of Quin-Coco as a substitute for plaintiff's Coco-Quinine, representing to the retail druggist that he could save $1.30 a gallon (or the difference between the price of defendant's product and the price of plaintiff's product, whatever it might be) by buying defendant's Quin-Coco and dispensing it on the calls and prescriptions for plaintiff's Coco-Quinine, assuring the druggist that Quin-Coco was such a perfect imitation of Coco-Quinine, not only in medicinal character *but in color and flavor*, that the substitution could never be detected, either by the physician or the customer, and no one would be the wiser. In many instances doubts in the minds of the retail druggist as to the correctness of the latter assurances were dispelled by making comparisons of the two preparations, by pouring a little of each on a piece of white paper or into a glass graduate for comparison as to color and tasting for comparison as to flavor.

Defendant attempted to deny these proofs by calling as witnesses its identical salesmen who were accused. As before called to attention these men had been instructed (O'Connell letter No. 4) as to the testimony desired by their employer. Each of such witnesses was made to profess approval of ethical standards and practices in the sale of products. Each salesmanager was then asked a question like this:

> "Have you ever authorized or suggested to one of your traveling salesmen that he should or might suggest to retail druggists that they could sell Quin-Coco, S & H on prescriptions of doctors

> or over the counter when Coco-Quinine, Lilly, was specifically called for?"

This question was put to sales manager Hagaman (p. 1278, Q. 21) and he answered "No."

The form of question put to the salesmen was substantially as follows:

> "State whether or not you ever suggested to a retail druggist that he could buy Quin-Coco S & H and sell it on prescription or over the counter when Coco-Quinine, Lilly, was specifically written or called for over the counter."

This question was put to Salesman Gonzales (p. 1360, Q. 41) and the witness answered:

"I did not."

It should be noted that these witnesses, defendant's salesmen, besides having the instructions contained in the general letter, O'Connell Letter No. 4, before testifying, had been called in to the home office at St. Louis or the home office in Philadelphia and had ample opportunity to be instructed respecting the testimony of plaintiff's witnesses they were expected to dispute and to be made acquainted with the character of answers they were expected to give.

The questions were put in a form so that the witness could answer perhaps without doing violence to his conscience, for the question and answer combined, while seemingly denying the statements of plaintiff's witnesses, nevertheless were rather poor attempts to conceal the truth. The questions asked if they advised using "Quin-Coco S & H" when "Coco-Quinine, Lilly," was "specifically" written or called for.

It is doubtful if defendant's salesmen ever referred to the product by the name "Quin-Coco S & H" and it

is a well known fact that plaintiff's product was called for and prescribed more generally by its trade name "Coco-Quinine" than by said trade name followed by the maker's name "Lilly."

The same character of questions above indicated were asked of practically all of the salesmen implicated by plaintiff's witnesses and also of the officials of the defendant concern and negative answers obtained.

In every instance where a defendant salesman was implicated, plaintiff has produced testimony showing the fact by two or more disinterested witnesses having no connection, near or remote, with the plaintiff concern and usually testifying most reluctantly.

Defendant's salesman Jones was implicated by plaintiff's witnesses:

Richard, p. 145, X-Q. 19.
Persell, p. 195, Q. 10.
Heno, p. 202, Qs. 12-13.
W. S. Ames, p. 218, Q. 11.
Stovall, p. 234, Qs. 11-12.
Mayfield, p. 234, Q. 3.
Albright, p. 237, Qs. 12-18, and p. 241, X-Q. 59.
Noiret, pp. 407-408, Qs. 7 and 12.
Culver, p. 549, Q. 4, and p. 550, Qs. 8-10; p. 556, X-Qs. 36 and 38.
Edmondson, p. 639, Q. 5.
Moise, p. 642, Qs. 4-13.

Defendant's salesman Moon was implicated by the testimony of plaintiff's witnesses:

Garber, p. 330, Qs. 11-12.
Lindsay, p. 333, Q. 16.
E. B. Allen, p. 342, Q. 10.
Nelligar, p. 348, Q. 15.

H. M. Allen, pp. 467-469, Qs. 17-22.
Ashton, p. 789, Q. 3.

Defendant's salesman Nottingham was implicated by the testimony of plaintiff's witnesses:

Jolly, p. 286, Q. 17, and p. 288, X-Qs. 30-55.
King, pp. 484-485, Qs. 8-13.
Howard, p. 954, Q. 7, and pp. 957-958, Qs. 22-23.

Defendant's salesman Wilkins was implicated by the testimony of plaintiff's witnesses:

Whitley, p. 389, Q. 26.
White, p. 531, Qs. 3-6.
Walker, p. 541, Qs. 5-7.

Defendant's salesman Starring was implicated by the testimony of plaintiff's witnesses:

Merithew, p. 60, Qs. 5-6.
Heim, pp. 731-732, Qs. 3-11.
Kessel, p. 736, Qs. 11.

Defendant's salesman Rogers was implicated by the testimony of plaintiff's witnesses:

Knowles, p. 66, Qs. 8-12.
Kessell, p. 735, Qs. 3-4.

In denying the statements of plaintiff's witness Kessel, defendant's Salesman Rogers made an interesting and suggestive statement (p. 1603, Q. 5) as follows:

"But I did not say that it could be sold *as* Coco-Quinine, *because* this man had already used the preparation before and it was not necessary to say that."

Defendant's salesman Duvall was implicated by the testimony of plaintiff's witnesses:

Blodau, p. 107, Q. 12; p. 524, Qs. 3-7.
Scott, p. 114, Q. 2.
Kuhn, p. 521, Q. 28.
Blodau, pp. 524-25, Qs. 4-7.

Answering defendant's salesman Duvall's statements respecting his methods and representations in selling Quin-Coco, the plaintiff's witness Blodau testified (p. 524, Q. 4):

> "If that was not his intention I really cannot understand his idea in showing me the Quin-Coco as I had had no calls for Quin-Coco or chocolate quinine, that the only name by which the chocolate quinine preparation has been called for in my store, to the best of my knowledge is Coco-Quinine, and as it (chocolate quinine or Coco-Quinine as it is called) would not interest me owing to the fact of having no sale for it under those names."

Defendant's salesman Richards was implicated by the testimony of plaintiff's witnesses:

Chestnutt, p. 148, Qs. 12-13.
Prochnow, p. 167, Q. 17.
Seeger, p. 666, Q. 5.

Defendant's salesman Kelton was implicated by the testimony of plaintiff's witnesses:

Porter, p. 173, Q. 8.
Kuhn, p. 516, Q. 7-8.
Kuhn, p. 521, Q. 30.
Kuhn, p. 522, X-Q. 36.
Lavison, p. 690, Q. 4.

Mr. Kelton not being at the time in defendant's employ, was called as a witness by plaintiff and as has heretofore been stated, confessed as to his sales methods in pushing Quin-Coco to be used as a substitute for Coco-Quinine.

Defendant's salesman Gonzales was implicated by the testimony of plaintiff's witnesses:

Barnes, p. 180, Q. 10.
Ray, p. 211, Qs. 8-11.
White, p. 532, Q. 9.

Defendant's salesman Wilson was implicated by the testimony of plaintiff's witnesses:

McCorkle, p. 919, Q. 2.
McCorkle, p. 924, Qs. 45-47.
James, pp. 925-26, Qs. 2-3.
Green, p. 964, Qs. 10-13.
Bell, p. 967, Q. 4.

Defendant's sales manager Hagaman was implicated by the testimony of plaintiff's witnesses:

Groves, p. 359, Q. 15; p. 368, Qs. 93-98.
Ege, pp. 418-420, Qs. 3-11.
Lebo, p. 430, Qs. 5-6.
Bell, p. 436, Q. 10, and p. 438, X-Q. 12.
Peabody, p. 448, Q. 15.
H. M. Allen, p. 465, Qs. 5-10.
E. B. Allen, p. 473, Q. 4.
Bolenbaugh, p. 745, Q. 4.
Howard, p. 955, Q. 8.
O'Connell, pp. 975-76, Qs. 7-9.

Witness Willis (p. 479, Qs. 6-7) confirmed the testimony given by Mr. Hardy, a former defendant sales-

man, respecting the methods he used in offering Quin-Coco to the trade, that Hardy told him that it was the same thing as Coco-Quinine, the only difference being in price; that it was a good substitute and nobody could tell the difference; and further:

> "He showed me his sample; had me pour some Coco-Quinine in a clear bottle and asked me if I could tell the difference by looks or taste."

Witness O'Connell, former defendant salesman, testified (p. 978, Q. 15) that he had personally sold Quin-Coco on the representation that there was no difference between Quin-Coco and Coco-Quinine and a good saving in price, and that the physician or patient could not tell the difference; and that he sold the substitute perfumes (Q. 19) by demonstrating that the substitutes could not be distinguished from the original.

Defendant's Officials Responsible.

That defendant's salesmen in selling defendant's product Quin-Coco to be resold or dispensed for plaintiff's product Coco-Quinine and on calls and prescriptions for Coco-Quinine were following instructions received from the officers and sales managers of the defendant concern is abundantly shown by the testimony of men formerly employed by defendant as salesmen who testified as to the teachings and instructions received from such officials and sales managers.

Sales Manager Hagaman was one of the men whose name was most frequently used by witnesses as representing defendant and traveling with its salesmen, teaching and instructing them how to sell defendant's goods. That he specifically instructed them to push

this product according to the methods complained of by plaintiff is shown by testimony of not only former salesmen but of druggists on whom he called in company with former salesmen.

WITNESS BOLENBAUGH, a former defendant's salesman, questioned as to what Mr. Hagaman said to him about Quin-Coco and as to Mr. Hagaman's methods in soliciting orders for this preparation in his presence, and testified (p. 745 Q. 4):

> "Yes, his first trip with me he showed the preparation by pouring it on a piece of white paper, showing it was the same color as Coco-Quinine, Lilly, but a little thinner preparation, run easier, and authorized me to demonstrate it in the same way."

He further testified (Q. 5) that Hagaman represented it to be of the same formula and *color* as Coco-Quinine.

WITNESS HOWARD testified that Mr. Hagaman called on him when in the retail drug business in company with one of defendant's salesmen and solicited his order for goods, among other items, Quin-Coco, and testified (p. 955, latter part of answer to Q. 8) as follows:

> "Mr. Hagaman told me repeatedly that druggists over his territory were using Quin-Coco very largely in substitution for Coco-Quinine and wherever Coco-Quinine was specified or called for. He took his sample of Quin-Coco and asked me to make comparison between it and Coco-Quinine and if I could tell any difference he would not ask me to buy any of his preparations but would make me a present of the best hat in town."

See also the testimony of former defendant's salesman Groves (p. 359, Q. 15, and p. 368, Qs. 93-98), and former defendant's salesman Peabody (p. 448, Q. 15, and p. 451, Q. 27 et seq.), and former salesman O'Connell (pp. 975-976, Qs. 7-9).

Also the testimony of retail druggist Ege (pp. 418-420, Qs. 3-11), H. M. Allen, p. 465,) and Bell (pp. 945-946, Q. 3).

DEFENDANT'S ASSISTANT SALES MANAGER MCNULTY was frequently referred to by witnesses as responsible for the methods used in the sale of Quin-Coco as complained about by plaintiff.

JOSEPH A. GRIMALDI, a former defendant's salesman, called as a witness for plaintiff, testified (p. 750, Qs. 3-4) that he knew Mr. Charles E. McNulty as the assistant sales manager of the defendant concern and that Mr. McNulty visited the local trade with him in the city of Detroit on several occasions, and (Qs. 5-6) that he had observed Mr. McNulty's methods in soliciting orders for Quin-Coco. He was asked (p. 751, Q. 7):

> "Q. 7. Please explain what you have ever heard Mr. McNulty say to a retail druggist when endeavoring to sell him Quin-Coco. A. I have heard the following dialogue take place between Mr. McNulty and the retail druggists:
>
> (McNulty) 'Have you any sale for Coco-Quinine?'
>
> (Druggist) 'Yes, some.'
>
> (McNulty) 'Do you sell very much of it?'
>
> (Druggist) 'Well, some physicians prescribe it quite frequently.'
>
> (McNulty) 'Well, we have a preparation that is very similar, Quin-Coco.'
>
> (Druggist) 'No, I don't believe you have.

There is only one product made that does the work and that is Coco-Quinine.'

(McNulty) 'Well, if you will allow me to show you, I will prove to you that there is a great similarity between the two. Have you any Coco-Quinine on hand?'

(Druggist) 'Yes, I have.'

(McNulty) 'Well, produce two graduates and pour a small amount in one graduate of the Coco-Quinine and I will pour a similar quantity of Quin-Coco in another graduate. Now compare them for color and taste. Are they not practically identical?

(Druggist) 'Yes, there is a great similarity.'

(McNulty) 'Now, you admit that frankly. The only difference is in the cost.'

Q. 8. As I understand your last answer it is stated as a dialogue between Mr. McNulty and the retail druggist? A. Absolutely.

Q. 9. Did you ever hear Mr. McNulty go through this method or dialogue with the retail druggists more than once? A. I did."

See also the testimony of witness Hardy, a former defendant's salesman (p. 370, Q. 6); the testimony of witness Greene, a retail druggist (pp. 506-507, Qs. 8-10); and the testimony of Earle R. Peabody, a former defendant's salesman (pp. 449-450, Qs. 20-21).

See also testimony of witness Frank E. Green, a former defendant salesman (p. 798, Q. 5, and p. 800, Qs. 15-16) showing that McNulty compound the "general appearance" of his substitute items with the original he was seeking to replace.

MR. PEABODY was called to rebut the testimony given by McNulty for defendant in which McNulty denied employing or teaching methods in the sale of any of de-

fendant's goods which suggested to the retail druggist that any of their items might be bought and resold, or dispensed, on calls for items made by competing houses.

The incident related by the witness is interesting and a complete rebuttal of McNulty's testimony.

The witness explained that Mr. McNulty called him to his hotel, the Hotel Essex in Boston, and sent him out to purchase two bottles of Fletcher's Castoria. This the witness did. McNulty then took the two bottles of genuine Fletcher's Castoria and from them filled one of defendant's Dr. Hobson's Castoria bottles, of larger size, McNulty remarking as he filled defendant's bottle with the genuine Fletcher Castoria:

> "I guess they can't tell any difference now between the Dr. Hobson's and the Fletcher's."

The witness explained that McNulty used this Dr. Hobson's bottle filled with the genuine Fletcher Castoria in soliciting the drug trade to buy the Dr. Hobson's Castoria asking the prospective customer to compare the contents of the Dr. Hobson Castoria bottle with one of the original Fletcher's and asked him if he could detect any difference "in taste or color" in the two preparations, explaining that as the Dr. Hobson bottle contained more than the original Fletcher's that his margin of profit would be greater.

Defendant's assistant sales manager Ritayik after declaring that he practiced and taught methods recognized as ethical in the sale of defendant's goods to retail druggists and related the kind of sales talk he employed, saying that this was his regular practice and that he made such statements to many druggists, was asked to name some of the druggists whose business

he had solicited with such talk. Notwithstanding his apparent perfect familiarity with his alleged talk to the druggists, he was unable to give the name of a single one (p. 1615, X-Qs. 26-30).

The record shows a number of different instances where other of the defendant's products were sold with the argument that they could be substituted at a profit to the druggist for like articles or items made popular by extensive advertising and detail work of other houses. The incident above related, however, is one of the most aggravated cases of fraud shown by the record, McNulty in his sales work using not defendant's imitation product but the genuine article of the original manufacturer, with which he had refilled one of defendant's Dr. Hobson's bottles, so that it was absolutely impossible for anyone to detect the fraud, with an appeal to the avarice or cupidity of the druggist by showing him that the profit in handling the imitation would be greater because defendant's package was larger and contained more than the package of the original manufacturer.

Mr. Henry Pfeiffer, the president of the defendant concern, was referred to by a number of witnesses as having traveled with salesmen and participated in the sale of goods, not only approving but participating in the fraudulent practices complained of by plaintiff in inducing druggists to buy defendant's goods.

Witness G. A. Lavison, a retail druggist of Memphis, Tenn., called as a witness for plaintiff testified (p. 690, Qs. 4-5) that Mr. Kelton urged him to buy Quin-Coco, representing it as exactly the same in every respect as Coco-Quinine and saying it could be used as a substitute on physicians' prescriptions written for Coco-Quinine without anyone knowing the difference.

He explained that he hesitated to accept Mr. Kelton's representations and did not buy when he was first solicited, but the next day Mr. Kelton returned with Mr. Henry Pfeiffer and again took up the subject and that Mr. Pfeiffer represented Quin-Coco the same as Kelton had, as the same as Coco-Quinine, and told him that it could be used for Coco-Quinine in any way that Coco-Quinine was used, and that both of them assured him that it was the same thing and much cheaper, the inducement to purchase being the cheaper price.

See also testimony of witness Thurman (pp. 806-7, Qs. 3-6) showing the character of work Mr. Pfeiffer taught his salesmen to do.

Under such a state of facts, surely defendant is accountable for the resulting fraud, deceit and imposition upon the public,and likewise for the injury to the reputation of the physician, and to the reputation, good-will and business of plaintiff resulting from serving the inferior product.

Mr. J. K. Lilly (p. 914, R-X-Q. 126) states very fairly and clearly wherein the manufacturer is responsible as well as the retail druggist for the practice of substitution. He was asked by counsel for defendant if, after all, it was not "a mere matter of honesty" on the part of the druggist. He replied:

> "Not altogether. It is a question of his honesty in the main, *but of course he must have the weapons to use* in order to substitute one preparation for another formula. In other words, the preparation must so closely resemble the original that he could use it to deceive. *This is where the manufacturer has some responsibility.*"

In the authorities presently to be reviewed will be

noted several holding as, for example, in the case of *Coca-Cola Co. vs. Gay-Ola Co.*, 200 Fed. 720, that:

> *"It is not necessary to show that the immediate purchasers were deceived as to the origin of the goods; but even if they thoroughly understand that they are buying the counterfeit and not the genuine the manufacturer of the counterfeit will be enjoined from selling it to dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer."*

Citing also *Garrett v. Garrett* (C. C. A.), 78 Fed., 472-476, and a number of other cases.

As showing Mr. Henry Pfeiffer's further participation with salesmen in these methods of selling Quin-Coco and other items, see the following testimony:

Hardy (a former defendant's salesman) p. 370, Q. 6.
Thurman (a former defendant's salesman) p. 392, Qs. 8-9.
Kuhn (a Nashville druggist) p. 517, Q. 10.

Debauchery of the Trade.

The demoralizing influence of this sort of teaching upon the retail drug trade will be appreciated from the testimony already reviewed. See, further, the testimony of Mr. Lavison, who apparently was accustomed to follow ethical rules in his store. On cross-examination he was asked (p. 698, X-Q. 64) what he would do when he did not have a certain drug or preparation called for over the counter. The witness replied that he would send out for it or not make the sale. He was then asked:

X-Q. 65. Do you state that that is absolutely true in every case? A. I have stated there that

I substituted Quin-Coco for Coco-Quinine, for the reason that both Mr. Kelton and Mr. Pfeiffer said that I could do so as they were one and the same thing, and that is the reason that I did so in that case. I did not do so in any other case that I can remember. And I did this because they told me so positively that it was all right to do so."

WITNESS JOHN W. CULVER (pp. 552-553, X-Qs. 14, 22 and 23) testified as did many others in justification of their purchases of Quin-Coca and their practices in passing it off on calls and prescriptions for Coco-Quinine. His testimony is but illustrative. It will bear quoting, and is as follows:

"X-Q. 14. Then you were a willing purchaser were you not of Quin-Coco? A. To the extent that I accepted his guarantee on behalf of his company for the product being identical with Coca-Quinine and therefore subject to use in place of Coco-Quinine on that account.

* * * * * * * * * * *

X-Q. 22. When you get a prescription or a call over the counter for a specified preparation and without saying anything about it, you fill it with a similar preparation, therapeutically, do you consider that honest practice in a drug store? A. I consider it bad practice from a commercial as well as a moral standpoint.

X-Q. 23. What I want to know is, whether, in your opinion, it is honest practice for a druggist on a prescription or call for one drug, to fill the order with a similar drug, without telling the physician or the customer. A. At that time I considered the guarantee of the manufacturers through their representatives made this a defensible act on my part, to fill or have these prescriptions for Coco-Quinine, filled with Quin-Coco, which on the manufacturer's representations was

absolutely identical with and could not be detected from Coco-Quinine. As to my present views in the matter, I do not approve of it, and the last year, or the greater part thereof, that I was in the retail drug business I discontinued handling Quin-Coca, *as the only use I had for it was in substitution for Coco-Quinine.*"

In view of this testimony, it can not be seriously contended that defendant's responsibile officials were not responsible for the sales policy pursued by its salesmen, resulting in the fraudulent practices by its distributor-customers, the retail druggists, complained of by plaintiff.

(k) *The name "Coco-Quinine" Identifies Plaintiff's Product and Represents Plaintiff's Good-Will.*

Nearly all druggists and physicians, as well as dealers called as witnesses testified that Coco-Quinine is generally recognized in the trade as the product of Eli Lilly and Company and whether or not the name "Lilly" is written in connection with the name "Coco-Quinine" on prescriptions, the name by itself is sufficient to identify plaintiff's product; and many that even when called for by the name "Chocolate Quinine," plaintiff's product is understood to be the thing asked for because the names cocoa and chocolate are frequently confused in the minds of people not thoroughly conversant with the technical name, and therefore the name "chocolate" is frequently used in the place of cocoa when calling for plaintiff's preparation, and that this practice prevailed for a long time prior to the advent of defendant's product.

Many witnesses testified in support of this contention, including the following:

Merithew, p. 60, Q. 3.
Knowles, p. 65, Q. 3.
Wright, p. 68, Q. 4.
Havenor, pp. 72-73, Qs. 4-5.
Van Schaak, p. 74, Q. 3.
Dr. Hoskins, p. 76, Q. 6.
Wolsey, p. 77, Q. 3.
Kinder, p. 81, Q. 3.
Walker, p. 84, Q. 3.
Schuh, p. 85, Q. 2.
Kenckell, p. 87, Q. 3.
Jennings, p. 92, Q. 2.
Sand, p. 103, Q. 9.
Koellein, p. 105, Q. 3.
Manning, p. 109, Q. 2.
Tague, p. 111, Q. 11.
Scott, p. 114, Q. 2.
Bracy, p. 124, Q. 3.
Knox, p. 125, Q. 4.
Blodau, p. 126, Q. 3.
Soulier, p. 127, Q. 4.
Dr. Randolph, p. 128, Q. 2.
Dr. Gremillion, p. 129, Q. 2.
Gravel, p. 130, Q. 4.
Dr. Perkins, p. 132, Q. 2.
Bowden, p. 138, Q. 3.
Fry, p. 141, Q. 3.
Richard, p. 143, Q. 2.
Chestnutt, p. 147, Q. 2.
Spurlock, p. 154, Q. 4.
Schaefer, p. 155, Q. 4.
Gilmer, p. 161, Q. 5.
Prochnow, p. 165, Q. 2.
Porter, p. 172, Q. 2.
Barnes, p. 180, Q. 3.
Samson, p. 187, Q. 6.
Lyons, p. 190, Q. 2.
Fitch, p. 194, Q. 2.

Heno, p. 201, Q. 3.
Walsdorf, p. 206, Q. 3.
Dr. Arrington, p. 209, Q. 2.
Ray, p. 210, Q. 2.
F. I. Ames, p. 216, Q. 2.
W. S. Ames, p. 217, Q. 2.
Colvin, p. 235, Q. 3.
Albright, p. 236, Q. 2.
McMillan, p. 244, Q. 2.
Shepherd, p. 247, Q. 2.
Vaughan, p. 254, Q. 2.
Dr. Walker, p. 258, Q. 2.
Barber, p. 260, Q. 4.
Northington (Jobber), p. 264, Q. 4.
Greil, p. 267, Q. 4.
Dr. Pearson, p. 271, Q. 2.
Reid, p. 272, Q. 3.
Moseley, p. 277, Q. 5.
Cunningham, p. 282, Q. 3.
Jolly, p. 285, Q. 3.
Greene, p. 296, Q. 2.
Coleman, p. 298, Q. 8.
Dr. Pumpelly, p. 301, Q. 4.
Riley (Jobber), p. 302, Q. 3.
Marshall, p. 306, Q. 2.
Fort, p. 308, Q. 3.
Burton, p. 321, Q. 6.
Dr. Fisher, p. 324, Q. 2.
Caurdo, p. 326, Q. 2.
Garber, p. 329, Q. 4.
Lindsay, p. 332, Q. 2.
Nelligar, p. 347, Q. 4.
Dr. Hargrave, p. 351, Q. 2.
Gorner, p. 379, Q. 23.
Whitley, p. 387, Q. 3.
Noiret, p. 407, Q. 3.

That when doctors write prescriptions for Coco-Quinine, they mean none other than the Lilly product is clearly shown by the testimony of Dr. Perkins (p.

132, Q. 3). Dr. Perkins was asked how he writes his prescriptions for this product, and answered:

> "'Coco-Quinine,' and sometimes I specify Lilly's, and when I do not, it is understood that my intention is to prescribe Lilly's product, that being the one I have learned to recognize as the originator of the medicine."

In answer to Q. 5, he stated that he never knew that there was any other product that was being used as a substitute for Lilly's Coco-Quinine.

See also the testimony of:

Dr. Walker, pp. 84-85, Qs. 4, 5, and 11.
Dr. Randolph, p. 129, Q. 4.
Dr. Gremillion, p. 129, Q. 5.
Dr. Fry, p. 141, Qs. 5-6.
Chestnutt, p. 147, Q. 7.
Dr. Ferguson, p. 152, Qs. 4-5.
Dr. Spurlock, p. 154, Qs. 5-6.
Schaefer, p. 156, Qs. 6-7.
Prochnow, p. 166, Qs. 4-5.
Porter, p. 172, Q. 6.
Heno, p. 201, Qs. 7-8.
Dr. Arrington, p. 209, Qs. 5-6.
Adams, p. 243, Q. 6.
McMillan, p. 244, Q. 9.
Dr. Walker, p. 258, Qs. 3 and 4.
Barber, p. 260, Q. 8.
Dr. Pearson, p. 271, Qs. 4-5.
Reid, p. 272, Qs. 6 and 7.
Moseley, p. 277, Q. 8.
Cunningham, p. 282, Q. 7.
Moore, p. 284, Qs. 6-9.
Jolly, pp. 284 and 286, Qs. 6 and 7.
Greene, p. 296, Qs. 5 and 6.
Coleman, p. 299, Qs. 11 and 12.
Dr. Pumpelly, p. 301, Qs. 5 and 6.

Franklin, p. 304, Qs. 6 and 7.
Marshall, p. 306, Q. 7.
Ridenour, p. 320, Qs. 6-8.
Burton, p. 321-22, Qs. 7 and 11.
Dr. Fisher, p. 324, Qs. 3-6.
Cavedo, p. 326, Qs. 11-13.
Lindsay, pp. 332-333, Qs. 8-10.
Allen, p. 342, Q. 5.
Arrington, p. 349-50, Qs. 7 and 10.
Dr. Hargrave, p. 351, Qs. 3-4.
Dr. Eskridge, p. 375.
Ashton, p. 790, Qs. 6-7.

That Coco-Quinine is sometimes called for and in some localities frequently, by the name "Chocolate Quinine" and that the druggists readily understand such calls to mean plaintiff's Coco-Quinine, is shown by the testimony of numerous witnesses.

WITNESS HAVENOR, manager for the Fuller Medicine Company, wholesale druggists of Chicago, one of the largest drug houses in the United States, testified (p. 73, Qs. 4-5) that if they would get an order for a chocolate quinine preparation not specified otherwise, they would furnish Lilly's Coco-Quinine, his understanding being that this was what the customer intended.

WITNESS VAN SCHAAK (p. 74, Q. 7) also representing a large wholesale drug house, testified to the same purpose, saying:

> "We would give Lilly's Coco-Quinine. That is the only item of the kind we carry in stock, and it might be ordered by two or three different names."

WITNESS WOLSEY, retail druggist of Cape Girardeau, Missouri, testified (p. 77, Q. 6) that if a customer should ask for a chocolate quinine preparation he

would suppose him to be ordering Eli Lilly and Company's Coco-Quinine.

Witness Kinder, a retail druggist of Cape Girardeau (p. 83, Q. 27), testified that if a customer should ask for chocolate quinine or a chocolate quinine preparation, he would understand him to want Coco-Quinine.

Witness W. S. Adams (p. 219, X-Qs. 13-17) explained that cocoa is the name of an article commonly called by the laity "chocolate," and that the laity regard cocoa as chocolate, and that they ask for chocolate quinine occasionally because they get chocolate and cocoa confused in their minds.

Witness W. S. Ames (p. 219, X-Qs. 13-17) ex- that when a customer asks for Chocolate Quinine he understands the customer to mean plaintiff's Coco-Quinine, and when asked why he had this understanding replied:

> "Well, Eli Lilly's Coco-Quinine is known as the original 'coco-quinine' or 'chocolate quinine,' and the only one that I have ever dispensed or have ever seen, and is the preparation the customers have alwaye been using. I would really be afraid to give anything except Lilly's Coco-Quinine, believing that I would be substituting and not supplying the customer with the article they desired, and in the case of a physician's prescription I would not dispense anything except Lilly's Coco-Quinine as I don't care to take the responsibility on my own shoulders of giving anything except what the physician specifies."

To the same purport is the testimony of the following witnesses:

Schuh, p. 86, Q. 13.
Henckell, p. 88, Q. 18.
Bryant, p. 89, Qs. 8-9.
Jennings, p. 93, Qs. 6-8.
Manning, p. 110, Q. 13.
Porter, p. 173, Q. 10.
Lyons, p. 191, Q. 11.
W. S. Ames, p. 218, Q. 10.
Albright, p. 238, Q. 22.
Daly, p. 257, Qs. 14-17.
Reid, p. 274, Qs. 20-22.
Moseley, p. 277, Qs. 9 and 10.
Moore, p. 284, Qs. 13 and 14.
Jolly, p. 286, Qs. 8 and 9.
Marshall, p. 306, Q. 9.
Lindsay, p. 333, Q. 14.
Garner, p. 383, Qs. 70-73.
Garner, p. 384, Q. 75.
Turner, p. 386, Qs. 21 and 22.

That defendant's claim that its product, Quin-Coco, was put on the market to supply a demand for "chocolate quinine," a demand existing independently of the demand for plaintiff's Coco-Quinine, cannot be regarded as anything more than mere pretense, for the defendant officials who testified to this fact well knew, and if frank in their testimony would have acknowledged, that the demand for so-called "chocolate quinine" was a demand created for the product Coco-Quinine by Eli Lilly and Company, the plaintiff herein, by great effort and at great expense by "detail" work among the physicians throughout the country. After the demand was created and the market established, then defendant entered the field and, without the expense of creating the demand, offered at a considerably lower price this counterfeit product designed particularly to supply the demand that plaintiff

had created. Defendant's officials observed that plaintiff had established a good demand in this item and saw an opportunity to appropriate to themselves the profits of the business by sending their salesmen around with the cheaper preparation and inducing the retail druggist to buy it to supply the demand for plaintiff's product and thereby make more money for himself. Every circumstance leads directly to such conclusion and to the further conclusion that defendant's excuses in justification of its acts are mere pretext and sham.

A late comer in the field (plaintiff having had its preparation on the market seven years before defendant succeeded in counterfeiting it), defendant sought to cause confusion in trade rather than to avoid confusion, as was clearly its duty and legal, as well as moral, responsibility.

> "The burden is on the later comer in an established field to exercise a proper degree of care and caution in these respects, so as to avoid such deception or confusion. If defendant had performed its full duty in these respects, it would not be responsible for wrongful acts of retailers in substituting one wine for the other; but this the defendant has not done. It has adopted a trade-mark of such similarity that, taken with other similarities in bottle, label, and dress, the natural and probable result is that purchasers are confused or deceived. It must therefore be held responsible for all the consequences of its neglect or default; that is, in the present case, held responsible for the substitution practiced by retailers of Virginette for Virginia Dare, and the appropriation in consequence thereof of some part of complainant's good will and established trade.
>
> The wrongful consequences of defendant's conduct is intensified by its business policy of re-

fraining from advertising, and of selling this wine in bulk and at lower prices, and thereby enabling it to appropriate in larger measure the results of complainant's efforts and advertising, and tempting retail distributors to indulge in substitution and unfair competition."

Garrett & Co. v. A. Schmidt, Jr., & Bros., Wine Co., 256 Fed., p. 943, on p. 947.

(1) *Passing Off by Defendant's Methods Is Fraud.*

It is submitted that when the public (in this case the prescribing physician as well as the laity) having become accustomed to use this medicine, ask for plaintiff's product they are entitled to receive plaintiff's product, and that to furnish anything else than plaintiff's product is fraud.

The testimony already reviewed shows many instances of actual "passing off." The admissions of druggists show that they are aware that the practice is wrong and fraudulent. But they excuse their acts by saying defendant's agents told them they could do it.

It will be understood, of course, that to obtain testimony from druggists, particularly voluntary testimony, admitting these practices is very difficult as it is equivalent to a confession of dishonest practices on the part of the druggist himself. Therefore, the considerable number of instances proved in this case should be regarded as but samples of the practice which is followed generally by those who purchase defendant's product.

The sales of Quin-Coco, defendant's product, have been shown to be large, claimed by some of the witnesses to far exceed the sales of plaintiff's Coco-Quinine in several localities (for example, Kelton, p. 97,

Q. 14). It must be disposed of in some manner by the druggists who buy it. If the druggists have no calls or prescriptions for the product, the inference naturally follows that it is dispensed, as stated by so many witnesses, as a substitute for Coco-Quinine, and on calls and prescriptions for Coco-Quinine, thus taking from plaintiff the business and the profits in supplying the demand for Coco-Quinine, a business created and built up by plaintiff by great effort and at great expense.

(m) *Similarity of Trade Names and Likelihood of Confusion.*

That it is difficult, even for those familiar with the two products, to distinguish them by their respective names, is clearly shown throughout the record. Frequently, during the taking of testimony, counsel in examining witnesses would refer to the respective products by the wrong names, calling plaintiff's product "Quin-Coco" or defendant's product "Coco-Quinine" inadvertently.

It is not necessary to refer to these instances, many of which were corrected, but that they exist is shown by the admission of counsel for defendant on the record. In cross-examining witness Broussard in reference to a statement related by the witness concerning a conversation between one of the defendant's salesmen and himself, in which conversation the defendant's salesman had claimed to have sold five gallons of Coco-Quinine and the witness had told the salesman that he had not sold *any* Coco-Quinine because he did not have it for sale, and the defendant's salesman answered that he meant "Quin-Coco," which was the same thing. Counsel for defendant asked the witness (p. 186, Q. 11):

"Have you noticed, or do you know, that all through these depositions counsel in referring to either of these products have got the names mixed in the record so that the examiner has had to correct them?"

"Inherent Improbability."

Counsel for petitioner stress what they term the "inherent improbability of the respondent's case" (p. 36 et seq., Petitioner's brief.) They contend that because the old house of William R. Warner & Company bore a good name and for many years enjoyed an enviable reputation in the drug trade, it is inherently improbable that the present corporation named "Wm. R. Warner & Co.," organized in July, 1908—seven years after the death of Mr. William R. Warner—to take over the old house, which corporation is largely owned and absolutely controlled by the owners of the Pfeiffer Chemical Company of St. Louis (G. A. Pfeiffer, p. 1227, Q. 219), can, under its present management be guilty of the things complained of.

It is true that the old firm of Wm. R. Warner & Company was for many years engaged in the business of manufacturing chemists in the city of Philadelphia and enjoyed an extensive business with a high reputation as ethical manufacturers. This old firm should not, however, be confused with the corporation doing business today under the same name, but under the management of Messrs. Henry Pfeiffer and G. A. Pfeiffer. William R. Warner died in 1901 and after his death the business began to drift until in the summer of 1908 it was acquired by the enterprising owners of the Pfeiffer Chemical Company of St. Louis, Missouri. The Pfeiffer Chemical Company was started as a patent medicine concern about the year 1901 and

early began its practice of copying as nearly as possible the specialties and widely advertised preparations of other concerns and offering them to the drug trade to replace such specialties or to be substituted therefor. From time to time these men acquired established businesses of other concerns, some of which had an established reputation in pharmaceutical lines and some of which had widely advertised "patents" and specialties. It acquired the Kick-a-poo Remedies, the Bucklin line, King's New Discovery, Meade & Baker's mouth wash, Sloan's liniment, Searle & Hereth of Chicago and Wm. R. Warner & Company of Philadelphia, the last two houses being manufacturers of pharmaceuticals and of high reputation, but both reported to be in need of financial support when taken over.

While the long established reputation of Wm. R. Warner & Company and its good will were of great value, this does not change the fact that its policies were directed by the new management, the Pfeiffers of St. Louis, from the time the business was taken over (Kelton, p. 102, X-Q. 46). The names of these old concerns were used by the new owners as might be to their greatest advantage for money making purposes. (G. A. Pfeiffer, p. 1228, Qs. 231-233.)

It is not hard to see how a retail druggist who had for many years become accustomed to regard Wm. R. Warner & Company as an ethical house, when approached by a salesman representing that house, could be easily influenced by the representations the salesman might make, and particularly as in some instances, such as referred to in the testimony of Mr. Lavison, of Nashville, Tenn. (p. 698, X-Q. 64), and the testimony of Mr. Thurman (p. 807, Qs. 3-6), when

the salesman was accompanied by the president of the corporation, who joined with the salesman in assurances that the item offered for sale, as in that instance, Quin-Coco, could be purchased by the druggist and resold for Coco-Quinine. That the present management of the defendant concern should seek to utilize the fair name and high reputation of William R. Warner to influence the retail druggists, whose confidence he enjoyed, to do the things complained of merely aggravates the offense.

The practice of substitution, or of offering substitutes, and particularly Quin-Coco for Coco-Quinine, was so common that the officials of the Company seemed to regard it as a joke. This is shown by the testimony of Thurman (p. 809, Q. 14) where he tells of one instance where Mr. Merner, treasurer of the company, spoke of some retail druggist who had dispensed so much Quin-Coco from his Coco-Quinine bottle, Lilly, that the label on the bottle had become so dirty as to be illegible and the druggist had asked the Lilly salesman if he could not send him a fresh label to place upon this bottle. Mr. Merner was laughing about it.

It will be remembered that a similar incident was mentioned by plaintiff's witness and salesman Tisdale (pp. 249-250, Qs. 10-16), who told of retail druggists asking if he could not obtain fresh Coco-Quinine labels for their Coco-Quinine bottles so that the doctors when coming behind the prescription counter might note that he was apparently using Coco-Quinine, Lilly, on their prescriptions when, as a matter of fact, they were, then and previously dispensing Quin-Coco, but out of a Lilly Coco-Quinine bottle so that the physicians could not detect the fraudulent practice.

DEFENDANT'S OTHER SUBSTITUTES.

The record abounds with references to other items manufactured and sold by the defendant concern to be used as substitutes for similar items previously manufactured and made popular by other concerns. One favorite line of substitutes offered to the trade by defendant's salesmen apparently was their perfumes.

The testimony of Mr. Thurman (pp. 807-809, Qs. 4-13) shows the practice referred to and that it was a well recognized policy of the house is shown by the further fact that Mr. G. A. Pfeiffer also supported the policy. This is shown by the testimony of Thurman (pp. 822-823, Qs. 81-82).

It will be noted that this testimony was given by the witness with Mr. G. A. Pfeiffer present while the witness was testifying and no word of denial as to the incident was made then or later.

WITNESS VAN DALE testified (pp. 721-724, Qs. 3-18) that while he was a traveling salesman for the defendant concern, he noted comparisons between Quin-Coco and Coco-Quinine being made by Mr. Garvin by placing the respective preparations on white paper. He also told of the use by the salesmen of a perfume card furnished by the defendant concern to its salesmen and having on one side a list of perfumes of well known and widely advertised makes and on the opposite side a corresponding list of the defendant concern's substitutes.

WITNESS MEYER testified (pp. 725-728, Qs. 2-15) that he recognized the exhibit perfume cards referred to saying that the card on one side showed the names of the original perfumes and on the other side the names of the defendant concern's perfumes, which were de-

signed to be used as substitutes for the original, the number of the substitute on one side corresponding with the number of the original which it was designed to be substituted, listed on the other side.

The witness testified that he was the man who made these substitute perfumes for the defendant concern and he was given his instructions by his employers, the Messrs. Pfeiffer, saying (p. 727, Qs. 9 and 10) that:

> "They would bring me the report of some of their salesmen, to the effect that such and such an odor has a good sale; such and such an odor from another concern would have a very good sale, and that it would help our perfume business by reproducing it as faithfully as possible in a competitive article, meaning, of course, substitute our perfume with a somewhat similar name, or maybe a different name (as the name 'Vogue' is entirely different from 'Jickey') from the original perfume. * * * They would bring an original package or sample of the competitive brand, or original brand."

Witness Charles F. Allen, a former traveling salesman and assistant sales manager for the defendant concern, testified (pp. 755-756, Qs. 5-13) that he recognized the exhibit perfume cards as like one carried by himself and the other defendant's salesmen in selling perfumes, explaining that the perfumes listed on one side were the perfumes of the defendant concern and numbered to correspond with the perfumes on the other side, listed by the name of the original maker.

The inducement to the druggist to buy the substitute perfumes was the same, of course, as to buy the substitute pharmaceuticals, that is, to get something which he could dispense to supply the demand for the

original articles created by the original manufacturers and make a larger profit than would be possible by handling the original goods.

Plaintiff's Exhibit "Document No. 3."

the "blue list"

As indicating the policy of the defendant concern, plaintiff introduced in evidence as exhibits several editions of a certain document commonly referred to by the witnesses as the "Blue List," the same being a list of a large number of pharmaceutical preparations manufactured and first introduced and made popular by the other concerns, the name as adopted by the original manufacturer with the price of the goods and name of the original manufacturer being listed on the left-hand side of the sheet and the defendant's substitute preparation with its price being listed on the right-hand side of the sheet, each of defendant's substitute preparations being opposite the original preparation which it is designed to be used in the place of.

These lists were supplied by defendant to its salesmen in order that they might readily call to the attention of the retail druggist the defendant's preparations which might be used in the place of the original preparations, and show the difference in price as the inducement to buy. For example, near the bottom of page 1 of the list we find "Coco-Quinine, Eli Lilly and Company," the five-pint bottle being listed at $3.30 per bottle, while opposite thereto is "Quin-Coco, S. & H," the five-pint bottle being listed at $2.50. The defendant's salesman with this list was able to show the retail druggist how he could fill his prescriptions and calls for plaintiff's Coco-Quinine with defendant's

Quin-Coco and save 80c on a five-pint bottle; and, of course, make a proportionate or larger saving by buying larger quantities.

That said list was intended for such use and was so understood by the salesmen, is clearly shown by the testimony of a number of defendant's former salesmen who were examined as witnesses for plaintiff. For example, Earle R. Peabody testified (p. 447, Q. 11) on being shown the list and asked if it was used by Mr. Hagaman, defendant's sales manager, and if so, what use he made of it, answered:

> "Yes, it was used by Mr. Hagaman and as replaces for the advertised articles, that is the way I understood it, that these items of Warner's and Searle & Hereth's opposite the advertised preparations were exact replacers for them."

Witness Kelton, another salesman formerly employed by defendant, on being shown the list and asked if he recognized it and what it was, stated (p. 97, Q. 19):

> "It brings tears of pleasure and regret and several other 'res' to see this familiar paper before me. It seems like shaking hands with an old friend. It is, as before stated, what was known to me as our 'replacer's' list, and I always invariably tried to knock the eye out of every product known on this 'replacer' list as the original and sell our own 'replacers' which were printed on said list."

He was asked (Q. 20) what information the list gave relative to Coco-Quinine and Quin-Coco, and replied:

"The paper was always used by me to demonstrate the difference in the price between Quin-Coco and Coco-Quinine."

Similar testimony is given by other witnesses who formerly were employed by the defendant concern as salesmen as follows:

WITNESS THURMAN (p. 399, X-Q. 57), in reference to this "Blue List" testified:

"The blue list * * * contains the leading sellers and original specialties put out by the different houses and for which substitute preparations are offered by the Pfeiffer Chemical Company."

A long controversy following between counsel for defendant and witness over the question of what are and what are not "substitutes" and what is and what is not "substitution" is illuminating; also as to what is honest and dishonest on the part of salesmen. On this last point counsel endeavored to embarrass the witness by having him admit that he had been guilty of dishonest practices (X-Qs. 75-80). Witness justified the salesmen by placing the responsibility on the house.

On this subject see also, among others, the testimony of the following witnesses:

Hooper, p. 15, Q. 5; p. 17, Qs. 10-12.
Groves, p. 358, Q. 5.
Hardy, p. 375, Q. 56.
Thurman, p. 394, Qs. 17-18.
Peabody, p. 447, Q. 11.
Kuhn, p. 521, Q. 29.
Perine, p. 659, Qs. 6-7.

Bolenbaugh, p. 748, Qs. 22-23.
O'Connell, p. 975, Qs. 6-7.

Defendant attempted to offset the effect of this exhibit as evidence by discovering and obtaining from some former Lilly salesman a list which counsel for defendant put into the record, by agreement with counsel for plaintiff, with a statement printed on pp. 882-884, alleging in his statement submitting it that it is a list of "precisely the same significance as the Warner list offered in evidence by plaintiff and marked 'Plaintiff's Exhibit Document No. 3.'"

Mr. Charles J. Lynn, general manager of the plaintiff concern, was questioned in respect to this list (p. 860, Q. 12) and testified that the list was brought to his attention about a year or so after he became general manager of the business, January 1, 1907, stating that it had been in existence for some months before he learned of it, but as soon as it was brought to his attention he immediately instructed that its use be discontinued and that copies in possession of their salesmen be withdrawn and that to the best of his knowledge this was done; that the plaintiff concern had not except for this short time used such a list and, so far as he knew, no such list had been in possession of plaintiff's salesmen since his instructions were given (about Jan. 1, 1908) to withdraw the list referred to.

He explained further that the assistant who put out the list explained to him that he did it to save correspondence as traveling men frequently wrote in for the name of the Lilly item that would compete with some other item in the same field made by some other house, and in response to such inquiries he would send a copy of the list but afterwards concluded to send a copy to each salesman. Mr. Lynn

testified that he reminded the assistant that such a list was in absolute violation of the policy of Eli Lilly and Company because of the use to which an unscrupulous salesman might put it, to which the assistant replied that he felt that the statement with which he had headed the list made the Lilly position perfectly clear and that with such a statement he thought that the list would not be objectionable to the management. He also testified that the assistant called attention to the fact that no comparison of prices was made on the list and that such comparison was necessary in order to enable the salesman to push a product as a substitute for another. Notwithstanding the assistant's explanation, and the evident innocent purpose and character of the list, Mr. Lynn ordered the list immediately withdrawn and its use discontinued. This was done and no such list ever used in plaintiff's business thereafter.

The statement heading said list, as prepared and put out by said assistant, solely for his own convenience in saving writing letters, is as follows:

"COMPETITIVE PREPARATIONS

The following is a list of proprietary or semi proprietary articles made by other manufacturers followed by the name of a competing preparation made by ourselves.

It must be distinctly understood that our product is in no instance offered as a duplicate, a substitute or 'the same as' but on the contrary is submitted to the profession as a preparation that meets similar pathological conditions, or in other words, is a competing preparation the formulas of which may differ in many instances."

The list follows, beginning:

Aboline—PETRONOL," etc.

In no instance was the price of any article, either as made by the plaintiff or by the competitor given on the list.

Mr. J. K. Lilly was also questioned respecting this list by counsel for defendant on cross-examination (p. 905, X-Qs. 67-73) and explained that such a list had not been used by his company for a great many years; that he could not state when it was used but that Mr. Lynn might possibly locate the year when it was used.

Mr. J. K. Lilly further stated in reference to this "Competitive List" (p. 907, X-Q. 85):

> "Many of these Lilly preparations have been in use and manufactured by all manufacturers for so many years that their origin is unknown to me."

And further in respect to the purpose of the list (pp. 913-914, Re-D. Q. 122):

> "It was for the information of our salesmen and detail men. When finding the trade or physicians using quantities of competing preparations we could present the merits of our preparations that were designed to fill the same needs. In no case were these preparations intended as substitutes, as clearly indicated at the heading of the list in question."

If counsel for defendant believed that in this list he had found evidence that plaintiff was guilty of the same practices complained of by plaintiff, he certainly failed to obtain any proof of it. Mr. Lynn and Mr. Lilly both answered frankly respecting the list in so far as they had knowledge of it, and Mr.

Lynn showed clearly that no such list was ever approved by the management, or had ever been used with the knowledge of the management, or had ever been used at all for a period of more than a few months and, moreover, that the list itself showed on its face that it was nothing more than to give the salesman information as to the name of the Lilly product which correspond in physiological action with the competing product; no effort in any case having been made to imitate the physical appearance of the competitor's item. Many of plaintiff's preparations named in the list were of different formula and different physical appearance from the competing items and intended only to compete as medicines. However, notwithstanding the comparative innocent character of the list, the management ordered its use discontinued as soon as its existence was discovered, for fear some salesman might make unfair use of it.

ETHICS—PLAINTIFF'S STANDARDS.

Counsel for defendant during the taking of the testimony endeavored time after time not only as above indicated but also in various other directions to show by the witnesses that defendant's methods of which plaintiff complains in this case are similar to methods followed by other houses, and further, that plaintiff itself has been guilty of the same kind of practices. That plaintiff has the reputation in the drug trade of being one of the most ethical in the business and that its policy is controlled by the highest ethical standards and practices is testified to by numerous witnesses throughout the record. It is not necessary to prolong this brief by quotations or extended references to such testimony. It is shown by the testimony of wit-

ness Kelton that the Pfeiffer's themselves recognized the fact.

Mr. Kelton was asked (p. 98, Q. 23) his opinion of the standing of the house of Eli Lilly and Company, and he answered:

> "I have always heard Mr. Pfeiffer (and I trust I will be pardoned for referring to him so often) refer to Eli Lilly and Company as the most ethical pharmaceutical house in the United States."

The spirit controlling the Lilly policy is shown by an incident that occurred after the beginning of the taking of testimony in this case. At the close of the first day's session in Indianapolis a conversation took place between Mr. G. A. Pfeiffer, on the one side, and Mr. Lilly and Mr. Lynn, on the other, in which Mr. Pfeiffer had suggested that there were certain items on the Lilly list which were original with Wm. R. Warner & Co. Mr. Lynn when testifying (p. 857, Q. 9) relative to certain items on the Lilly list that defendant contended were original with other houses, said:

> "I note in this list several items made by one or another of the Warner associated houses which, since the beginning of this suit we have taken out of our list following a conversation with Mr. G. A. Pfeiffer in which he stated that in those items he felt we were trespassing on his rights. This was the first suggestion from Mr. Pfeiffer that he felt we should withdraw these items or modify them that had come to my attention, and in withdrawing these items or modifying them to meet his views we only followed what has been our invariable custom whenever we have been advised by other manufacturers that we have unwittingly trespassed in any way."

Again (p. 859) in answer to Q. 10 he said.

> "It is not the practice of Eli Lilly and Company to imitate or duplicate the specialties of other manufacturers, as has been stated. When we have unwittingly done so we have never hesitated to accede to requests to either discontinue or modify the product. We abhor this practice which, in the early days of my connection with the pharmaceutical business, was a somewhat common practice, and is today on the part of a certain class of pharmaceutical houses, and we object to its practice upon us just as much as we do the idea of practicing it upon others."

Mr. Lynn's letter to Mr. Pfeiffer notifying him that the items complained about had been withdrawn by Eli Lilly and Company, is printed beginning at the bottom of p. 862.

He said further on this subject (p. 869):

> "I would like to say also that we took the first opportunity possible to make the changes and discontinuance that Mr. Pfeiffer indicated he thought should be done. * * * I would like to say further with reference to not all but several of these items named by Mr. Pfeiffer, that the formulas for the products were given us by Mr. Frank S. Hereth, who was in our employ as a pharmacist, this being the same Mr. Hereth who was one of the founders of the Searle & Hereth Company of Chicago. His coming to us was some time after he severed his connection with the Searle & Hereth Company. I think Mr. Pfeiffer was no doubt justified in his suggestion, and certainly it was our pleasure to do what he thought, and we admitted by our action, was the right thing to do, as has always been our attitude toward all competitors."

The facts in respect to these items were that Mr. Hereth was the originator of the formulas; that some time after selling the Searle & Hereth Company to the Pfeiffer Chemical Company, he came to work for plaintiff and made up these preparations from his own formulas, and this led to the placing of the items in plaintiff's list without any thought that Mr. Hereth had not the right to do this thing.

On p. 868 Mr. Lynn tells of the only other instances within his knowledge where plaintiff received any complaints from any source relative to infringing upon the rights of others.

While plaintiff makes many—probably hundreds—of preparations that are competitive with preparations made by other houses it does not make substitutes for preparations made by other houses.

Counsel for defendant questioned Mr. Fly, one of plaintiff's witnesses, in respect to an item generally understood to be a general line item "Elixir Viburnum Compound" found in plaintiff's list (p. 231, X-Q. 53-57) and asked the witness if he did not consider it a replacer for Hayden's Viburnum Compound." He replied in the negative, and then was asked why, and replied:

> "Because it is not alike in color, odor, or taste, the same as H. V. C. The formula of Hayden's Viburnum Compound is a hidden formula which no competing manufacturer knows nor are they in position to make a piece of goods so nearly like in its physiological action, as to take the place of H. V. C. I would say further that there is a piece of goods manufactured by William R. Warner that in odor, color, and taste is so nearly like Hayden's Viburnum Compound in its general ap-

pearance that it is used in a number of places as a substitute remedy for Hayden's Viburnum Compound."

He stated futher (X-Q. 57):

"I have stated in my previous answer that this item (plaintiff's) was distinctive in its odor, color and taste, so completely so that it could not be used as a substitute for H. V. C."

Every effort made by counsel for defendant to show that plaintiff has itself been guilty of the unfair practices which it charges against defendant only served to emphasize the high ethical standards which have always controlled plaintiff's business policy.

GENERAL LINE OR OPEN FORMULA PREPARATIONS

It is well known that there are hundreds of drugs and medicines listed in the United States Pharmacoepia and National Formulary that are manufactured by all pharmaceutical manufacturers and are known as "general line" or "open formula" items.

Counsel for defendant sought through the testimony of Mr. G. A. Pfeiffer, Mr. George M. Beringer, and others to show that in the Lilly catalogue are listed a large number of items corresponding in physiological action to items or drugs previously manufactured by other concerns. This presumably to base an argument that what defendant has been shown to have done in the instant case is common practice and therefore permisible.

Mr. J. K. Lilly, president of the plaintiff concern, and himself a chemist and graduate pharmacist, ex-

plained in respect to these items, that they are what is commonly termed "general line items" common to all houses, and showing clearly that none of them were intended for and could not well be used as substitutes.

Among the items is a natural, colorless mineral oil, which all pharmaceutical manufacturers sell, each under its own name, the competitor's name being "Aboline" and plaintiff's "Petronol;" and so on through the list, many of the items referred to are shown to be ordinary drugs made and sold freely by all houses but usually each house adopting a name of its own to distinguish its product from that of its competitors. This was true in the Lilly list, the Lilly products being identified clearly by Lilly names adopted for the purpose and in many instances made up by different formulas and of different physical appearance.

Mr. Lilly was subjected to a long cross-examination beginning on p. 900 and ending on p. 912, in respect to these items, answering freely all questions propounded and explaining clearly the differences between the Lilly preparations and the competing preparations.

The underlying idea in the questions seemed to be to have the witness admit that planitiff's preparation was of a similar nature and for a similar use to another preparation previously introduced and exploited by a competitor, and then to ask the witness whether or not the exploitation by the original house did not create a market for that class of preparations and if the plaintiff concern did not get some benefit of that market when it introduced its competing item. To all these questions the witness frankly answered "Yes."

In the instant case, it may be observed that plaintiff originated the formula for Coco-Quinine, that so far as its medicinal characteristics are concerned the defendant evidently has been able to substantially duplicate the formula, that plaintiff's exploitation of Coco-Quinine has undoubtedly created a large market and demand for a *liquid preparation containing quinine sulphate.* Plaintiff has also shown that this preparation can be produced and offered to the drug trade and medical profession in a large variety of colors and of a large variety of flavors so that physically it can be easily distinguished even "naked," as stated by the Court of Appeals, from plaintiff's product. If defendant wishes to honestly compete with Coco-Quinine the field is open for honest competition. Such competition would not excite the slightest opposition or complaint from plaintiff.

OTHER IMITATIONS

It is urged on behalf of defendant as an excuse for its conduct complained of, that other manufacturers have also imitated plaintiff's Coco-Quinine and put their imitations on the market. This point deserves but little attention. The evidence shows that a number of such preparations were discovered by defendant's organization and sample bottles thereof obtained and introduced as exhibits. It is shown by the testimony of Mr. Lilly (p. 896, Qs. 11-14) and Mr. Lynn (p. 855, Q. 8) that some of them had never been heard of by plaintiff's officials; that as to the others, with the exception of two or three, they were of comparatively no consequence being unsatisfactory as pharmaceuticals and giving plaintiff no particular concern. The

sales of such preparations must be compartively limited and probably confined to restricted localities.

While defendant's testimony shows that, at least, attempts had been made by others to put a Chocolate Quinine preparation on the market to duplicate Coco-Quinine at about the time or a little earlier maybe than when defendant achieved its success in this direction, yet such efforts were unknown to plaintiff until defendant's preparation had become known. (J. K. Lilly, p. 896, Q. 14.)

DIFFICULT TO DUPLICATE.

It is shown in the evidence that it is not an easy matter to duplicate a high class pharmaceutical preparation; that even after the ingredients and their proportions are known, the method of compounding, without which a perfect duplicate can not be produced, is difficult to discover, and therefore imitations or counterfeits of original pharmaceuticals which are satisfactory in use are not common (LaWall, p. 1272, Qs. 36-38; Lynn, p. 860, Q. 11).

Both of defendant's experts, Mr. Beringer and Mr. LaWall, were members of the Committee on the Revision of the National Formulary. Mr. Beringer was chairman of a subcommittee which, among other things, undertook to devise a formula for a chocolate quinine mixture to be standardized and published in the next revision of that work.

WITNESS LAWALL testified (p. 1269, Q. 24) that the Committee on Revision was appointed by the American Pharmaceutical Association, consisting of fifteen members, and (p. 1270, Q. 33) that this revision committee had considered placing in the National Formulary a preparation similar to Coco-Quinine. He noted

by a circular letter dated February 5, 1910, that the proposition to add such a preparation was approved by twelve of the fifteen members, all of the members who voted, and that this job was referred to Committee B of which Mr. Beringer was chairman. He referred to various bulletins from year to year until he came to Bulletin No. 75, dated August 15, 1914, which referred to the efforts to produce the chocolate quinine preparation and there he found the endorsement:

"No satisfactory formula yet devised."

This indicates that this committee of eminent pharmacists and chemists had the subject under consideration at least from February 5, 1910, until August 15, 1914, a period of more than four years and six months, without being able to produce a satisfactory formula.

The witness testified (p. 1271, Q. 34) that this endorsement "No satisfactory formula yet devised" meant that:

> "The subcommittee or individual to whom the preparation was referred for the construction of a satisfactory formula had not been able to combine the ingredients in a way that would make a preparation that would be pharmaceutically satisfactory."

Mr. Beringer on the same subject testified in reference to the National Formulary substantially as had Mr. LaWall (p. 1513, Qs. 43-48). He testified further (p. 1526, Q. 77) that the preparation of a formula for a syrup of quinine with chocolate was referred to a subcommittee of which he was the chairman, and that they tried out a number of formulas that were submitted and that they were not entirely satisfactory, concluding:

"So it remains the one subject on which that committee has not filed a final report and for which a formula has not yet been accepted."

He states further (p. 1527, Q. 78) that:

"It still remains as an unfinished business with the subcommittee B of which I was and am the chairman."

The witness was testifying on December 30, 1915. The subject was referred to his committee on February 5, 1910. His testimony, therefore, shows that after six years of effort his committee was still unable to report a satisfactory formula.

HOW DID DEFENDANT SUCCEED?

There are a number of references by witnesses throughout the record to statements made by defendant's salesmen to the effect that defendant had obtained the services of a chemist from the plaintiff's laboratories and by this means had obtained plaintiff's formula and thus was able to exactly reproduce plaintiff's preparation and for this reason the salesmen felt justified in assuring the druggist that defendant's preparation was exactly the same thing as plaintiff's Coco-Quinine.

For example see testimony of the following witnesses:

Blodau, p. 106, Q. 6; p. 108, Q. 20.
Dr. C. A. Noriet, p. 407, Q. 7.
H. M. Allen, p. 467, Q. 17.
E. B. Allen, p. 474, Q. 6.

In view of the difficulty experienced by Mr. Beringer and his committee as well as in view of other circumstances it seems *inherently probable* that such statements were true insofar as they relate to the source of the formula used by defendant.

These circumstances also probably explain the unsatisfactory character of the other preparations made by other manufacturers as imitations of plaintiff's Coco-Quinine as well as account for the success attending defendant's efforts in supplying a considerable part of the demand for plaintiff's product with its substitute Quin-Coco.

QUIN-COCO NOT DISTINGUISHABLE FROM COCO-QUININE

From time to time in the examination of witnesses, counsel for defendant attempted to show that, as a matter of fact, defendant's product Quin-Coco is not a duplicate of plaintiff's product, Coco-Quinine, that there are substantial differences in physical characteristics, particularly in appearance. It is true, of course, that there may be a difference in the identical shade of color. This is true as between two different batches of plaintiff's product, is probably true as between two different batches of defendant's product, and is probably true as between one batch of plaintiff's product and another bath of defendant's product. It is not true, however, that there is no regard paid by either manufacturer to obtaining a substantially uniform color and it is not true that there is ever such a difference between the shade of color of one batch and the shade of color of another batch, whether it be plaintiff's product or defendant's product, that any user, either physician or patient, considering them separately, could ever tell

the difference, although possibly an expert with the two preparations submitted together for comparison might detect a slight difference. That the similarity in color was so close as to deceive many retail druggists in the comparisons made of the two products by defendant's salesmen in their efforts to sell Quin-Coco is shown by abundant testimony.

If any further proof were needed of the fact, it is afforded by the testimony of defendant's distinguished chemical and pharmaceutical expert, Dr. Beringer himself.

After weeks of preparation and abundant opportunity for analysis, comparison, and all kinds of tests desired, this witness testified that he did not know of any other substance than chocolate or cocoa which might be used in a syrup preparation of quinine and serve to suspend the quinine sulphate. That chocolate is absolutely the poorest suspending medium of all the mediums used by Mr. Bibbins in his experiments is fully substantiated by testimony of disinterested chemists and pharmacists of undoubted qualifications, Dr. Beal, Dr. Caspari, Dr. Winton, and Dr. Hilton, all agreeing as to this.

After Mr. Beringer had spent nearly a day in putting his views upon record, he was asked a few questions on cross-examination relative to the similarity of defendant's preparation, Quin-Coco, to plaintiff's preparation, Coco-Quinine.

Beringer's Blunder

The witness was asked (X-Q. 134) if he had examined and analyzed plaintiff's Coco-Quinine. He admitted that he had made a partial examination of Coco-

Quinine in connection with his work with the national formulary. He was then asked if he had examined and analyzed defendant's product Quin-Coco (X-Q. 136). He admitted that he had. He was then asked (X-Q. 138) if he noticed any material difference in the two products. He answered:

> "There is some physical difference in the samples that I examined."

He was then asked (X-Q. 139) if they would be apparent to laymen. He replied that he believed they would be apparent to the ordinary user.

He was then asked (X-Q. 140) what differences he had in mind. He replied:

> "There is some little difference in the color which to me is quite distinct."

He was then asked which is darker (X-Q. 141). He replied:

> "The S. & H. Quin-Coco is darker. *It is distinctly* shown.

He was then asked if it was thicker (X-Q. 142). He replied:

> "No, I do not think it is any thicker. The samples I have examined seem to be of about the same consistency."

He stated that he made the comparison of the two preparations *at the time,* but did not discover any difference that would distinguish them as to taste (X-Qs. 144-145). He was then asked if he discovered any difference "in the appearance" (X-Q. 146). He replied:

"In the appearance, yes, I should say so. There is difference in the appearance."

Then followed this examination:

"X-Q. 147. Do you think a customer accustomed to using Coco-Quinine, if given a bottle filled with Quin-Coco could tell the difference?

"A. A critical customer could.

"X-Q. 148. From its appearance?

"A. My experience has been that customers in drug stores are quite critical today. A little difference in flavor or a little difference in shade of color is noticed."

Then to test the matter and give the witness, himself a distinguished chemist and pharmacist, who had so recently examined and compared these two preparations, an opportunity to prove the accuracy of his judgment, counsel for plaintiff took defendant's exhibits, Beringer Samples, bottles Nos. 12 and 13 (one containing Coco-Quinine and the other Quin-Coco), and after shifting them about in his hands, handed witness one of them with its label concealed, and asked the witness:

"X-Q. 149. Without observing the label, will you tell me which product is in this bottle?

"A. Will you let me see the other so that I can make a comparison?

"X-Q. 150. No, the customer could not compare them.

"A. All right. Then I am simply judging without a comparison of the two. I should say that this was the S. & H. Quin-Coco.

"X-Q. 151. Now, will you observe the label, and state what it is?

"A. Coco-Quinine, Lilly. That was without the two together. With the two together, I can tell the difference in shade very quickly."

Thus all that witness had previously testified to on this is shown to have been pure theory and of no practical value.

It will hardly be contended that any novice or ordinary user would be able to distinguish one preparation from the other when Mr. Beringer, recognized as one of the leading pharmaceutical chemists of the country, who had spent days and perhaps weeks in comparing these preparations and considering this subject, preparing his most elaborate and exhaustive answers (largely read from manuscript) to questions propounded by counsel for defendant (also read from manuscript), was unable to do so.

Mr. Beringer had already testified that in taste the two preparations were identical and he *proved* by his answer (X-Q. 150) that in color they are so nearly identical that even chemists of wide experience in pharmaceutical work, after exhaustive study and comparison at the immediate time, cannot tell one from the other.

It should be borne in mind that the bottle handed to the witness and which he wrongly identified, was one of his own samples (No. 13) introduced by his own testimony and a part of the identical preparation that he had been experimenting with, testing, and making his comparisons with.

As before stated, it is admitted that there is a shade of difference between the color of different batches of the preparation of each house. Witness Fritsch for defendant so testified in respect to defendant's product and it likewise appears of record in respect to plaintiff's product. This is due entirely to a slight difference in the color of different supplies of cocoa or chocolate used as obtained from time to time, although

both houses endeavored to secure chocolate of a standard shade of color. That defendant has succeeded, so far as the purpose of simulating plaintiff's "dress" for its product is concerned, in duplicating plaintiff's shade of color, is clearly proven by Mr. Beringer's testimony.

MEDICINE—NOT A FOOD

It should be borne in mind that the product in controversy is a *medicine* and not a *food* or a *confection;* that medicines are compounded to serve certain therapeutic purposes, and that the value of the medicine as a therapeutic agent is the sole consideration to which the scientist, who by his research and experimental work produces the preparation, or the physician, or the druggist, is directing his attention. The *color* or the *flavor* of a medicinal preparation is of no consequence when considering its value as a medicine.

Medicine is not prescribed because of its color or its flavor. Such suggestion would be considered a joke by any physician or any druggist. The contention, therefore, that chocolate, or any other coloring and flavoring medium, used in medicine, has any essential function, or has any "functional" purpose, must be seen to be ridiculous when the matter is viewed from the standpoint of plain common sense. In articles of food, chocolate may be and is an important element. Some articles of food can not be made without it. Not so with medicine.

Many medicinal agents are unpleasant to take even in the form in which they are administered. Quinine sulphate is a medicinal agent which but few people can take in its uncovered form. Because of this, it is commonly administered in capsules or pills. Some

people object to taking medicine in the form of capsules or pills, and others are incapable of taking it in such form. Quinine sulphate is perhaps one of the most extensively used drugs known to the medical profession, and for many years prior to the advent of Coco-Quinine the need of some means whereby this most bitter salt of quinine could be administered to patients in liquid form was recognized. No such means was discovered (notwithstanding the literature contains references to efforts made in this direction) until Dr. Eberhardt, carrying out the instructions of Mr. J. K. Lilly, conducted his experiments which resulted in the production of the satisfactory formula for Coco-Quinine.

"SUBSTITUTE"—SIGNIFICANCE OF

Counsel for defendant seem to contend that the word "substitute" signifies legitimate competition and the words "passing off" are the only ones that signify fraud. Counsel's purpose in so arguing would seem to be that the Court in reading the testimony, may attach to the word "substitute," when used by witnesses, the significance of *legitimate competition* and only consider their testimony to suggest unfair competition when the words "passing off" are used.

The words "substitute" has but one significance in the drug trade, and that is one that is odious to good morals and good ethics. A "substituter" in the drug trade is not regarded as an ethical druggist and the term "substitution" is never used in the drug trade except in the sense of unfairly passing off to the customer, or by filling a prescription with, some substitute preparation in place of the one called for or pre-

scribed, without advising either the customer or the doctor.

"Substitution" is considered dishonest in the drug trade and while, contrary to the claims of counsel for defendant, its practice is quite general and a considerable proportion of the retail druggists indulge in it, it is only because of the inducement to make more money and the fact that many of them are practically driven to it by the practices of their competitors and the persuasions of the manufacturers who hold the lure of larger gain before them.

Throughout all of the record and the testimony of the numerous witnesses examined, there is not a single instance of a witness using the term "substitute" or "substitution" in any other sense than as synonymous with "passing off." In fact, the distinction which counsel for defendant would have the court recognize in this case is one that is seldom recognized by the laity in any branch of business but is chiefly recognized, if at all, in the arguments of counsel or the decisions of the Courts in defining the lines of distinction between fair and unfair trade.

It must then be understood, that in all the testimony the term "substitute" is used by the witnesses as synonymous with the term "passing off" and that this means giving to the physician, to his patient, or to the customer coming to the drug store and asking for Coco-Quinine, defendant's product, Quin-Coco. This is giving to the customer a thing different from the thing asked for; and this is fraudulent substitution and not honest competition.

Throughout the record counsel for defendant frequently interrogated witnesses respecting their views on substitution and their understanding of what the term "substitution" meant.

Witness Thorburn, chief chemist of the Pitman Moore Co., manufacturing pharmacists and a competitor of both plaintiff and defendant, was called as a witness for plaintiff and on cross-examination by counsel for defendant testified (p. 34, Qs. 30-32) that a "substitute" is "something intended to entirely replace the article that is already on the market;" that it is possible to "furnish an article intended to replace the successful one from a *medicinal* standpoint without intending to duplicate the successful article in every particular, pharmaceutically or in regard to the *physical characteristics* of the preparation." He was then asked:

> "X-Q. 32. If two preparations are pharmaceutically the same, would the mere change in color of one by any important coloring matter take it out of the class of substitute? A. I think it would. Such a change would make it impossible to deceive a purchaser into thinking he was getting one article for the other."

This seems to be a very fair statement of the general understanding of those engaged in all branches of the drug business and also the physicians as to what a "substitute" is. A substitute preparation, therefore, is one that can be used by the retail druggist in the place of an original preparation made by another house and the purchaser be deceived into thinking he is obtaining said original.

See also testimony of the following witnesses:

> Hooper, pp. 18-19, Qs. 20-23; p. 24, X-Qs. 92-93.
> Dr. Perkins, p. 133, X-Qs. 8-10.
> Chestnutt, p. 149, X-Qs. 17-18.
> Persell, pp. 198-200, X-Qs. 51-67.

These are but examples of similar testimony of many witnesses throughout the record.

"CRIME" OF SUBSTITUTION

It need not be stated that the relation between patients and physicians, and physicians and druggists is an intimate and confidential one, and that it should be respected and protected to save the public from being imposed upon. Even in the case of medicines the formulas of which have become public and may be found in the lists of formulas published for the guidance of physicians and druggists, it is recognized as the duty of the druggist to fill prescriptions according to the name designated on the prescription; and defendant does not dispute that when Lilly's product is called for by anyone it is "a crime" (as testified by Witness Fly, Q. 11, p. 226) to fill that prescription with the product of the defendant. But defendant asserts that everything short of this is proper; that he may copy the formula of the plaintiff not only in the essential matters recited by the court, but in the non-essential details by which the plaintiff's product has become known and is identified to the physician and to the patient. For plaintiff's product would not be recognized as distinctive if comprising simply the combination of quinine sulphate and yerba santa—the essential ingredients, one the therapeutic agent and the other the agent for masking its bitter taste—in simple syrup. Some identifying means had to be employed to distinguish this new compound and to that end the plaintiff employed chocolate. This was not used to disguise the bitterness of the quinine, for that was the function of the yerba santa, an essential function. It was done and done only to impart a distinc-

tive color and flavor though, as the record shows, there were available to the plaintiff many other substances, any of which might have been used to impart a distinctive color and desirable flavor, some of which were superior even to the chocolate or cocoa, as shown by the testimony of celebrated experts reviewed hereinafter.

WITNESS FLY, testifying for plaintiff (p. 226, Q. 11), stated that he was for many years engaged in the business of a registered pharmacist and for four years occupied the position as president of the Mississippi Board of Examiners and served a term as president of the Mississippi Pharmaceutical Association. He expressed his opinion of substitution as follows:

> "As a man actively engaged in the filling of prescriptions I felt that the prescription work was a sacred trust, based upon confidence and any departure from the accuracy of dispensing was considered entirely out of my prerogative and, as history will bear me out, the slogan that I used in connection with my business was 'Substitution considered a crime.' "

He explained (Q. 13) the reason why he considered substitution a crime, as follows:

> "For the reason that in dispensing medicine under the direction of an attending physician, I thought in presuming to substitute one item for another I was taking upon myself a great responsibility and one that did not come within my province, feeling that in presuming to substitute one item for another I might possibly be undoing all that had gone before in the way of diagnosis by the physician who is the legitimate source for the prescribing for his patients."

Mr. Fly has in these two answers very clearly and forcefully stated why substitution is a "crime" and why it should be prevented, particularly in a case such as this where the preparation goes "naked" to the patient, bearing only such label on the package as the druggist may choose to put there, and particularly when it can be prevented by merely requiring, as the Circuit Court of Appeals has done, that defendant use some other substance than chocolate to color and flavor its preparation.

SUBSTITUTION UNETHICAL AND DISHONEST.

WITNESS THORBURN, whose testimony is again referred to because he is an official of a competing house of both parties to this case and entirely unbiased and fair, testified (p. 38, RDG. 69) that it is not considered good morals or good business ethics for one drug manufacturing concern to place upon the market a preparation which can be used as a replacer or substitute for a successful specialty of another concern, and that his house (the Pitman-Moore Company) does not follow such practices (Q. 70) for the reason (Q. 71) that it does not help the reputation of the house and is not directly profitable and does not win support of the customers, concluding:

"There is a decided sentiment among our customers against this practice."

The witness further testified (p. 36, X-Q. 49):

"As long as I have been connected with the drug trade there has been a protest against such duplication and I do not think that it has been as common to duplicate these preparations as it has been to *make new ones.*"

And further, as to the extent of the practice in the drug trade (X-Q. 52), he testified:

> "Considering the number of preparations that had been introduced into medicinal use, I do not think that the drug trade generally has made a practice or did it at any time make a practice of duplicating a large number of these preparations in such a way that the new article could be sold for the old and the purchaser deceived."

Mr. J. K. Lilly was asked (p. 44, Q. 13) to state the ethics of business among reputable concerns relative to placing upon the market preparations of similar character. He replied:

> "Many manufacturers in the United States scrupulously avoid duplicating, in a manner that might deceive, the preparations of other manufacturers, especially those designated as specialties. This practice is generally considered among manufacturers as good morals and proper ethics and is considered perfectly legal as long as it does not tend to create a monopoly or restrain trade. Other manufacturers make it a practice to duplicate as nearly as possible preparations of others in such manner as to deceive, rendering it possible to substitute the one preparation for the other.

The witness further testified (p. 45, Q. 15) as to the practice of manufacturers in duplicating preparations:

> "What is known as general pharmaceuticals, being common property, all manufacturers feel perfectly free to make and market them without

any restrictions whatsoever. When one manufacturer, however, creates something new and original, expending time and money in creating, introducing and establishing same, many other manufacturers do not feel that they have any legal or moral right to duplicate the preparation precisely in color and flavor or general nature and undertake to secure trade that has been created by the originator. They, therefore, refrain from such practices. *This does not interfere in the least with their creating something entirely different yet competing in the same field of usefulness.*"

ERNEST G. SWIFT, secretary and general manager of Parke, Davis & Co., another large competitor of both plaintiff and defendant, testified (p. 64, Q. 7) that his house has not placed a preparation on the market like Coco-Quinine because they have "respected what they believe to be the priority rights of Eli Lilly and Company."

The testimony of Witness Winchester (p. 112, Q. 9) shows that Sharpe & Doehme, another large pharmaceutical manufacturing concern and a competitor of both parties to this suit, refused to consider putting a preparation on the market which could be substituted for plaintiff's Coco-Quinine.

FRANK S. HERETH, the former president of Searle & Hereth Company, the label of which concern is used by defendant on its packages of Quin-Coco because, as testified by Mr. Pfeiffer, they considered that after purchasing this concern they had a right to use the name "Searle & Hereth" as they might deem to their best advantage, testified (p. 353, Q. 11) as follows:

"Q. 11. Do you mean that the Searle & Hereth Co. declined to make any preparations which

would compete with preparations manufactured by Eli Lilly and Company? A. No, I do not mean this, since we made many preparations that were in a sense competitors, but I regard the form in which this preparation was made as original and felt that we should not make a preparation similar to it in composition and appearance *in order that it might be used as a substitute for 'Coco-Quinine.'*"

This testimony by Mr. Hereth shows the policy of the Searle & Hereth Co. under his management, which no doubt accounts for the reputation acquired by that concern during its comparatively brief existence prior to its acquisition by the Pfeiffer Chemical Company, as an ethical house entitled to the confidence of the drug trade and medical profession. It also accounts for the adoption of the Searle & Hereth label for Quin-Coco by the officials of the defendant concern, for it no doubt had the effect of impressing the retail druggist with the argument that the preparation had merit as a pharmaceutical.

Dr. E. C. Fisher, of Richmond, Virginia, a witness for plaintiff, defines the attitude of the medical profession toward the practice of substitution. He testified (p. 325, Qs. 11-12) as follows:

"Q. 11. How is substitution by the druggist regarded by the medical profession in this community? A. We do everything that we can to prevent it, and if we find a druggist substituting on us we try to keep other prescriptions from going there.

"Q. 12. Do you regard it of importance to your practice or to your patients that your prescriptions be filled with the drugs you specify, and if you do, why? A. It is important to both doctor

and patient, for if the druggist substitutes we don't know what results are to be derived from the prescription, as we expect definite results from each drug used in every prescription."

Dr. Perkins, of Lake Charles, Louisiana, a witness for plaintiff, also testified (p. 132, Q. 7):

"Q. 7. How do you feel or what is your opinion of the practice of substitution and what are your reasons for your opinion? A. I always think that substitution should be condemned because a physician is not always in a position to know what drug is being substituted and whether it has the same medical value as the original which he intends to prescribe."

For further views respecting the ethics of the drug trade and medical profession on this question, see testimony, among others, of the following witnesses:

Hooper, p. 27, X-Q. 108.
Merithew, p. 61, X-Q. 18.
Sand, p. 104, X-Qs. 14-16.
Blodau, p. 108, X-Qs. 17-18.
Scott, p. 120, X-Q. 52.
Bowden, p. 139, X-Qs. 12-13.
Chestnutt, p. 149, X-Q. 18.
Schaeffer, p. 157, X-Q. 28.
Barnes, p. 181, X-Qs. 18-19.
Dr. Gargrave, p. 351, Q. 6.

COMPARATIVE VALUE OF TESTIMONY

Plaintiff has not relied upon the testimony of its own officials and employees for proof to support the allegations of its bill, but has introduced the testimony of an unusually large number of witnesses having no

financial interest in the plaintiff concern, no relationship to the officials of plaintiff concern, and no interest in the outcome of the litigation, in an effort to prove beyoud doubt that each and every allegation in its bill of complaint is well founded in fact. The Circuit Court of Appeals found the proof sufficient.

Defendant's proofs consist almost entirely of denials by its officials and its employees of the testimony submitted on behalf of plaintiff. Defendant introduced the testimony of Mr. Beringer and Mr. LaWall as chemical experts, in an endeavor to support the theory that chocolate is an ingredient essential to the manufacture and sale of the medicine; the testimony of Mr. Mulford and Mr. Stone to show that H. K. Mulford & Co. put out a chocolate quinine preparation in 1904—four years after the plaintiff preparation was on the market; the testimony of U. S. McClellan and O. G. Salb to show that John G. Milliken & Co. began making quinine preparation in July, 1905; the testimony of E. F. Helbig to show that the Meyer Brothers Drug Co. of St. Louis began making a chocolate quinine preparation in 1905; the testimony of T. K. Boesch, a retail druggist of Philadelphia, to show that retail druggists carry in stock preparations of various manufacturers similar in composition which can be used interchangeably; the testimony of Henry C. Blair, a retail druggist of Philadelphia, to show that he at one time made up a chocolate quinine mixture for Dr. Samuel K. Ashton in his drug store, but did not know whether it was used or not and that the quantity was about four ounces; the testimony of W. C. Kerstann to show that the Webster-Warnock Chemical Company of Memphis put up a chocolate quinine mixture about 1909 or 1910. Aside from these witnesses, whose tes-

timony is comparatively unimportant in its bearing upon the real issue, all of the testimony for defendant was by its own officials and employees.

This testimony consisted, as before stated, very largely in merely denying the allegations of plaintiff's witnesses.

Mr. Henry Pfeiffer, for example, in his testimony uses such statements as "I did not;" "Not true;" "I can not say;" "I do not recollect," etc., etc.

Mr. Kelton had testified that Mr. Henry Pfeiffer had discussed with him the subject of making Quin-Coco as a preparation to sell against Lilly's Coco-Quinine and Mr. Pfeiffer was asked if he ever discussed the subject of Quin-Coco with Mr. Kelton (p. 1245, XQ. 111). He replied:

"Not that I know of."

When asked what he would say to the salesmen about the "Blue List" in giving the salesmen instructions, he replied (p. 1246, XQ. 118):

"I do not recollect."

When asked what he instructed his salesmen about their chief duty, he replied (XQ. 119):

"Get as many orders as they could."

Mr. Merner denied everything that Mr. Thurman had said in reference to his conferences with Merner and what Merner had said to him. When he was asked by his counsel how and when Thurman's employment was terminated (p. 1290, Q. 85) he said:

"I do not remember the exact year—"

But then his counsel called his attention to Thurman's testimony as to the date when said employment terminated and he unhesitatingly finished his answer by saying:

"But I think it was in December, 1912."

Counsel for plaintiff had the Examiner note at this point that the witness' attention was called to Thurman's testimony by Mr. Rawle and that Thurman's statement of the fact was accepted by the witness in making his answer. He did not even remember the year, but without hesitation accepted Thurman's statement not only as to the *year,* but as to the *month* of the year. The readiness with which Mr. Merner accepted Mr. Thurman's statement as to one fact shows that he at least had confidence in his veracity. This casts a grave doubt upon the value of Merner's denials of the other things Thurman had said, particularly when it is considered that Thurman was a disinterested witness, under no obligation to either side, while Merner was one of the chief officers of the defendant concern.

Defendant's sales manager, Ritayik, after denying all of the things alleged by plaintiff's witness as to his conduct in the sale of Quin-Coco, testified (p. 1309, XQs. 94-95) that he never heard one of his salesmen represent to a retail druggist that Quin-Coco could be dispensed when Coco-Quinine was called for and, in fact, that he *never heard one of his salesmen mention Coco-Quinine to a retail druggist.* The "inherent improbability" (to borrow a phrase from counsel for defendant) of this testimony does not need to be commented upon.

And so throughout defendant's testimony will be

found many of these vehement protests by the defendant's salesmen that they did not do the things charged against them by plaintiff's witnesses. But standing against their testimony in every case is the testimony of two or more disinterested witnesses, while their testimony in each instance is given not only as an interested witness, an employee of defendant, but after full and complete instructions as to the character of the testimony desired by defendant to defeat plaintiff's case and after many months since the receipt of Exhibit O'Connell Letter No. 4, by which they obtained such instructions and in which they were requested to obtain the evidence required.

Witness Fritsch who, on cross-examination, admitted everything that Mr. Groves had said about the experiments in the Philadelphia laboratories in an effort to produce a preparation like Lilly's Coco-Quinine, with particular efforts directed to duplicating its color, except the date when these experiments were made, admitted that his statement in reference to dates was largely controlled by a conversation with his wife and upon information he obtained from her as to when they took a certain trip to Atlantic City (p. 765, Qs. 16-19).

He admitted that he talked with Mr. G. A. Pfeiffer about it (p. 768, Qs. 37-38) and that this was after the Pfeiffer Chemical Company came to Philadelphia, and he stated (p. 767, Q. 36) that Mr. George Martin told him to make the experiments.

"SALESMEN'S CONFIDENTIAL"

Counsel for defendant make strenuous protest against every suggestion that defendant has been guilty of anything unethical or wrong. As showing

this they point with great satisfaction to what they term the "Salesmen's Creed" printed on the last page of defendant's "Salesmen's Confidential," which, in other words is the confidential price list of the house used by the salesmen. They seem to argue that with such creed defendant could do no wrong.

This creed has been printed in all issues of this confidential price list since 1911, according to the testimony of witness Haffa (p. 1546, Q. 6).

Mr. Haffa could not tell the name of the author of this "Creed" but stated that it was printed, as appeared on p. 60, by courtesy of Sheldon University Press, Libertyville, Illinois.

Evidently someone saw this literary gem and thought it would look well in the price list and had it printed there. The salesmen were nearly all made to testify that they studied this confidential carefully and read the creed, and followed its teachings. None of them, however, on being asked respecting the particular admonitions of the creed, could specify except that it told them to be honest.

The former Warner salesmen who testified as witnesses for plaintiff did not seem to recall very clearly very much about the creed.

That this creed is all camouflage is evident from a reading of the numerous salesmen's letters sent by defendant to its travelers.

The letters may be searched in vain for any admonitions respecting honesty, ethical practices, refraining from mentioning competitors, etc., as outlined in the "Salesman's Creed" and about which counsel for defendant has so much to say in his examination of defendant's salesmen while they were testifying as witnesses.

Please note Kelton letter No. 31 on p. 614 exulting over a nice order for "Vogue," one of the Pfeiffer Chemical Company's substitute perfumes, as will appear in the evidence. Also Kelton letter No. 36, p. 617, congratulating Mr. Kelton on a fine order, including a gallon of "Quin-Coco." That Mr. Kelton was a pretty good salesman is indicated by letter No. 40, on p. 619.

Letter No. 42, p. 620, begins with the significant headline: *"What is more welcome than orders."*

In letter No. 44, p. 624, 2d and 3d paragraphs, are found these significant suggestions:

"Selling goods is your business."

"Proper suggestion is the greatest selling force known."

Mr. Henry Pfeiffer admonished Mr. Kelton to "go for your best and most doubtful trade first" when he found that the salesman of a competing house was also in Memphis (Q. 28, p. 626).

Mr. Kelton refers to the fact that Quin-Coco was the best seller he had in the pharmaceutical line *"after I once introduced it to the trade,"* noting that in one day at Dyersburg, Tenn., he sold twenty (20) gallons in five orders. This was on November 13, 1909, and Dyersburg was a town of only 7,000 population (Q. 34, p. 628).

Mr. Kelton claimed (Q. 36) that he used Mr. Garvin's statement in regard to the quantity being manufactured as an argument when he found a man who was not a buyer of Quin-Coco "to show him that we were actually *knocking the eye out of Eli Lilly & Co. in their sales of Coco-Quinine.*"

Note also the O'Connell exhibit letters, the same being another series of salesmen's letters from defendant to its travelers printed on pp. 980-1016. These

letters also contain many statements urging the travelers to make diligent effort in pushing the sale of many items on their lists designed to be substituted for original items of other houses. They can be searched in vain for any reference to the salesmen's "creed" or any admonition to follow the teachings of the salesmen's creed printed in the back part of the confidential price list. On the contrary, many expressions are found, such as these:

> "Make hay while the sun shines." (Letter No. 23, p. 1007.)
> "Seed that grows." (Subject of Letter No. 24, p. 1009.)
> "All together, let's reap while the reaping's good." (Letter No. 30, p. 1015.)

The only reference found in any letters to the salesmen's confidential is contained in O'Connell letter No. 29 (p. 1015) which tells the salesmen that the house is revising its "salesmen's confidential" and wants suggestions. This letter states:

> "We are revising Salesman's Confidential. This booklet is intended for the salesman exclusively, and we want the new edition to be perfect. To help make it so, send us your suggestions of the additions and changes you would make if you were selected to superintend the revision.
> "The purpose of the Salesman's Confidential is to give information, which taken in connection with the Epitome, enables you to know your line and quote prices intelligently and quickly. The Salesman's Confidential should be:—
> 1. Neat and legible.
> 2. Simple and concise.
> 3. Specific and clear.

4. Easy and quick of reference.
5. An answer to every question, either a salesman or customer might or will ask.

"Your suggestions will help make it so. Send them in at once. We are now revising.

Truly yours,

WM. R. WARNER & Co.,
G. A. PFEIFFER, *Treas.*"

It is significant that in this letter sent out to its travelers in September, 1916, after this case had been running for a year and nine months, no mention was made of the alleged standard of morals, "the Salesman's Creed," and no suggestion made of the purpose of this creed in the Confidential.

The conclusion can not be avoided that the efforts of counsel to establish a code of ethics for their client and give it good character in this proceeding, by resorting to this pretext of the "salesmen's creed" is a dismal failure. Except for the fact that it, the effort, seemed to be seriously undertaken and seriously pursued during the taking of the latter part of the testimony (nothing was said about it during the first stages of this proceeding), it would be considered but little more than a joke, particularly in view of the fact that the record abounds with proof of practices by defendant so entirely out of harmony with the spirit of its "Salesmen's Creed."

LACHES.

Defendant has sought throughout the record to make it appear that plaintiff has been guilty of laches by not more promptly beginning this action, arguing because defendant was allowed to proceed with its practices complained of for several years, that plain-

tiff acquiesced and is now estopped from asserting its rights.

This is contrary to the controlling rule of law and probably will not be urged seriously but the history of the matter may be briefly reviewed.

Mr. G. A. Pfeiffer testified (p. 1196, Q. 5) that Quin-Coco was first marketed in the fall of 1906 by the Pfeiffer Chemical Company, and (Q. 11) that since August 1908 Wm. R. Warner & Co. have been substantially the sole distributors.

It is true that Quin-Coco was listed in the Pfeiffer Chemical Company 1906 catalogue, but there is no evidence of any sales during that year, and Mr. Pfeiffer himself was not able to state (p. 1226, X-Q. 207) that any was made and sold during the fall of 1906; and (X-Q. 208) that he thought the preparation was in marketable form in the fall of 1906 but was unable to state positively, and (X-Q. 209) he could not state how much was sold during either 1906 or 1907, answering by comparison that there was less sold then "than we sell now."

The first evidence of any sale of Quin-Coco is in the testimony of witness Kelton who was employed by defendant and the Pfeiffer Chemical Company from 1901 to 1912. Mr. Kelton's own testimony was that this product was put on the market in 1907 and his list of duplicate orders (printed on pp. 568-583) shows that his first order for two pints of Quin-Coco was dated January 23, 1907, the next March 14, 1907, for five pints, and that during the year 1907 he sold ten gallons amounting to $39.15. As Mr. Kelton was acknowledged to be one of the best salesmen handling the product and covered a large territory, which was peculiarly a quinine consuming territory,

it is fair to assume that the sales of the product during 1907 were not so extensive as to be likely to be brought to the attention of the executive officers of the plaintiff concern.

Mr. C. J. Lynn, plaintiff's general manager testified (p. 870, X-Q. 19) that he first heard of Quin-Coco through reports from their salesmen, stating that the only way he could locate the time is that it was not long before "we began remonstrating with Messrs. Wm. R. Warner & Co. over the fact that they were offering the product. That, I think, must have been in 1909, probably the early part."

He explained further (X-Q. 20) that while it might have been put on the market earlier, it would not likely have been brought to his attention until its sales were actively pushed.

Mr. J. K. Lilly, president of the plaintiff concern testified (p. 895, Q. 9) that he could not remember that Quin-Coco was called to his attention prior to 1909, and (p. 896, Q. 14) that this action was brought against Wm. R. Warner & Co. because Quin-Coco was the oldest imitation preparation within their knowledge and that it secured the largest volume of sales.

It is shown that during the fall of 1909 and the first part of 1910 certain correspondence passed between plaintiff and defendant and certain interviews were held, the purpose of which on the part of plaintiff's officials was to protest against the manufacture and sale of Quin-Coco by defendant and induce defendant to discontinue such manufacture and sale by friendly conference and discussion, if possible. That plaintiff at all times insisted upon its moral right to complain of the practices by defendant in marketing its Quin-Coco to supply the demand which plaintiff had created

for Coco-Quinine is clearly apparent and cannot be denied. The testimony shows, however, that neither Mr. Lilly, the president, nor Mr. Lynn, the secretary and general manager of the plaintiff concern, was at that time advised that a legal remedy for the wrong existed.

Mr. Lynn testified (p. 859, Q. 10):

> "At that time, and for some time afterwards, we had no knowledge of the fact that we had any redress at law, and so confined our efforts to secure relief to persuasion by letter and personal interview."

It is thus shown that there is no basis in fact for the assertion that plaintiff rested on its rights. With reasonable promptness after learning of defendant's product, it protested and took up negotiations seeking to obtain from defendant a recognition of its rights in a peaceful and friendly manner. However, these efforts were exhausted without result, and the practices of defendant continued notwithstanding the protests until the situation became extremely aggravating, then plaintiff sought legal advice and promptly thereafter, following said advice, sought legal redress.

But it is urged on behalf of defendant that because Mr. Lilly in his letter of August 31, 1909 (p. 1214) urged defendant to make its price to the retail trade to correspond with plaintiff's price, the right by plaintiff to make and sell Quin-Coco was not denied.

In Mr. Pfeiffer's reply (p. 1215) to Mr. Lilly's letter it will be noted that he says "we admit that Coco-Quinine was entirely original with your house."

In Mr. Lilly's reply to Mr. Pfeiffer, dated October 6, 1909 (p. 1216) the writer says:

"Coco-Quinine was so entirely original with us and such a radical departure in the way of quinine preparations that we have felt that we were entitled to full consideration for it in the same manner that we have always endeavored to consider the rights of others in original, novel preparations. All reputable houses except yours have tendered this consideration, and we were in hopes that you, in the light of our desire to work together to our mutual advantage, would at least consider our rights in the premises so far as not to cut under our prices."

Again, in Mr. Lilly's letter to Mr. Pfeiffer, dated January 11, 1910 (p. 1217) he urged that defendant's course in selling Quin-Coco was in violation of one of the fundamental principles of the Homilia Club, stating that "If this club means any one thing more than another, it means that members will not attempt to build up a business at the expense of a competitor."

It should be explained that the Homilia Club was an organization of manufacturers of pharmaceutical products finally developing into what is now the American Pharmaceutical Manufacturers Association, the purpose being to meet from time to time and discuss matters of interest to the industry and to adjust differences respecting conflicting trade rights where possible. Among other things, each member was allowed to register its trade names for its products and it was at least an implied understanding that each member would respect the trade rights of the others in so far as trade names for its products were concerned and the placing upon the market of preparations which might be used by the retail druggists as substitutes for original and novel preparations put out by other members. Legitimate competition found no objection, but

only those practices which led to "substitution." In other words, the purpose was to raise the ethical standards of the drug trade and to establish a moral standard which would make the practice of substitution unpopular. Nothing in the plan sought to restrict the right of any manufacturer to bring out a medicine as a competing item with any original medicine made by another so long as in name and appearance it was so distinguished from the other as not to be a mere "substitute" therefor.

It will be noted (p. 1221) that under date of March 7, 1910, Mr. Pfeiffer notified Mr. Lilly that he was resigning from the Homilia Club; presumably because he did not find it profitable to live up to the moral standard prescribed by the club, particularly in respect to the recognition required as to the trade rights of the other members.

But it is said that because Mr. Lilly asked Mr. Pfeiffer to raise the price of Quin-Coco, so that it would correspond with plaintiff's price for Coco-Quinine, he recognized the defendant's right to manufacture and sell. In answer to this it may be said, first, that Mr. Lilly, as explained in the testimony by both himself and Mr. Lynn, had not taken legal advice and did not realize that they had any legal redress. Moreover, he desired, as would any other high class business man, to adjust the matter amicably if possible.

However, it does not require an exceptionally astute mind to realize that the request made by Mr. Lilly of Mr. Pfeiffer, if complied with, would have effectually removed Quin-Coco as a substitute for Coco-Quinine in the drug trade, for no druggist would buy and use a *substitute* for *any* preparation if he could buy and use *the original* at the same price. All druggists know

that substitution is regarded as unethical and dishonest. Those who yield to the temptation yield solely because of the larger profit to be obtained by such practice. For this reason, as any one can see, except for the lower price of Quin-Coco, or any other substitute pharmaceutical, there would be absolutely no sale for it in the retail drug trade. Therefore while Mr. Lilly's request was couched in friendly and gentlemanly terms, nevertheless, the inevitable effect of what he asked to be done, was to remove Quin-Coco from the market.

PLAINTIFF'S RIGHTS.

It is believed that in a case such as this where the product goes from the manufacturer to the consumer through the medium of a retailer, the retailer receiving the product from the manufacturer in large or bulk packages and dispensing it to the consumer in small packages without the manufacturer's label,—in this case in small prescription bottles, with the usual drug store label on which the druggist may write any name he pleases, —that the manufacturer is entitled to protect itself as well as the public against the substitution of an imitation product for the original by incorporating in said product itself some non-essential substance to give to said product a distinctive color or a distinctive flavor, or both, in order that the origin of the product may be identified. It is particularly important in the case of a medicine, where the health or even the life of the consumer is at stake, as well as the reputation of the physician and of the manufacturer, that such a practice be approved and the right of the manufacturer to the exclusive use of such identifying substance in his medicine be recognized.

It is shown by abundant testimony that in the instant case plaintiff was not satisfied to depend upon the common coloring substances, Carmine or Cudbear, but wished to adopt something for the purpose entirely different from what anyone else had used and finally decided upon chocolate or cocoa. Coco-Quinine, as has been stated before, and proved by the testimony of many witnesses, was the first liquid medicine in which chocolate or cocoa was used for a coloring or flavoring medium. It would seem that if the drug business could get along without chocolate for such a use for all time prior to the year 1900, no great hardship will be imposed upon the public or upon the business by recognizing plaintiff's exclusive right to its use in so far as this preparation is concerned.

Mr. C. J. Lynn stated what would seem to be a very fair and reasonable conclusion as to the rights of the originator of a medicinal preparation in the matter of protection (p. 874, X-Q. 36) when he said:

> "If he gives it something to distinguish it from other similar preparations, something that is non-essential to the product itself, I certainly think the manufacturer should be entitled to protection to the extent that the peculiar appearance or characteristic of his product should be respected."

AUTHORITIES.

In the Court below plaintiff urged that in the case of *Coco-Cola Company vs. Gay-Ola Company,* 200 Fed. 720 (Circuit Court of Appeals, Sixth Circuit), the issue was very similar to that of the instant case, and that the conclusions reached there justify plaintiff's contentions here. In that case the Gay-Ola Company was selling to the drug stores its product in bulk packages to be dispensed at the soda fountains to customers, and it was shown that in many instances the defendant's

product was dispensed when plaintiff's product was called for, either by its exact trade name or one of the other names commonly accepted as indicating Coca-Cola.

In considering this decision as applied to the instant case, the District Court, referring to the coloring substance, caramel, stated that there is no claim that it serves any other purpose in the compound except to give color and distinguished the instant case from that on the ground that the flavor of chocolate is obtainable from no other substance. The District Court overlooked the fact that caramel (a compound of butter, burnt sugar, etc.) does impart, a flavor to whatever it is used to color and a distinctive flavor, and moreover, this fact was recognized in the decision itself, for the Court said of that defendant's product:

> "The product is identical both in appearance and taste."

The Gay-Ola case is, in fact, directly in point, and the court of the Sixth Circuit shows that it rests upon prior decisions which present the fundamental principles sustaining the rule of restraining defendants engaged in practices similar to those of the defendant here. For example, that court cited *Garrett, et al., vs. G. H. Garrett & Co.*, 78 Fed. 472, where, at page 474, it is said:

> "Whether retail dealers were advised that they could sell the snuff as 'Garrett's Snuff' to their customers as and for the snuff manufactured and sold by complainants, and whether it was intended that those customers should be thus deceived is in dispute. Affidavits for complainants sustain the charge, and affidavits for the defendant deny it.

> But that the effect was to impose snuff manufactured by the defendants upon purchasers from retailers as 'Garrett's Snuff,'—that is to say, as snuff manufactured by complainants,—is, we think, too well established to be doubted; and we were fully impressed that it was the intention of the defendant company, by the use of the name 'Garrett,' to appropriate the good-will and interfere with the trade of the complainants."

Again at page 476 in the Garrett case the court said:

> "It is not to be credited that the imitations were unintentional or accidental. It is not claimed that the packages of snuff on which they were placed were put on the market with the intent to deceive the retail dealers who were supplied by defendant. That would have been impracticable. The claim is that the snuff was of inferior quality, and sold at prices below complainant's prices, with the expectation that the retail dealers, who knew what they were buying, would sell it to their customers as 'Garrett's Snuff,' and at the price of the genuine article thereby reaping a larger profit. That was the lure, and it was of the sort to be successful in the great majority of instances."

Likewise in a case where the Court of Appeals of the Sixth Circuit found that because of a deception of the public by the name used by both parties, relief could not be granted, nevertheless at page 816, in *California Fig Syrup Co. vs. Frederick Stearns Co.*, 73 Fed. 812, the Court (Taft, Lurton and Hammond), said:

> "But it is well settled that, even if the complainant is using something to designate its articles which it can not claim to have the exclusive right to use as a trade-mark, yet, if it can show to the court that the defendant is selling an article like the complainant's in such a way as to induce the public to believe that defendant's article

is the complainant's, and that it is doing this intentionally and fraudulently, the complainant may have the relief of a court of equity by injunction to prevent such piracy. Thus in this case, even though 'Syrup of Figs' is such a descriptive term that it can not be used as a trade-mark, yet, if the defendant here put its medicinal preparation up in packages ornamented and dressed so as to be a colorable imitation of the complainant's package, with the intention of misleading the public into the purchase of the defendant's article as the complainant's, then undoubtedly the defendant might be enjoined from thus attempting to palm off its article as the article of complainant. Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625; Lawrence Manuf'g Co. v. Tennessee Manuf'g Co., 138 U. S. 537, 11 Sup. Ct. 396; Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 209; McLean v. Fleming, 96 U. S. 245; Wotherspoon v. Currie, L. R. 5 H. L. 508; Thompson v. Montgomery, 41 Ch. Div. 35-50.

In this case there is evidence tending to show that the defendant is attempting to appropriate to itself by unfair means the good name which the preparation of the complainant has acquired by advertising and use among the public at large. Witnesses, who are retail druggists, testified that defendant's agents visited them, and recommended the sale of defendant's article, on the ground that the druggists could palm off defendant's article as complainant's article upon intending purchasers who were not familiar with complainant's package, and who called only for syrup of figs, intending thereby to purchase the complainant's article. The defendant reduces the price of its article very considerably in order to induce druggists to take this course. We are not prepared to say, therefore, that the complainant might not, except for the reason about to be stated, be entitled to some relief, by an injunction against the defendant to prevent unfair competition."

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The court of the Sixth Circuit also based its principles of the Gay-Ola case upon the interesting decision in *Kalem Co. vs. Harper Bros.*, 222 U. S., 55-63, 56 L. Ed., 92, where even motion pictures were held to come within the power of Congress governing copyright, showing that the underlying principles of unfair trade reach out through these various realms.

COCA-COLA v. GAY-OLA.

The case under discussion, *Coca-Cola Co. vs. Gay-Ola Co.* (6th Circuit 912), 200 Fed. 720, 119 C. C. A. 164, is so directly in point that it seems expedient to quote at length therefrom as follows: (The italics in the quotations are ours.)

> "It is first to be observed that defendant is at the best on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in *appearance and taste.*
>
> • • • • • • • • • •
>
> "Accordingly, we find it recognized by this Court that, in a suit for unfair competition, it is not necessary to show that the immediate purchasers were deceived as to the origin of the goods; but even if they thoroughly understand that they are buying the counterfeit and not the genuine, the manufacturer of the counterfeit will be enjoined from selling it to dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer. *Garrett v. Garrett* (C. C. A., 6), 78 Fed., 472, 476 (24 C. C. A., 173); *Royal Co. v. Royal*, 122 Fed., 337, 345 (58 C. C. A., 499). And see cases cited in Cyc., vol. 38, p. 778, notes 25 and 26; also *Kalem v. Harper*, 222 U. S., 55, 63 (32 Sup. Ct., 20; 56 L. Ed., 92). Under the principles on which these cases were decided, we are

satisfied that an injunction must go against the defendant. There is no room for it to shift the blame to 'tricky retailers,' as in *Rathbone Co. v. Champion Co.*, 189 Fed. (C. C. A., 6), 26, 33 (110 C. C. A., 596; 37 L. R. A. (N. S.), 258); *defendant is an accomplice, if not the principal in the trick. With this conclusion established, it is obvious that the injunction should forbid all attempts directly or indirectly to encourage or induce the dealer to make the fraudulent substitution;* but complainant also asks that the injunction extend to the use of the barrels or kegs painted of the same color as complainant's, and *to coloring the product itself* with the same color, and to using any packages not plainly marked Gay-Ola."

* * * * * * *

"The question remains whether the injunction should go to the extent of forbidding defendant to sell Gay-Ola *with the identical color it now has;* that is, *to forbid its sale unless colored so as to distinguish it from Coca-Cola.* Defendant contends that such a prohibition is inconsistent with its legal right to make and sell an article which is in fact exactly like Coca-Cola. This contention seems unpersuasive in view of defendant's pleading. In its answer it has abandoned the claims of its advertising literature that Gay-Ola is made exactly according to the Coca-Cola formula, and urges that its product is a different and better compound. It says that it has improved upon the formula of Coca-Cola, while eliminating one of the elements, and that its product is 'greatly superior' to Coca-Cola. It thus destroys a considerable part of the foundation upon which rests its claimed right to adopt a color which will be deceptive; but we pass by this consideration.

"The record justifies the conclusion *that the color is 'non-functional'*—to use the phraseology of the patent law. The bill alleges that Gay-Ola

is 'artificially and unnecessarily' colored so as to look exactly like Coca-Cola. The answer denies this in terms; but it goes on to say that the color is produced by caramel, which is in universal use for coloring purposes, and is used by complainant for coloring Coca-Cola. There is here no claim that caramel serves any other purpose in either compound except *merely to give color,* and say that it is one of the 'component elements' as one of the witnesses does, is saying nothing more. It follows that the adoption not only of caramel but of the selected amount of caramel was for the main and primary purpose of making the two articles look just alike. *In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers.*

"The record also requires the conclusion that defendant's business had a substantial basis in this contemplated fraud. Doubtless it intended to try to make a reputation and business for Gay-Ola on its own merits in certain quarters, and perhaps eventually in a general way; but it is clear that in the meantime, and wherever it could, and as the easiest way of getting a large business, it intended to have its product sold as and for Coca-Cola. Under these circumstances, we need not consider what the rule would be if the color was the incidental result of an ingredient used for some other purpose, nor yet what the rule would be if the defendant had adopted even a wholly unnecessary identity in color in connection with a good-faith effort to sell its own goods on their own merits. This Court has not yet said that a case of fraudulent competition can be made out solely by proof of identity in a non-functional particular. *Rathbone Co. v. Champion, supra; Hilker Mop Co. v. U. S. Mop Co.*, 191 Fed., 613; 112 C. C. A., 176. This case is not even one of imitating matters of appearance in an article of common manufacture,

like furniture. *Globe Wernicke Co. v. Macey Co.*, 119 Fed., 696, 704; 56 C. C. A., 304. We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that, if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and that, so far as defendant cannot safeguard this result *it may not use the color.* There is here marked—indeed, close—analogy to the rule of *Westinghouse Co. v. Wagner Co.*, 225 U. S., 604 (32 Sup. Ct., 691; 56 L. Ed., 1222), and to the rule which requires an article which is likely to deceive as to its origin to be distinctly tagged with the name of the real producer. *Merriam v. Saalfield, supra.* It follows without saying that this tag should be in form adapted to reach the notice of the final purchaser."

In *Coca-Cola Co. v. Dubersteim et al.* (D. C., S. D. Ohio W. D., 1918), 249 Fed., 763, the Court held "Coca and Cola" an infringement of the plaintiff's trade-mark, and upon a change by the defendant to "El-Cola" that that was a mere evasion and was an infringement of the trade-mark; and that the subsequent endeavor to evade the infringement by a paper label covering the infringing name was not sufficient because of the liability of the label to become detached.

A similar view of the law relating to similar subject-matter is found in *Moxie Co. v. Doaust* (1st Circuit), 1913, 206 Fed., 434; 124 C. C. A., 316.

The Court by Judge Brown said they could

"see no legitimate reason why Daoust in marketing a beverage so similar to Moxie *in color and taste*, should choose also to adopt a container so

closely resembling that of the Moxie Co., thus *increasing the chance of deception.*"

The Court at page 436 said:

"Counsel for Daoust insists that he is not responsible for the fact that tricky retailers represent the manufacturer as that of the Moxie Co., provided he has done his legal duty in distinguishing his product. If, however, he chooses, without necessity, to imitate in general appearance the complainant's package, *he does not perform his legal duty of distinguishing his product by making differences which leave unimpaired the general resemblance.*

"The question is of similarity in essentials. This similarity could easily have been avoided by ordering a bottle of size or shape different from the Moxie bottle, *or by change in color of the beverage.* See *Coca-Cola Co. v. Gay-Ola Co.* (C. C. A.), 200 Fed., 720, 724, 725. It is suggested that the latter is impossible, but little weight can be given to such suggestion or to Daoust's evidence as to the impossibility of doing so.

"*If the confusion is caused by the general appearance,* the burden is upon Daoust to see to it that ultimate fraud does not result. Though Daoust has a right to use a bottle like the Moxie bottle, and to make a beverage that resembles in taste or in color the complainant's beverage, he has no right to use these things in that special combination in which the complainant uses them, if that has become a distinctive combination distinguishing the complainant's article."

This case, like the quoted and cited Coca-Cola case, clearly supports plaintiff's contentions in the instant case. It is plain and direct in its meaning and says

that the color and taste were features which enabled the deception.

The case of Coca-Cola vs. Gay-Ola is not a passing case to be lightly dismissed. It is a ruling case having been cited with approval by many courts and repeatedly reaffirmed by the same court as for example, 208 Fed., 543; 209 Fed., 920; 211 Fed., 617; 211 Fed., 754; 211 Fed., 942; 215 Fed., 530; 215 Fed., 694; 216 Fed., 265; 222 Fed., 479; 233 Fed., 157; 235 Fed., 414; 240 Fed., 743; 245 Fed., 614; 245 Fed., 830; 247 Fed., 663; 250 Fed., 964, and 264 Fed., 813.

Some of these cases so clearly state the law indicating the objection to the position of the defendant in this case that it seems advisable to refer to a few of them which reaffirmed, or cited with approval, the Gay-Ola case.

For example in *Hiram Walker & Sons v. Grubman, et al.,* 222 Fed., 478, 479, the court said:

> "On the other hand, it is in evidence in these cases that the color of this whiskey is wholly within the control of the distiller and that it is shaded to suit the fancy of the consumer. It is also in evidence that the 'body' and flavor need not be affected by changes in shade. In view of this proof it seems to me that the color may be said to be a 'non-functional' characteristic, as was said of the color of the beverage in *Coca-Cola Co. vs. Gay-Ola,* 200 Fed., 720, 119 C. C. A., 164; Id., 211 Fed., 942, 128 C. C. A., 440, by the Circuit Court of Appeals in the Sixth Circuit."

In the case of *Margaret Steiff, Inc., vs. Bing,* 215 Fed., 204, 207, in a case where the injunction was modified but sustained, the court said:—

> "What makes the fight unfair is always the borrowing by the newcomer from the first maker of something not necessary to excellence of product, but required for functional perfection, yet almost invariably cleverly calculated to attract and fix the attention, or please the eye of the careless."

Kellogg Toasted Corn Flake Co. vs. Quaker Oats Co., 235 Fed., 657, 663, is a case cited to illustrate the law urged by the defendant. The fact is that that carefully and elaborately written case of the 6th circuit was certainly not intended to reverse itself as expressed in the Gay-Ola case, in fact it reaffirms the Gay-Ola case and it says, for example at page 663:—

> "Where a person has so used descriptive words as in truth to establish in them such significance as this with respect to his goods, he is entitled to relief against a subsequent user who is employing the words in a way calculated to effect sales of the latter's goods as those of the former, since such acts constitute unfair and fraudulent competition. *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S., 674, 21 Sup. Ct., 270, 45 L. Ed., 365; *Computing Scale Company v. Standard Computing Scale Co.*, 118 Fed., 967, 55 C. C. A., 459 and citations. The relief granted in such cases is adapted to the circumstances of each particular case, though such as effectively to prevent confusion and fraud in sales of the subsequent user's goods."

Citing numerous cases and quotations from the Computing Scale case of the Supreme Court.

In *Rubber, Etc., Co. vs. Devoe, et al.*, 233 Fed., 150 (N. J., 1916), the court citing the Gay-Ola case with others says (p. 157):

"In applying the rule it is to be borne in mind that the likelihood of deception is not confined to the dealer (who would likely be able to distinguish); but *the rule primarily seeks to protect the ordinary purchaser* or, in other words, the liability of the ultimate consumer to be misled must be reckoned with. *Fuller v. Huff, supra; Samson Cordage Works vs. Puritan Cordage Mills, supra;* 211 Fed., 610, 128 C. C. A., 203 L. R. A., 1915, F., 1107, and cases cited; *Florence Mfg. Co. v. Dowd, supra; Scriven vs. North, supra; Coca-Cola Co. vs. Gay-Ola Co.,* 200 Fed., 720, 119 C. C. A., 164; *International Silver Co. vs. Rogers Corp'n, supra.* Indeed, the rule would be of little practical use **if it could be avoided by showing that dealers would not be deceived; for the dealer would unrestrainedly perpetrate deception upon the ultimate consumer.** So the courts have wisely required that the **manufacturer** must, in the first instance, take such precautions as will make it fairly impossible **for a dealer to deceive an ordinarly cautious customer.**"

In *Kawneer Mfg. Co. vs. Detroit Showcase Co.,* 240 Fed., 757, the court citing a number of cases in which the Gay-Ola case leads, says at page 733:—

"**It is also unfair competition to manufacture a patented or unpatented article and sell it for resale to the ordinary purchaser, if it is so similar in all its details, functional and non-functional, essential and non-essential to the article made by the patentee or original manufacturer that the ordinary man who buys it and uses it cannot tell it from the genuine even though the actual sale to the jobber, the wholesaler or the middleman is without misrepresentation.**"

In *Helment Co. v. Wm. Wrigley, Jr., Co.,* 245 Fed. 824, the court of the 6th circuit had before it a chewing

gum case. The court in that case at page 830, citing numerous authorities, says:

> "True, it is said that the predominating color, pink, is cheaper, but this is simply illustrative of defendant's apparent indifference to the rights of the using public, not to speak of the rights of complainant. It is well settled that *dealers are not so much to be considered as are the ordinary users;* the former will of course know the manufacturer from whom their purchases are made, but the latter are open to deception whether practiced by the manufacturer or the dealer; and hence the effect of producing and dressing goods that are calculated to deceive is at once a temptation to unscrupulous dealers and an imposition upon unwary users."

And again said at page 831, citing other authorities:

> **"It is idle to suppose that defendant's officers cannot discern the injurious effect of the manner in which they suffer the company's brands to be dressed and put upon the market. The defendant is therefore chargeable with knowledge of the inevitable consequences of such conduct and so is open to the inference that it intends its products to be confused with and mistaken for complainant's product."**

In the case of *Shredded Wheat Co. v. Humphrey Cornell Co. et al.*, 250 Fed., 960, the court of the 2nd circuit at page 964 said, citing numerous cases:—

> 'It is in cases where the connotation of origin rises, not from verbal description, but *only from the appearance* of the article, that the trouble arises in application, because the appearance must in some way be changed, or the article must be wrapped or marked. Thus has arisen the prin-

ciple often applied in this court that minor or 'non-functional' changes in appearance may be required, so long as the substantial elements are left in the public domain."

In *Auto Acetylene Light Co. vs. Prest-O-Lite Co.*, 264 Fed., 810, the court of the 6th circuit in extending an injunction in unfair competition said at page 813:—

> "Defendants' contention that customers need not have been deceived, had they taken note of the differences disclosed to their senses in the appearance between the Prest-O-Lite package filled by defendant, is answered by the truism that the imitation need not be such as to mislead the careful and discriminating purchaser; it is enough that it misleads the ordinary and casual buyer. *Coca-Cola Co. vs. Gay-Ola Co.* (C. C. A., 6), 200 Fed., 720, 723, 119 C. C. A., 164."

In *W. A. Gaines and Co. v. Turner-Looker Co.* (Sixth Circuit, 1913) 204 Fed., 553; 123 C. C. A., 79, the unfair competition turned essentially on the plaintiff's word "Hermitage" for whiskey, preceded by "Golden." It was held that the defendant's mark infringed the plaintiff's. The Court said:

> "The defendant must be presumed to have intended the natural consequences of its acts, and having put the goods on the market under a name so nearly like complainant's as to enable dealers to palm them off as complainant's and at a price which makes it an object to do so, an invasion of complainant's rights is shown. *Tarrant & Co. v. Hoff* (C. C. A.), 76 Fed., 959 (22 C. C. A., 644); *Fairbank Co. v. Luckel etc., Co.* (C. C. A., 9), 102 Fed., 327 (42 C. C. A., 376)."

In *Hennessy et al. v. Wine Growers' Ass'n* (D. C., S. D. N. Y., 1914), 212 Fed., 308, the Court (p. 311) in referring to the evidence needed to prove infringement and unfair practice said:

> "It is not necessary to prove a course of business in order to warrant an injunction. I do not think that it is incumbent upon the plaintiff to establish a habit by showing very many sales; it is enough that plaintiff has established several sales from which must be deduced the fact that defendant was willing to make further sales, and that in several of the stores owned by defendant its agents were ready to make sales is clearly established. *Gorham Mfg. Co. v. Schmit* (D. C., 196 Fed., 955; *Julius Kessler & Co. v. Goldstrom*, 177 Fed., 392 (101 C. C. A., 476); *A. B. Dick Co. v. Henry* (C. C.), 149 Fed., 424; *Badische Anilin, etc., v. Klipstein* (C. C.), 125 Fed., 543, 556; *Samuel & Co. v. Hostetter*, 118 Fed., 257 (55 C. C. A., 111); *Chicago P. T. Co. v. Phila. P. T. Co.* (C. C.), 118 Fed., 852; *Hostetter Co. v. Conron* (C. C.), 111 Fed., 737; *Hostetter Co. v. Schneider* (C. C.), 107 Fed., 705; *Hostetter Co. v. Sommers* (C. C.), 84 Fed., 333; *Hostetter Co. v. Becker* (C. C.), 73 Fed., 297; *Hostetter Co. v. Brueggeman* (C. C.), 46 Fed., 188."

On this point in *Yale and Towne Mfg. Co. v. Worcester Mfg. Co.* (D. C., D. Mass., 1913, 205 Fed., 952), the Court said at p. 957:

> "It is claimed by the plaintiff and denied by the defendant that this evidence proves that the public are being misled by the defendant's use of the name. It seems to me unnecessary to discuss this question apart from the exhibits themselves. Proof of actual deception is not necessary. The Court may determine without it, from the exhibits them-

selves, whether deception will be the natural and probable result of their use. *Notaseme, etc., Co. v. Straus* (C. C. A.), 201 Fed., 99, 100. I am unable to doubt that some deception would be their natural and probable result in this case, or that their use has had that result."

In *Notaseme Hosiery Co. v. Straus, et al.* (Second Circuit, 1912), 201 Fed., 99; 119 C. C. A., 134 (decision on profits, 215 Fed., 361; 131 C. C. A., 503), the Court holding that the evidence was insufficient to show actual deception, said:

"Such proof, however, is not necessary. The question is whether the natural and probable result of the use by the defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions—where there is a degree of similarity calculated to deceive."

In *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.* (Eighth Circuit, 1913), 206 Fed., 611; 124 C. C. A., 409 (affirmed, 240 U. S. 251), the Court having before it a case in which the defendant was enjoined from applying "American Lady" on shoes when his name appeared only on the carton, said (p. 616):

"In cases of unfair competition, the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the infringer. *Fairbanks Co. v. Windsor, et al* (C. C. A.), 124 Fed., 200 (61 C. C. A., 233); *Florence Mfg. Co. v. Dowd, et al.* (C. C. A.), 189 Fed., 44 (110 C. C. A., 608). And so this Court held on the former appeal (165 Fed., loc. Cit., 416; 91 C. C. A., 363)."

Again at page 617:

> "If a manufacturer or wholesale dealer wilfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser. *Scheuer v. Muller et al.* (C. C. A., 744 Fed., 225; 20 C. C. A., 161); *Dennison Mfg. Co. vs. Thomas Mfg. Co.* (C. C.), 94 Fed., 651; *National Biscuit Co. v. Baker et al.* (C. C.), 95 Fed., 135; *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed., 869 (23 C. C. A., 554); *Revere Rubber Co. v. Consolidated Hoof Pad Co.* (C. C.), 139 Fed., 151; *Lever v. Goodwin*, L. R. Ch. Div., 1; *Gulden v. Chance et al.* (C. C. A.), 182 Fed., 303 (105 C. C. A., 16).
>
> "In such cases the complainant will not be held to specific proof that ultimate purchasers were deceived, and limited to loss or profits thus established. Loss will be presumed."

In *Lawrence et al. v. P. S. Sharpless Co.*, 203 Fed. 762, affirmed in 208 Fed. 886; 126 C. C. A., 46, there is in the decision of the lower court an excellent statement of the law. The statement need not be quoted in full, but includes this reference to the importance of color, as follows:

> "A comparison of the label of the complainants, printed in blue upon tin foil, with that of the defendant, also printed in blue upon tin foil, discloses such identity in form, color and design as to indicate an intentional imitation."

In *Samson Cordage Works v. Puritan Cordage Mills* (C. C. A., 6), 211 Fed., 603, the Court said:

> "However, the protection against unfair competition is not limited to such imitation or conduct as would deceive a cautious and discriminating purchaser, but includes such as would be likely to mislead the ordinary or usual buyer; and the liability of the ultimate consumer to be misled must be reckoned with. *Edward Hilker Mop Co. v. U. S. Mop Co., supra; Coca-Cola Co. v. Gay-Ola Co.* (C. C. A., 6th Cir.), 200 Fed., 720, 723, 119 C. C. A., 164; *Gaines v. Turner-Looker Co., supra,* 204 Fed., at page 556, 123 C. C. A., 79. And if the marking of defendant's cord was such that it was likely, by the ordinary purchaser, to be taken for complainant's cord, if not closely examined, the failure to use distinguishing labels would normally be evidence of an intent to mislead. In such a case a burden would rest upon defendant to see to it that purchasers are not likely to be deceived by confusion between the two marks; and, if defendant's product cannot be so dressed or put out as substantially to assure such result, defendant should not be allowed to use the mark in question. *Coca-Cola Co. v. Gay-Ola Co., supra,* 200 Fed., at pages 274, 275, 119 C. C. A., 164."

In all cases of unfair competition, the principals may turn as a refuge to charging the retailer or the agent with having done what anyone in such a position would be likely to do. The principal hands him a product, not as his own product, distinguished, as it might well have been, in color or taste or in dressing, from that of the plaintiff, but as a counterfeit of plaintiff's product, and seeking whatever reputation he might obtain from what has been done by the plaintiff.

Defendant in the instant case has been left without support for its belated pretensions that the color and taste given its product were the necessary pharmaceutical consequences of completing it. It is proved beyond question that defendant, with many materials for manifold colors and tastes readily obtainable, chose a particular color and taste, not because it was the best, or in any degree essential, from pharmaceutical considerations, but because it was precisely the color and taste which was essential for the purpose of substitution and deception and to enable its product to be "passed off" for plaintiffs.

In the oft-cited case of *Fox vs. East Baking Co.*, 209 Mass., 251 (1911), Loring, J., said, in speaking of the use of an oval loaf in the manufacture of bread—

> "And the defendant would have a right to make and sell bread which has that shape, were it not for the fact that bread of that shape means to the public that it is made by the plaintiff."

In citing the authorities, plaintiff has selected those which are believed to apply directly to the instant case. The decrees in unfair competition cases vary widely with the circumstances, but all agree in reaching the thing which is the basis of the scheme of unfair trading. They all agree in declining to accept flimsy excuses when the evidence shows the clear intent was to take away the plaintiff's trade and to do this by the adoption of some one, or many things, which go to the heart of the matter. In speaking of the trend of these cases, Nims on "Unfair Competition and Trade-Marks" (second edition), p. 238, says:

> "Seldom does the newcomer in any commercial field have *absolute* rights as to the use of these

common characteristics of the article he sells. He must first consider, not himself, but those who entered the field before he did, with whom the public have become acquainted. If he can not enter the business without confusing himself with one or more of these older concerns he will be compelled to stay out."

THE GENERAL PRINCIPLES OF UNFAIR COMPETITION.

All these various principles rest on familiar statements of the law. One much quoted and applied is *Putnam Nail Co. v. Bennett, et al.* (C. C., E. D. Pa., 1890), 43 Fed., 800, where Mr. Justice Bradley had before him a case in which the counsel for the defendant in the present case appeared for the complainant. The complainant had bronzed his product, horseshoe nails, as a trade-mark to indicate the origin of the nails.

The Court declined to dismiss the bill on demurrer and announced the rule of law applying to this class of cases as follows:

"Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainants which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainants. This is fraud. We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegation that the complainants' peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge, which we think the defendants should be required to answer."

This direct and even blunt statement of the law has been repeatedly cited and quoted, as for example in *Cleveland Stone Co. v. Wallace, et al.* (*C. Cys., E. D.* Mich., 1892), 52 Fed., 431, 438; *Heller and Merz Co. v. Shaver, et al.* (C. C., N. D. Iowa, 1900), 102 Fed. 882 (quoted at 887); *Scriven, et al. v. North, et al.* (Fourth Circuit, 1904), 134 Fed., 366 (67 C. C. A., 348); *Kronthal Waters, Ltd. v. Becker* (C. C., E. D. Pa., 1905), 137 Fed., 649 (cited 653); *Standard Varnish Works v. Fisher, Thorsen & Co.* (C. C., Oregon, 1907), 153 Fed., 928 (quoted at 931); *Shredded Wheat Co. v. Humphrey Cornell Co., et al.* (D. C., D. Conn., 1917), 244 Fed., 508, 522; and cited and quoted with approval by the U. S. Supreme Court in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537 (34 L. Ed., 997, 1004).

Of these cases it may be noted that Judge Thomas in *Shredded Wheat Co.* cites and quotes elaborately from the authorities bearing out the various points customary in unfair competition cases, saying, for example, at p. 522 (244 Fed.):

> "The vital question here—as in all cases of like kind—is not whether dealers are liable to be deceived in buying from the manufacturer or wholesaler, but whether the user is liable to be misled in buying from the retailer. This distinction is well borne out and sustained by the Circuit Court of Appeals for this circuit in *Enterprise Mfg. Co. v. Landers; Frary & Clark, supra; Yale & Towne Mfg. Co. v. Alder*, 154 Fed., 37 (83 C. C. A., 149); *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed., 939 (90 C. C. A., 299 L. R. A. (N. S.), 269); *Rushmore v. Badger Brass Mfg. Co.*, 198 Fed., 379 (117 C. C. A., 225); *Rushmore v. Saxon*, 170 Fed., 1021 (95 C. C. A., 671), and by Mr. Justice Bradley in *Putnam Nail Co. v. Ben-*

nett (C. C.), 43 Fed., 800, in an opinion which is quoted from with favor by the Supreme Court in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, 549 (11 Sup. Ct., 396; 34 L. Ed., 997). Another well-considered and instructive case sustaining this view is *Banzhaf v. Chase*, 150 Cal., 180 (88 Pac., 704)."

DEFENDANT'S POSITION.

So long ago as the "Statute against Monopolies" the word "Monopoly" was used in the brief sense as a means of restraining individuals and corporations "of any freedom or liberty that they had before or hindered in their lawful trade."

Defendant's counsel rely upon the English case, *Lever Bros. Ltd. vs. Massbro' Equitable*, etc., Soc. 29 Rep. Pat. Cas. 225, 234, 106 L. T. 472, where the plaintiff owned "Brooks' Monkey Soap," the defendant "Lux."

The defendant's counsel endeavors to make it appear that the plaintiff in the instant case is, like the plaintiff in this cited case, trying to prevent another dealer from selling a plainly marked substitute "Lux" to the customer buying the goods instead of the "Monkey Brand," which the dealer could not supply. That is to say, in the soap case, there were two brands of soap each marked plainly and clearly with entirely different names. When "Monkey Brand" was asked for the salesman sometimes offered "Lux." It was impossible to make a mistake because the purchaser was there and he could take or not take the substitute offered. He could see for himself what the offered substitute was. It was not a case like this instant case because the salesman in the soap case did not put a product resembling in every particular the plaintiff's product in a bottle

bearing the name of the plaintiff's brand to send to a customer who had asked for the plaintiff's goods and who had no way of telling he was not getting the thing he expected.

As to "substitution" counsel for defendant said in his brief below, this most extraordinary thing.

"Now, a physician buys whatever drug he pleases and prescribes it. His patient takes what is given him. How can there be any unfair selling method in this?"

Of course, *a physician if he buys Quin-Coco from defendant knows that he is getting just that and not Coco-Quinine,* but how does he know what the druggist gives his patient in filling his prescription.

This argument would seem almost incredible if the words were not there. It must be apparent that even the "dispensing physician" can be deceived as well as the patient when he buys from a druggist Quin-Coco in the belief and trust that he is getting "Coco-Quinine," particularly when it comes to him from the druggist bearing the label "Coco-Quinine."

The quotation from the Lever Bros. case shows the kind of substitution meant by the defendant, that is, handing out to a customer one kind of clearly marked goods instead of another, or offering to sell for example "Lux" soap when "Monkey brand" was asked for. Even in such cases the courts expect some explanation to the consumer. That is, the salesman universally says something to the effect "We have not the brand you asked for, but here is another brand which is about the same," or "just as good." That practice might do with soap because the user of soap is probably as much of an expert as the salesman and he does not regard it as a serious matter in any event; but when a physician orders a particular drug or a customer asks for a particular drug it needs no argument

to justify the assertion that it is unfair, a deception and fraud to give him another drug that looks like the one he asks for, and to indicate that it is the drug he asked for.

The defendant also relies upon the old case "Hostetter vs. Fries, 17 Fed. 620 (N. Y.) but omits to emphasize the qualification of Judge Wallace who said "provided care is observed to fill the preparation as a manufacture of the seller and not a preparation made by another."

In *Hiram Walker & Sons vs. Grubin*, 224 Fed. 175 (N. Y.), the court held that the defendants had a right to make a *particular kind of whiskey, but that they should so distinguish their product that people should not be deceived and buy it as genuine Canadian whiskey.* This was the whole point of that case.

Again, in *Rice v. Redlich Mfg. Co.*, 202 Fed. 155 (from the Third Circuit), the opinion states the general doctrine that an unpatented article may be copied and sold but says:

> "Every one may have the right to make such article but no one has the right, in putting the same article on the market to use any package, common law trade-mark, label *or other dress or indicia* calculated to induce the casual purchaser to believe that the article is the manufacture of another person. **This general statement of what may constitute unfair competition, while not exhaustive, may include such imitation of form or color or other essential and external details of the article itself as may deceive the casual purchaser as to the origin of the manufacture.**"

By "copying" in this line of decisions the Courts invariably refer to the thing in its essentials for use, and never to include non-essentials used merely for

identifying purposes. This is wherein, if pertinent at all, they support plaintiff's rather than defendant's case.

In the case of *W. A. Gaines & Co. vs. Turner-Looker Co.* (6th Cir. 1913), 204 Fed. 553, 123 C. C. A. 79, the Court said:

> "The defendant must be presumed to have intended the natural consequence of its acts, and having put the goods on the market under a name so nearly like complainant's so as to enable dealers to palm them off as complainant's and at a price which makes it an object to do so, an invasion of complainant's rights is shown."

Likewise the District Court in Massachusetts (1913) in *Yale and Towne Mfg. Co. vs. Worcester Mfg. Co.*, 205 Fed. 952, said:

> "It is claimed by the plaintiff and denied by the defendant that this evidence proves that the public are being misled by the defendant's use of the name. It seems to me unnecessary to discuss this question apart from the exhibits themselves. The proof of actual deception is not necessary. The Court may determine without if from the exhibits themselves whether deception will be the natural and probable result of that use."

And again, for example, the Court of Appeals in the 8th Circuit (1913) in *Wolf Bros. & Co. vs. Hamilton-Brown Shoe Co.*, 206 Fed. 611, 124, C. C. A. 409:

> "In cases of unfair competition the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the infringer."

And at page 617 the Court said:

> "If a manufacturer or wholesale dealer wilfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of

another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser (here citing numerous cases)."

"In such cases the complainant will not be held to specifically prove that ultimate purchasers were deceived, and limited to loss or profits thus established. Loss will be presumed."

Notwithstanding these strong statements of the Courts recognizing the difficulties in such a case, the plaintiff, here did proceed to establish the custom and habit of the defendant as has been shown heretofore.

TRADE-MARK—COCO-QUININE.

Respondent (plaintiff) contends that the name "Coco-Quinine" has by long and exclusive use come to designate in the drug trade only one thing, viz.: the medicine made and marketed by plaintiff under that name. This is shown by the fact that none of the manufacturers who undertook from time to time to market imitation preparations ever used the name "Coco-Quinine." The various products of this class introduced as exhibits by defendant during the taking of testimony (petitioner's brief, p. 27) all bore names sufficiently different from plaintiff's name to show that these concerns recognized plaintiff's right to the name even though they sought to invade plaintiff's market with an intended substitute made to imitate the physical appearance and characteristics of plaintiff's preparation. In this the instant case is not unlike the case of *Coca-Cola Co. vs. Koke Company of America,* 254 U. S. 143, wherein this Court held that the name "Coca-Cola" had acquired a secondary meaning and that the

Coca-Cola Company is entitled to the exclusive use of said name as a trade-mark.

In that case this Court said:

> "Whatever may have been its original weakness, the mark for years has acquired a secondary significance and has indicated the plaintiff's product alone. It is found that defendant's mixture is made and sold in imitation of the plaintiff's and that the word Koke was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff and of selling the imitation as and for the plaintiff's goods. * * *
>
> "The argument does not satisfy us. We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in *United States v. Coca-Cola Co.*, 241 U. S., 265, 289, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled."

In *Holeproof Hosiery Co. v. Wallach Bros.* (C. C. A. 2d) 172 Fed. 859, 860, Judge Lacombe, considering the word "Holeproof" as a trade-mark said:

> "Nor do we find any particular force in the objection that the word is descriptive. The record, as it now stands, sufficiently indicates that by expensive advertising and large sales during several years the word 'Holeproof' has acquired a secondary meaning, indicating to the prospective purchaser, not that socks sold under it are indestructible, but that they are those which complainant has been making and supplying to consumers, apparently to their entire satisfaction."

In *Wunder Mfg. Co. v. Block* (C. C. A. 9th) 249 Fed., 748, 749, the court held the word "Arch Builder" and "Heel Leveler" to be good trade-marks for in-soles for shoes, saying:

> "And the terms 'Arch Builder' and 'Heel Leveler,' as used by the plaintiffs, are susceptible of exclusive appropriation, since they are used in a secondary sense. The primary meaning of 'arch builder' is one who builds arches. No suggestion is conveyed that the arch referred to is the arch of the foot. The primary meaning of 'heel leveler' is perhaps more obscure, but it is more suggestive of the shoemaker's trade than that of the chiropodist. It is only in its application to the plaintiffs' device that its significance becomes apparent."

The proofs clearly establish that plaintiff began using the name "Coco-Quinine" in the latter part of 1899 or early part of 1900, to designate the new medicine which was at that time produced in its laboratories and made valuable for use. No other concern has ever used the name for any purpose, even to the present day, so far as known. Approximately 25 years of continuous, extensive, and exclusive use would seem to establish plaintiff's claim to trade-mark rights in the

name under the authority of the decisions above quoted from.

It can not be denied that defendant's name "Quin-Coco" under which it sells its product to the retail drug trade is a close simulation of plaintiff's name "Coco-Quinine" and that its use if employed in actual competitive business, would inevitably result in confusion.

How easy it is to confuse the words comprising the names of the products in referring to them is shown not only by mistakes of counsel made and acknowledged in the record, of which mention has before been made, but it is noted on page 30 of petitioner's brief, fourth line from the top, counsel for petitioner have inadvertently used the name "Coco-Quin" when evidently it was intended to use the name of one of the products.

Errors in Petitioner's Brief.

No attempt has been made to reply point by point to the arguments submitted in petitioner's brief, but rather to present respondent's case on its merits, and thus present a complete reply as seen from the viewpoint of respondent.

However, it may not now be out of place to briefly respond to some of the points urged in behalf of petitioner.

It is urged for petitioner (p. 25 of petitioner's brief) that chocolate was used for years to disguise quinine before respondent made its preparation. It is sufficient answer to this to say that chocolate was never used to disguise the bitter taste of quinine sulphate because that thing cannot be done with chocolate, and since it can not be done, no one ever did it.

Chocolate coated pills and tablets containing medi-

caments of many different characters have been made. If the pill or tablet is swallowed before the coating is dissolved, of course, the person taking the medicine will not taste the bitterness. The same thing is true when like medicines are taken in capsules, or in pill or tablet form coated with any other substance.

There is absolutely not a syllable of evidence to show that anyone ever made a successful liquid quinine medicine of permanent form, containing quinine sulphate as the medicinal agent, in which the bitterness of the quinine was disguised with chocolate, or anything else, prior to the time plaintiff put its medicine Coco-Quinine on the market. There is not a syllable of evidence showing that anyone ever at any time disguised the bitter taste of quinine sulphate with chocolate. Yerba Santa is the disguising agent, and the only disguising agent as has been abundantly proved and acknowledged. Prior to the discovery of this quality in Yerba Santa, licorice had been used but with only partial success.

The use of chocolate in plaintiff's product is for absolutely no purpose but to give to it a distinctive color and flavor, to identify its origin; and the use of chocolate in defendant's product is for absolutely no purpose except to make it like plaintiff's and so that it can be sold as and for plaintiff's.

Plaintiff Sought No Monopoly.

It did not patent its formula. The manufacture and sale of *the medicine*, as such, is free to everyone. It is abundantly shown by the evidence that the identical medicine can be manufactured of a large variety of different colors and different flavors and a medicine identical with Coco-Quinine, in so far as every therapeutic

condition and value are concerned, given to the public without the use of chocolate to color and flavor it.

The Philadelphia laboratory of Searle & Hereth is referred to in the Brief for Petitioner (p. 31). The Philadelphia laboratory of Searle & Hereth and the St. Louis laboratory of Searle & Hereth are shown in the proofs to be one and the same as the Philadelphia laboratory of Wm. R. Warner & Company and the St. Louis laboratory of the Pfeiffer Chemical Company. The laboratories are identical. The employees are identical, and the only justification for referring to the Searle & Hereth laboratory anywhere is the fact that on some preparations defendants use a Searle & Hereth label for trade reasons. (G. A. Pfeiffer, p. 1227, X-Qs. 223-227.)

With knowledge of his physician. In the Brief for Petitioner (p. 52) it is urged that Mr. Heno was evidently using Quin-Coco with the knowledge of his physician. There is nothing in the evidence to justify this assertion but, rather, that the physician on investigation discovered that he was being imposed upon; that the investigation came about because of unsatisfactory results from the prescriptions filled at Heno's pharmacy, calling for Coco-Quinine; and that when the physician found out that Heno was dispensing defendant's product Quin-Coco instead of plaintiff's product Coco-Quinine, which his prescription called for, he called Heno to account and ordered him not to do this but to obtain plaintiff's Coco-Quinine and fill his prescriptions correctly.

Discharged employees. In the Petitioner's Brief (p. 66) reference is made to "several discharged employees of petitioner." This is an unfair statement

because the record does not show, with the possible exception of Thurman and Greene, that they were discharged. It may as well be asserted that the others left to accept better positions with other houses. It is shown that Thurman was discharged because while at lunch with Mr. Merner in a conversation he referred in a complimentary way to the goods of a competing house. Here we obtain a clear understanding of the significance of the statement in defendant's "salesman's creed that "it does not pay to even mention your competitor." (P. 40, Petitioner's Brief.)

Bias of employee witnesses. In Petitioner's Brief (p. 83) counsel reflect upon the testimony of plaintiff's witness Hooper on the ground that he "testified with natural bias in favor of his present employer." Tested by this rule, there is but little testimony in the record for defendant that is entitled to any greater weight or consideration.

Market for Quin-Coco. In Petitioner's Brief (p. 86) the point is made that there was a market for Quin-Coco. There is abundant evidence in the case showing that the market that existed had been created by plaintiff's efforts and at plaintiff's expense and that the market for this particular medicine was under the name Coco-Quinine or chocolate quinine (the latter name being frequently confused by some classes in certain localities with the name "Coco-Quinine") because of this work and these expenditures by plaintiff.

Improper rebuttal. Counsel for petitioner complain that some of the testimony taken in rebuttal for plaintiff was improperly offered and urged that it should have been excluded. In reply it may be said that sub-

stantially all of the so-called improper rebuttal testimony was of additional witnesses called to prove the acts of defendant's salesmen respecting their methods in selling Quin-Coco. These salesmen had been called to deny what had been said by witnesses testifying for plaintiff while taking its testimony-in-chief and this additional or cumulative proof was put in to rebut these denials by defendant's salesmen. The same defendant's salesmen were re-called and denied the statements by these additional witnesses just as glibly and positively as they had similar statements by plaintiff's other witnesses. We have the situation of one defendant's salesman saying positively that three to six or eight responsible disinterested witnesses for plaintiff were testifying falsely as to what he said in his efforts to make sales of Quin-Coco to them.

Right to duplicate plaintiff's product. Petitioner's Brief (p. 106) makes the point that the Circuit Court of Appeals is in error in depriving petitioner "of the exercise of its admitted right to duplicate respondent's product by a preparation of its own." It has been said repeatedly on behalf of respondent, and is said again, if petitioner wishes to duplicate respondent's product limiting its duplication to the medicinal characteristics, the medicinal formula, omitting the non-essential color and flavor imparted to it by the use of chocolate, no objection will be raised by respondent.

COURT OF APPEALS DECISION HAS BEEN APPROVINGLY CITED BY OTHER COURTS.

It should be noted that the decision of the Circuit

Court of Appeals has been cited and followed by other courts as follows:

In the Second Circuit by Judge A. N. Hand in *Cheney Bros.* vs. *Gimbel Bros.*, 280 Fed. 746.

In the Sixth Circuit by Judge Westenhaver in *Knight* vs. *Milner Co.*, 288 Fed. 816.

CONCLUSION.

In this case, as in practically all cases of unfair competition in business, the defendant found a market created by the efforts and at the expense of plaintiff. The very testimony of the defendant's, as well as that of plaintiff's expert witnesses, shows that a variety of fair and legitimate means and methods of competition were open to defendant. Defendant did not copy the exact name of the plaintiff's product but took a simulated name upon which to string excuses, simply reversing the words of plaintiff's trade-mark. In short, it would have been impossible to have more closely followed plaintiff's mark without actually copying it. It was just enough different to enable experts and dealers to differentiate by title from Coco-Quinine, and yet sufficiently similar to suggest the very acts which were material to the introduction of "Quin-Coco."

The allegations of plaintiff's bill have been fully proved.

Defendants are shown to be unfair traders beyond question and without excuse.

The road to fair and honorable competition was wide open, the way plain and easy.

One concern (the Pitman-Moore Co.), at least, manufactured and sold a strictly competing preparation without either the color or the flavor of Coco-Quinine.

The evidence is conclusive that an identical prepara-

tion, in so far as its medicinal virtue is concerned, might have been made and sold by defendant, having any one of many different colors and any one of many different flavors, and honest and legitimate competition thus established.

Defendants are shown to have gone to great pains, with premeditation and deliberate purpose, to duplicate the exact color and the exact flavor of plaintiff's product; to have exploited their preparation to the retail drug trade as the same thing as Lilly's Coco-Quinine and a product that could be sold for Lilly's Coco-Quinine and when Lilly's Coco-Quinine was called for, without detection; and it is shown that this work and these methods were followed by the expected results.

The bare outlines of the case show unfair trading. There can be no doubt in view of the overwhelming evidence, that those responsible for the trade policy of defendant, carefully and deliberately planned the simulation and counterfeiting.

Ordinary knowledge of human nature and of "business" makes it obvious beyond cavil that the results were results which were expected and intended by the officers of the defendant company.

The same purpose involved in the choice of the name was present in the "dressing" of the goods. The evidence shows convincingly that practically illimitable opportunities to produce a legitimately competitive article, distinct in appearance and taste, were open to the defendant. Nevertheless no one can read this record without conviction that the persons acting for defendant had before them the successful formula of the plaintiff and then addressed themselves to the task of producing an article which could not be distinguished

by appearance (color) or taste from that of the plaintiff; and to devising a name which even the veriest tyro must have known would inevitably contribute to the results which followed.

That is, the defendant's officers, with industry and cunning purpose, put into the field long before occupied by the plaintiff a product which could start immediately as a substitute for plaintiff's, with every effort and expense of making a market and reputation for such product performed and met by plaintiff; and which would, because it duplicated the physical appearance, the indicative character, of the "trade dress," of plaintiff's, coupled with the lower price, present the desired opportunities for all the shades of unfair trading which inevitably followed, as illustrated in the record.

The evidence is clear that defendant's salesmen were instructed and expected to do exactly as they did do, induce the retail druggist to buy defendant's Quin-Coco and dispense it when plaintiff's Coco-Quinine was called for by prescriptions or customers. Whether much or little instruction was given to these shrewd agents who went out from the defendant into the field, the patent facts were known and the particular instructions would make but little difference. Coco-Quinine had been introduced and "detailed" by plaintiff to the medical profession and the trade. Plaintiff's product was the first of its kind, the first of its name. Its place in professional and public estimation had been made by no ordinary efforts of promotion. They were both laborious and expensive. The indicative character of its trade dress had been for a long time thoroughly established and recognized. Graduates of medicine and pharmacy, practical experts in these lines, had care-

fully explained the qualities and uses of the new remedy to thousands of physicians in many States.

The introduction of the new product, "Coco-Quinine," by plaintiff was, then, the result of careful preparation, patient education and great expense. The product had been given a distinct color and distinct taste so that it might be known by all users and dealers, might, in fact, bear *in itself* the label of Eli Lilly & Co.

Defendant's agents came to the druggist bearing credentials in the name of an old established firm, of high reputation.

Defendant's officers and employees have endeavored to make it appear that their agents were not *instructed* to do the admittedly dishonest things which the testimony overwhelmingly shows they did. It would be expected that people inducting such a self-starting scheme would deny giving instructions how to promote it. The manifold cases on unfair trading abound in just such instances of either false swearing or of threadbare arguments devised, sometimes as excuses, and sometimes as the natural effort of human nature to palliate an offense.

It will be noted that the defendant's officers carefully elaborate what they claim they did *not* tell their repre-representatives, but there is not the slightest indication in the record that they ever made any endeavor to stop their admittedly dishonest practices; that they for a moment considered the injury to the plaintiff and the public, or by a single act from beginning to end evidenced the slightest desire to distinguish their product from plaintiff's. We have seen that the defendant's officials even laughed over the fact that druggists had asked for plaintiff's fresh labels to replace ones on their bulk supply bottles that had become so

dirty from long use in dispensing Quin-Coco therefrom as to be illegible, indicating that they consider this kind of fraud—this "knocking out the eye of Eli Lilly & Co." as one of their men expressed it, a good joke. Every act by defendant from the beginning was to counterfeit plaintiff's product and promote fraudulent substitution, "passing off" and confusion in the trade.

Defendant's officers and employees, long after the event, gathered the information, which they say is their excuse for using chocolate to impart the desired appearance and taste, but which is shown by plaintiff's experts and by plain common sense to be without the slightest merit. There is not the slightest evidence that any investigation was made to discover anything else that might have been used in its place, when they devised their product and scheme. There is not the slightest evidence that they ever studied the literature of the art to determine what they could use to distinguish their goods from that of plaintiff.

The record shows that there are materials in abundance which could have been used for the same purpose for which the chocolate was used by plaintiff; but there is not the slightest evidence that defendant in the beginning, or at any time, made any effort to ascertain the fact. The fact came out not only in plaintiff's testimony, but also in that of defendant, but defendant's witnesses produced the information only on cross-examination. By the testimony it appears that the knowledge was at hand, ready for defendant if defendant really had desired that knowledge.

The evidence is convincing that all defendant desired for producing the preparation was the formula of the plaintiff and a sample of plaintiff's product, possibly

some instruction from a chemist who had been in plaintiff's employ so that, as the superintendent of the defendant's laboratories says, they could get the same "*physical appearance.*"

There is a sharp distinction between the whole of plaintiff's testimony and the whole of defendant's. Plaintiff has called impartial men by the score from widely separated regions, men who have no interest in the suit and no interest in plaintiff. Some of these men under oath have admitted unfair practices, practices which were dishonest. Witnesses have testified in great numbers to the temptation put before them by defendant's representatives and put before them in a way which, as might be expected, was denied by the men who devised and urged these schemes, when their employment depended upon it.

Plaintiff's witnesses tell an obvious story, following precisely what must have been expected and intended by defendant's leaders when they produced the counterfeit product. Men do not invent schemes of this sort and then expect their representatives to be squeamish about their methods of "*getting orders.*"

The denials of defendant's officers and employees are hardly believable, but if these perpetrators of "Quin-Coco," who not merely followed the formula but who copied the color and taste of the plaintiff's Coco-Quinine, had given instructions to their representatives to *not* call attention to this striking resemblance; to *not* mention the fact of similarity, to *not* urge that defendant's product could be substituted for plaintiff's; to *not* show the apparent identity; to *not* urge that orders for plaintiff's product be filled with defendant's; to *not* show the gain which would arise from these practices—the results must have been the same, for the

agents would *by indirection* have received the same information and instructions as if they had been told to do just what they did.

It would be as if they should put bombs in the hands of anarchists and tell them that they must *not* throw these bombs at public officials or public buildings.

Plaintiff called a number of witnesses who had indignantly rejected defendant's product and scheme of deception; and others who were so impressed by the arguments of defendant's representatives that they agreed to these unfair methods, realizing later the mistake they had made.

Defendant's officers and employees did not have the hardihood to deny that the practices set forth in the plaintiff's records at great length are unfair and dishonest. They contend that what they did in preparing an article in the closest possible simulation of plaintiff's article was correct; they maintain that their selection of a name which was a mere reversal of plaintiff's name was correct; but they admit that the very practices which necessarily flow from sending their men out with an article identical with plaintiff's, in the characteristics of color and taste, and under the simulated name, were unfair and dishonest.

It is submitted that a more flagrant and inexcusable case of unfair trade than the one here made out would be difficult to conceive, or one more burdened with fraud and deceit, or more likely to cause serious injury to the public as well as to the plaintiff.

In view of the abundant proofs found in the record supporting all the charges of plaintiff's bill; in view of the failure by defendant by its proofs to substantiate any of the material allegations of its answer; and in view of the rules of law controlling the facts proved, as established by the many court decisions cited, it is

submitted that the property rights and trade rights of plaintiff have been unfairly and illegally invaded to the great wrong and damage of plaintiff; that the public has been defrauded and imposed upon; and that to the end that plaintiff's just rights may be secured and respected, the rights and interests of the public protected, and justice meted out, the decision of the Circuit Court of Appeals in directing a decree prohibiting the use of chocolate by defendant in its preparation is right, and in this conclusion it should be affirmed.

It is further submitted, however, that said Court erred in holding that the name "Coco-Quinine" is "but descriptive of the ingredients in the compound and, therefore, can not become the subject of trade-mark." It is urged that the long and exclusive use of said name by plaintiff, "whatever may have been its original weakness," has given to said name a secondary meaning; that, as in the *Coca-Cola Co.* vs. *Koke Co.* case, it has from the beginning indicated plaintiff's product alone; that it means this single thing coming from a single source and, therefore, that plaintiff (respondent) has trade-mark rights in said name. It is submitted, further, that defendant's name "Quin-Coco" is but a simulation of plaintiff's name "Coco-Quinine," a mere reversal of words, and, therefore, that its use by defendant should be enjoined.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Plaintiff.

Washington, D. C.,
April 4, 1924.

Quinine Syrup.

A series of experiments were made using as a base Yerbazin (uncolored); Yerbazin 38 syr. 1; and Yerbazin 1 and syrup 1 with quinine alkaloid, quinine sulphate and quinine tannate respectively. It was found that the alkaloid was the most and the tannate the least bitter. Also diluting the yerbazin tended to develop the bitterness. To give a distinctive color both Budbear and Carmine were used.

Coco-Quinine

It occurred to the writer that a syrup containing chocolate would give both a distinctive color and an elegant flavor.

(Photolithographic copy of Plaintiff's Exhibit "Document No. 1," page 147 of Mr. Eberhardt's journal.)

IN THE U.S.DISTRICT COURT
EASTERN DISTRICT OF PA.

The Eli Lilly & Company,
Plaintiff
vs
Wm. R. Warner & Co.,
Defendant.

"PLAINTIFF'S EXHIBIT, DEFENDANT'S PERFUME CARD A."

Chas. E. Riordon

Oct. 25,1916, Special Examiner.

1 Guerlain's Jockey
8 oz. $4 77
2 Allan's Janice
8 oz. $4.00
3 Piver's Le Trefle Incarnat.
16 oz. $8.52
4 Piver's Azurea
16 oz. $8.52
5 Houbigant's Parfum Ideal
8 oz. $11.11
6 Roger & Gallet's Peau d' Espagne
8 oz. $3.50
7 Palmer's Frangipanni
8 oz. $2.50
8 Roger & Gallet's Vera Violetta
8 oz. $4.00
9 Palmer's Rose Leaves
8 oz. $2.50
10 Palmer's Lilac Sweets
8 oz. $2.50
11 Pinaud's French Carnation
8 oz. $4.75
12 Dabrook's Locust Bloom
8 oz. $2.50
13 Rickecker's Ping Pong
8 oz. $2.50
14 Lighterr's Red Roses
8 oz. $2.00
15 Atkinson's White Rose
16 oz. $7.00
16 Lubin's Jockey Club
16 oz. $7.50

1 VOGUE
9 oz. ..... $3.00 20 oz. .....
2 FLORITA
9 oz. ..... $3.00 20 oz. .....
3, TREFLE QUINTUPLE
9 oz. ..... $3.00 20 oz. .....
4 ORIANA
9 oz. $4.00
5 PERFUME IDEAL FLOR.
8 oz. $6.00
6 PEAU D'ESPAGNE QUINT
9 oz. ..... $3.00 20 oz. .....
7 SPECIAL FRANGIPANNI
9 oz. ..... $3.00 20 oz. .....
8 FRENCH VIOLET
9 oz. ..... $3.00 20 oz. .....
9 FOREST ROSES
9 oz. ..... $2.00 20 oz. .....
10 LILAC SPRAY
9 oz. ..... $2.00 20 oz. .....
11 CARNATION PINK
9 oz. ..... $2.00 20 oz. .....
12 LOCUST BLOOM
9 oz. ..... $2.00 20 oz. .....
13 PING PONG
9 oz. ..... $2.00 20 oz. .....
14 RED ROSE
9 oz. ..... $2.00 20 oz. .....
15 WHITE ROSE EXTRA QUAD.
9 oz. ..... $2.00 20 oz. .....
16 JOCKEY CLUB
9 oz. ..... $2.00 20 oz. .....

U.S.District Court
Eastern District of Pennsylvania.
The Eli Lilly & Company
Plaintiff
vs
Wm. R. Warner & Co.,
Defendant,
"PLAINTIFFS EXHIBIT, DEFENDANT'S PERFUME CARD B"

Charles E. Riordan

Oct. 25,1916Special Examiner.

1 Guerlain's Jickey.
8 oz.....$4.77

2 Allen's Janice
8 oz.....$4.00

3 Piver's Le Trefle Incarnat.
16 oz.....$8.52

4 Piver's Azurea.
16 oz.....$8.52

5 Houbigant's Parfum Ideal.
8 oz.....$11.11

6 Roger& Gallet's Peaud'-Espagne
8 oz.....$4.78

7 Palmer's Frangipanni.
8 oz.....$2.50

8 Roger & Gallet's Vera Violetta.
8 oz.....$4.95

9 Palmer's Rose Leaves.
8 oz.....$2.50

10 Colgate's La France Rose.
8 oz.....$2.98

11 Palmer's Lilac Sweets.
8 oz.....$2.50

12 Pinaud's French Carnation.
8 oz.....$4.75

13 Dabrook's Locust Blossom.
8 oz.....$2.50

14 Ricksecker's Ping Pong.
8 oz.....$3 50

15 Alfred Wright's Mary Stuart.
8 oz.....$2.50

16 Lightner's Red Roses.
8 oz.....$3.00

17 Atkinson's White Rose.
16 oz.....$7.00

18 Colgate's Pansy Blossom
8 oz.....$2.98

19 Colgate's Clover Blossom
8 oz.....$2.98

20 Lubin's Jockey Club.
16 oz.....$7.50

21 Colgate's Cashmere Bouquet.
8 oz.....$3.

1 VOQUE.
9 oz.....$3.00 20 oz.....$6.00

2 FLORITA.
9 oz.....$3.00 20 oz $6.00

3 TREFLE QUINTUPLE.
9 oz..... $3.00 20 oz.....$6.00

4 ORIANA.
9 oz.....$4.00

5 PERFUME IDEAL FLOR.
8 oz.....$6.00

6 PEAU D'ESPAGNE QUINT.
9 oz.....$3.00 20 oz.....$6.00

7 SPECIAL FRANGIPANNI.
9 oz.....$3.00 20 oz. $6.00

8 FRENCH VIOLET.
9 oz.....$3.00 20 oz.....$6.00

9 FOREST ROSES.
9 oz.....$2.00 20 oz.....$4.00

10 FRENCH ROSES.
9 oz.....$1.75 20 oz.....$3.50

11 LILAC SPRAY.
9 oz .. .$2.00 20 oz.. ...$4.00

12 CARNATION PINK.
9 oz.....$2.00 20 oz.....$4.00

13 LOCUST BLOOM.
9 oz.....$2.00 20 oz.....$4.00

14 PING PONG.
9 oz.....$2.00 20 oz.....$4.00

15 MARIE STEWART.
9 oz.....$2.00 20 oz.....$4.00

16 RED ROSE.
9 oz.....$2.00 20 oz..... $4.00

17 WHITE ROSE EXTRA.QUAD.
9 oz. ....$2.00 20 oz.....$4.00

18 GOLDEN PANSY.
9 oz.....$1.75 20 oz.....$3.50

19 SHAMROCK.
9 oz ...$2.00 20 oz.....$4.00

20 JOCKEY CLUB.
9 oz.....$2.00 20 oz.....$4.00

21 BOUQUET DE FRANCE.
9 oz. ....$3.00 20 oz.....$6.00

COMPARATIVE PRICES OF
SPECIAL AND MISCELLANEOUS PREPARATIONS

ALL PRICES ARE NET.

Abbott's Saline Laxative Salts	3 oz. $2.00 doz. 6 oz. 4.00 doz. 16 oz. 9.00 doz.	The Abbott Alkaloidal Co.	
Alboline Liquid	1 pt. bottle each .40 5 pt. bottle each 1.75	McKesson & Robbin	
Aletris Cordial	8 oz. $8.00 doz.	Rio Chemical Co.	
Alkalithia	4 oz. 9.00 doz.	Keasbey & Mattison	
Alka-Men-Thym, W. & Co., part 2. An alkaline, non-irritating Antiseptic. Indicated as a local treatment for inflammation of the Respiratory tract, Tonsillitis, Bronchitis, etc.			
Alophen, Pills		Parke Davis & Co.	
Anti-Cold Tabs. Huyck's, Part 3		S. & H., Indicated in Colds and LaGrippe.	
Anticongestus, W. & Co., part 2. An antiphlogistic, plastic dressing, indicated as a local treatment for Congestion and Inflammation.			
nticongestus Comp., B A, part 2, W. & Co. Most efficient plastic dressing on the market. Therapeutic value much increased by opium, belladonna, aconite and subacetate of lead.			
Anti-Malarial Pills, Dr. Bonner's. Part 1, Warner's Anti-Malarial Tablets, Dr. Bonner's, Part 2, S. & H. Indicated as an Anti-Periodic, valuable in the treatment of Chills, Fever and Malaria.			
Antikamnia Powder	$1.00 oz.	Antikamnia Chemical Co.	
Antikamnia Powder Laxative	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia Laxative Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Codeine Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Quinine Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Quin. Lax. Tabs.	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Salol Tabs.	1.00 oz.	Antikamnia Chemical Co.	
Antiphlogistine	½lb. $ 4.00 dozen 1 lb. 6.00 dozen 2 lb. 10.00 dozen 5 lb. 20.00 dozen		
Antiseptic Solution, W. & Co., Solutions, part 2			
Arsenauro	1 oz. bots. $8.50 doz.	Chas. Rome Parmalee Co	
Borolyptol	3 oz. $2.15 doz. 6 oz. 4.25 doz. 16 oz. 8.50 doz.	Palisade Mfg. Co.	
Bromidia	4 oz. 8.50 doz. 16 oz. 28.00 doz.		
Bromo Potash, W. & Co., Salts Eff., part 2.			

	per dos pints	Per 5 pint	per g
Gran. Effer. Salts, part 3, S. & H., for prices see Trade Confidential.			
Gran. Effer. Salts, Part 2, Warner for prices see Trade Confidential.			
Petrolene Oil, Part 3, S. & H.	$ 4 00	$ 1 40	$ 2
Aletris Comp. Part 3, S. & H.	9 00	3 00	4
Elix. Aletris Comp. H B, Part 1, E S Warner	7 20	2 70	4
	per lb.	per dos. ½ lb.	
G. E. Lithia Comp. Part 3, S. & H.	1 00	4 00	
	per dos. pints	Per 5 pint	per ga
Pills, Phenolpthalein Compound C. No. P 541	4 80	1 75	2 50
	Per M.	Per 500	per 10
	2 16	1 11	2
	2 50	1 30	2
½lb. Jars per doz.	2 75		
1 lb. " " "	4 45		
2 lb. " " "	7 00		
5 lb. Cans each	1 38		
½lb. Jar per doz.	3 05		
1 lb. " " "	4 95		
2 lb. " " "	8 60		
5 lb. Cans each	1 60		
Sugar Coated Pink	per M. 3 05	per 500 1 58	per 100
Chocolate Coated	3 00	1 52	34
	Per lb.	Per lb. in ½s	Per lb. in ½s
Anti-pain Powder, part 3, S. & H.	4 60	4 20	4 40
Anti-pain Powder Lax. part 3, S. & H.	4 60	4 20	4 40
Anti-pain Tabs. 5 gr. 32f, part 3, S. & H.	4 60	4 20	4 40
Anti-pain Tabs. Lax. 62g part 3, S. & H.	4 00	4 20	4 40
Anti-pain & Codeine Tabs. 62h. part 3, S. & H.	9 00	9 20	9 40
Anti-pain and Quinine Tablets 5 gr. 62j, part 3, S. & H.	4 60	4 80	5 00
Anti-pain and Quinine Laxative 5 gr. 62k, part 3, S. & H.	4 60	4 80	5 00
Anti-pain and Salol, 621, part 3, S. & H.	4 60	4 80	5 00
Anticongestus, W. & Co., see this list.			
Anticongestus Comp. W. & Co., see this list.			
	per doz	each	
Cataplasm of Kaolin, U. S. P., W. & Co., part 2	½lb. 2.40 1 lb. 3.84	5 lb. 1.38 10 " 2.50	
Plasticum, part 3, S. & H.	½lb 1.50 ½ " 2.40 1 lb. 3.84 2 lb. 7.20	5 lb. 1.35 10 " 2.50	
	per dos. pints	per 5 pint	per gal.
	4 40	1 50	2 25
Sol. Gold & Arsenic Brom. part 3, S. & H	per oz. 50	per ½pt 1 75	per pt. 6 75
Borobenzoformol, part 3, S. & H.	per doz pints 5 40	per 5 pint 2 00	per gal. 3 00
Chlora-Kaline, part 3, S. & H.	11 40	4 25	6 50
	per doz. doz. bot.	per lb. bottle	
	7 00	1 65	
	per doz.	per doz.	lb.

Antiseptic Solution, W. & Co., Solutions, part 3					
Arsenauro	1 oz. bots. $8.50 doz. Chas. Rome Parmalee Co	Sol. Gold & Arsenic Brom. part 3, S. & H	per oz. 50	per ½ pt 1 75.	per pt. 6 75
Borolyptol	3 oz. $2.15 doz. Palisade Mfg. Co. 6 oz. 4.25 doz. 16 oz. 8.50 doz.	Borobenzoformol. part 3, S. & H.	per doz pints 5 40	per 5 pint 2 00	per gal. 8 00
Bromidia	4 oz. 8.50 doz. 16 oz. 28.00 doz.	Chlora-Kaline, part 3, S. & H.	11 40	4 25	8 50
Bromo Potash, W. & Co., Salts Eff., part 2.			per doz. 4oz. bot. 7 00	per lb. bottle 1 65	
Bromo Soda, W. & Co., Eff. Salt, Part 2. For Sick and Nervous Headaches, due to Indigestion, Over Indulgence, Overwork, Close Confinement, Loss of Sleep, etc.			per doz. 25c. size 2 00	per doz. 1.00 size 8 00	1 lb. fancy jar each 2 25
Cactina Pellets	$2.00 doz. 25c size Sultan Drug Co.	Tablets Cactus Grandiflorus 2 min. 130f, part 2, S. & H.	per M 90	per 500 47	per 100 13
		Tablets. Cactus Grandiflorus 2 min. T267 part 1. Warner	90	47	13
		Glycerole Calendula Comp. part 3, S. & H.	per doz pints 3 40	per5 pt. 3 00	per gal. 6 50
Calenduline	2 ozs. $4.00 doz. Calenduline Co. 16 ozs. 12.00 doz.		Per M.	per 500	bot. 100
Calolactose Tabs. White. part 3	S. & H. A mild, effective and ideal preparation for the administration of Calomel. About 7000 in lb.	See also Calolactose Powder.	67	40	per doz. 1 60
			¼lb 1.15 per M.	¼lb 2.15 per 500	1 lb. 4.10 bot. 100
Calolactose Tabs. Pink, part 3	S. & H. About 3500 in lb.		67	40	per doz. 1 60
			¼lb. 63	¼lb 1.15	1 lb 2.15
Calolactose Powder Part 3	S. & H. Calolactose is composed of Calcme and Bismuth Subnitrate, each 1 part, Sugar of milk. (lactose) 8 parts. This mixture is triturated constantly for at least 10 hours.		per lb. 2 50	per lb. in ¼'s 2 60	per lb. in ¼'s 2 70
					1 oz bot per doz. 2 50
Campho Phenique	4 ozs. $8.00 doz. Phenique Co.	Phenolated Camphor, part 3, S. & H.	per pt. 1 50	per5 pt. 6 25	per gal. 9 00
			¼'s 1.63		
			¼'s 1.70		
Cascara Evacuant	Pts. per lb. $ 1?10 Park Davis & Co. per 5 pints 6.65 per gallon 10.50	F.E. Cascara with Podophyllin. F108 Part 2. Warner	per pt. 1 32	per 5 pint	per gal. 4 95
		F.E. Cascara with Podophyllin No. 114 Part 1. S. & H.	1 32		4 95
Castor'a	1¼ oz. $2.85 doz. The Centaur Co.	Castorole, part 3, S. & H.	per doz. pints 5 00	1 80	2 75
Castor Oil, Aromatized, White or Red. W. & Co., part 2.		Pure cold pressed Castor Oil, with Aromatics to make it Exceedingly Palatable, for Children and Adults	4 80	1 80	2 50
Castor Oil, Aromatic, White or Red. S. & H. part 3			4 80	1 80	2 50
Celerina	8 oz. 8.50 doz. Rio Chemical Co.	Tr. Celery Comp., No. 19, part 1. S. & H.	75		
		Tr. Celery Comp. No. 18, part 1 W. & Co.	75		
Chionia	8 oz. 8.00 doz. Peacock Chemical Co.	Elix. Chionanthus, part 3, S. & H.	7 80	2 75	8 75
		E73 Elix. Chionanthus, part 1, Warner	5 76	2 19	8 15
Coco Quinine	16 oz. 8.50 per doz. Eli, Lilly & Co. 5 pts. 3.30 per bottle	Quin Coco, part 3, S. & H.	7 20	2 50	3 75
Cod Liver Oil. Ext. of, Wampoles	16 oz. 8.50 doz. H. K. Wampole & Co.	Cod Liver Oil Comp. Ext. Cordial of formerly Tasteless, part 3, S. & H.	6 60	2 25	8 50
Cod Liver Oil, Wine of, Ext. of, with Malt and Hypophosphites, part 3 S. & H. Valuable in the treatment of Colds, LaGrippe and tubercular tendencies.			6 60	2 40	8 50
Cod Liver Oil Wine Ext. with Hypophosphites and Wild Cherry, Part 2, Warner			6 15	2 25	3 40
Creolin, Pearsin	16 oz. 8.00 doz. Merck & Co. 6 oz. 4.00 doz. 3 oz. 2.00 doz.	Kreosol, part 3, S. & H.	2 60	70	90
		Tabs. Hexamethylene-Tetramine 5 gr. part 3, S. & H.	per M 1 80	per 500 1 05	per 100 25
		Tabs. Formin, 5 gr., Part 1, Warner	1 95	99	24
Cystogen Tablets	25 Tabs. doz. bxs. $4.00 1 oz. each $1.00	Tabs. Hexamethylene-Tetramine 7½ gr. part 3, S. & H.	2 95	1 55	34
		Tabs. Formin, 7½ gr., part 1. Warner	2 85	1 44	33

ALL PRICES ARE NET.

Photolithographic Copy
"BLUE LIST"
(Original on blue paper)

(Photolithographic copy of page 1 of Complainant's Exhibit "Document No. 3"—referred to throughout the testimony and brief as defendant's "Blue List." The original copies of this exhibit are printed on blue paper.

WM. B. STANS
OF

IN THE

Supreme Court of the United States

No. 32, October Term, 1923

WILLIAM R. WARNER & COMPANY,
Petitioner,

vs.

ELI LILLY & COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF

FRANCIS RAWLE,
GEORGE W. WICKERSHAM,
ROGER S. BALDWIN,
JOSEPH W. HENDERSON,
Counsel for Petitioner.

Lewis, Inc., 165 William Street, New York City

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IN THE

Supreme Court of the United States

WILLIAM R. WARNER & COMPANY, *Petitioner,* *against* ELI LILLY & COMPANY, *Respondent.*	**October Term, 1923. No. 32.**

PETITIONER'S REPLY BRIEF.

Respondent's brief apparently disregards entirely any distinction between the facts found concurrently by both the District Court and the Circuit Court of Appeals and facts as to which those two courts are at variance, and argues the entire case *de novo* from the evidence. This would seem to place an unnecessary burden upon this Court. However, we shall, as briefly as possible, discuss the points raised in the Respondent's brief.

The so-called facts which Respondent contends the evidence shows beyond any doubt, almost without exception are challenged by Petitioner as not being supported by the evidence. There is scarcely one of the propositions enumerated on pages 5, 6, and 7 of Respondent's brief which, to say the least, does not depend upon weighing conflicting evidence and drawing deductions from such conflict.

The real basis of complaint upon which Respondent's entire case is predicated, may be found in two letters addressed by Mr. J. K. Lilly, President of Respondent Company, to Mr. G. A. Pfeiffer, Treasurer and General

Manager of William R. Warner & Company, the first bearing date August 31, 1909, in which Lilly writes asserting a claim to originality in the preparation of Coco-Quinine, and says:

> "While it would probably be asking too much to make the request that you discontinue this preparation, we do think it would be reasonable to ask that you observe the same prices. We find that you are selling 5 pint bottles at $2.50 against our $3.30; pints at $7.20 a dozen against our $8.50 to the retail trade. Should you feel inclined to make your lowest price to the retail trade correspond with our prices, which are absolutely fixed, we would certainly appreciate it and be very glad to reciprocate whenever possible. If manufacturers were generally making this preparation, we would not be bold enough to make this suggestion" (Rec., Vol. III, p. 1214).

In the second letter, dated January 11, 1910, he repeats his complaint that Petitioner was pushing the sale of Quin-Coco in competition with Respondent's Coco-Quinine, and says:

> "You have taken our preparation bodily, simply transposing the name and are today energetically and actively offering it as a substitute for Coco-Quinine at $2.50 per five pint bottle against our $3.30. You are not creating any new demand to speak of, and are simply taking at a cut price, business that originated with and was built by Eli Lilly & Company.
>
> • • • • • • • • • •
>
> "If you cannot see your way clear to withdraw this preparation from the market, we ask that you change the name to one that has not the slightest resemblance to Coco-Quinine and increase your price so that the lowest price to the retail trade will be $3.30 per 5 pt. bottle or $8.50 per dozen pints making no better prices in packages larger than 5 pint bottles" (Rec., Vol. III, p. 1217).

After a careful consideration of the Respondent's brief, together with the evidence, the case presented appears to be this:

A first class manufacturing drug concern (one of the six leaders according to the Respondent's own witness, *infra*, p. 48), is charged by a competing house with grossly "unfair" methods in the sale of one small item, Quin-Coco, out of its 5,000 drug items. The apparent profit on this item was perhaps $1,000. a year on a gross business of $2,600,000.

The Respondent, with 145 traveling salesmen visiting all of the retail druggists in the country (53,773) several times a year for seven years, produced as witnesses to prove its charges of this fraudulent conduct on the part of the Petitioner, some 22 druggists. Of these, all but two (Walker and W. G. Scott), whatever their testimony in chief was, broke down on cross-examination, thereby entirely failing to sustain the averments of the bill.

Petitioner's usual sales force was 75. They had a total of 313 different salesmen in their employ during the seven years in question. These salesmen likewise visited the 53,773 retail druggists from four to six times a year for seven years.

The Respondent called certain witnesses who had been formerly salesmen of the Petitioner, in order to prove that the officers and sales managers of Petitioner had given them unethical instructions concerning the sale of Quin-Coco. All of these witnesses either proved nothing substantial or else broke down on cross-examination, except Hardy. The principal one, Kelton, testified to "absolutely ethical teaching."

On the other hand, the general officers, the sales managers and the salesmen, all (except the salesmen who had gone over to the Respondent) testified that the Petitioner's training of its salesmen had been ethical and none of

the others but Hardy, gave evidence tending to prove the contrary.

All or nearly all of the witnesses were more or less stale, and testified to conversations which had taken place from a few months to nine years previously.

The testimony of all of these impugning witnesses was unqualifiedly denied by the officers, sales managers and salesmen referred to (except in the cases of Gill, whose mind had become impaired, and of the former salesmen who had gone over to the Respondent's side and testified for it).

Not only were the witnesses mostly stale, but it appeared that the Respondent for seven years, and until the bill was filed, never complained to Petitioner about its alleged unfair selling methods, although it had ample means to have ascertained all the facts if there were any, and although in 1909 it did complain that Petitioner was selling Quin-Coco at prices under those of Coco-Quinine.

The District Court, after a careful consideration of the proofs, dismissed the bill, finding that there was no evidence of unfair selling, but the Circuit Court of Appeals found the contrary and enjoined the Petitioner from the use of chocolate, although expressly stating that that right was open to all the world except the Petitioner.

The case has gone far beyond a mere question of the right to sell this relatively unimportant item. It has become a question of an unwarranted attack by one drug house upon the moral character of its competitor, a concern of high standing in the business.

I.

The question of Petitioner's right to manufacture its product Quin-Coco and to market it by lawful selling methods cannot seriously be controverted at this time.

That right is settled by an unbroken line of cases, among which are the following:

Saxlehner v. *Wagner*, 216 U. S., 375, 380, 381, was a suit to enjoin the defendants from the use of "Hunyadi Janos" or "Hunyadi" as a name for its artificial water. The opinion of the Court affirming a decree below dismissing the bill, was rendered by Mr. Justice HOLMES, who said:

> "We see no reason for disturbing the finding of the courts below that there was no unfair competition and no fraud. The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade-mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood *what they are copying and trying to sell.* But the plaintiff *has no patent* for the water, and the defendants *have a right to reproduce it as nearly as they can.* They have a right *to tell the public what they are doing* and to get whatever share they can in the popularity of the water by advertising that they are *trying to make the same article* and think that they succeed. If they do not convey, but, on the contrary, exclude the notion that they are selling the plaintiff's goods, *it is a strong proposition that when the article has a well-known name they have not the right to explain by that name what they imitate.* By doing so they are not trying to get the good will of the name, *but the good will of the goods.* See *Flagg Manufacturing Co.* v. *Holway*, 178 Massachusetts, 83, 91; *Chadwick* v. *Cov-*

ell, 151 Massachusetts, 190, 191. Although the application is different, the principle seems to be similar to the rule that when a patent has expired descriptive words or even an arbitrary or personal name by which it has become known may be used if sufficient precautions are taken to prevent the public from being deceived. See *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S., 169.

"The plaintiff says that no one can succeed in imitating a natural water. *But all are free to try.*" (Italics ours.)

See also *N. K. Fairbank Co.* v. *Bell Manfg. Co.*, 77 Fed., 869; C. C. A., 2nd Circ., LACOMBE and SHIPMAN, C. JJ.

The decree there expressly provided that the defendants should not be enjoined from "making a powder having the appearance of complainant's 'Gold Dust.'"

Canal Co. v. *Clark*, 13 Wall., 311, was a case on Lackawanna coal, in which Mr. Justice STRONG wrote the opinion. He said (pp. 323-324, 327):

"And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark, or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, *or a name merely descriptive* of an article of trade, of its qualities, *ingredients*, or characteristics, be employed as a trade mark and the exclusive use of it be entitled to legal protection. As we [misprint for "was"] said in the well-considered case of *Amoskeag Manufacturing Co.* v. *Spear* (2 Sandf., 599), 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive

use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, *others may employ with equal truth,* and therefore have an equal right to employ for the same purpose.' [Citing many cases.]

* * * * * * * *

"True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but *if it is just as true in its application to his goods* as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." (p. 327.)

Standard Paint Co. v. *Trinidad Asphalt Co.,* 220 U. S., 446, 461, was an unfair trade case on rubber roofing—"Ruberoid."

The fifth paragraph of the syllabus:

"The essence of unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and this cannot be predicated solely on the use of a trade-name *similar to that used by plaintiff if such trade-name is invalid as a trade-mark.* To do so would be to give the plaintiff's trade-name full effect of a trade-mark notwithstanding its invalidity as such." (Italics ours.)

The opinion (McKenna, J., at p. 461):

"The only imitation by the asphalt company of the roofing of the paint company is that which exists in the use of the word 'rubbero,' and this only by its asserted resemblance to the word 'rub-

eroid.' To preclude its use because of such resemblance would be to give to the word 'ruberoid' the full effect of a trade-mark, while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S., 665, 673."

ANY ARTICLE (NEW OR OLD) NOT PROTECTED BY LETTERS PATENT IS OPEN TO ALL THE WORLD TO SELL.

Chadwick v. *Covell*, 151 Mass., 190; 6 L. R. A. 839.

Dr. Spencer had a secret formula for "Dr. Spencer's Queen of Pain." The defendant (having discovered the formula without any breach of trust) manufactured the article and put it on the market.

Mr. Justice HOLMES said, in rendering the judgment of the Supreme Judicial Court of Massachusetts (p. 191):

"So far as the right to manufacture and sell the medicines goes, the plaintiff's case may be disposed of in a few words. Dr. Spencer had no exclusive right to the use of his formulas; his only right was to prevent any one from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will. *Peabody* v. *Norfolk*, 98 Mass., 452, 458; *Morison* v. *Moat*, 9 Hare, 241, 263; *Williams* v. *Williams*, 3 Meriv. 157."

Matter of Williams, 34 R. P. C., 197:

Before Lord COZENS-HARDY, M. R., WARRINGTON, L. J., and LAWRENCE, J.; see especially the opinion of LAWRENCE, J.

The plaintiff made and sold a new confection of chocolate and macaroons, under the name of "Chocaroons." It was *held* that it was a new product and a new name, which was open to any person, and that any person could make and sell it, *using the plaintiff's name "Chocaroons"*; that the name was not used to distinguish plaintiff's make from others but to distinguish the particular sweetmeat; and that if others were debarred from using the name (*while having the right to make the thing*) they would be debarred from selling it, because the public would refuse to buy it except under the name by which they knew it. Thus the defendant would secure a monopoly in the goods by having a monopoly in the name. See especially the opinion of WARRINGTON, L. J.

Cellular Clothing Co. v. *Maxton & Murray* [1899] A. C., 326, 344 (House of Lords):

Before the EARL OF HALSBURY, L. C., LORD WATSON, LORD SHAND and LORD DAVEY:

> "But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, *although they are entitled to do so*, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article: *all the world may make the article, and all the world may tell the public what article it is they make* and for that purpose they may *prima facie* use the name by which the article is known in the market." (*Per* LORD DAVEY; italics ours.)

Viavi Co. v. *Vimedia Co.*, 245 Fed., 289, C. C. A., 8th Circuit, certiorari denied, 246 U. S., 664:

The Viavi Company sold a line of medicinal goods such as "Viavi Capsules" and "Viavi Laxatives," etc.

The defendant sold another such line under the name "Vimedia."

Held, that in the absence of such a monopoly as a patent confers, any persons may produce the articles, if they can, and may sell them under the representation *that they believe they are the same article,* if they exclude the notion that they are plaintiff's goods.

Hostetter v. *Fries,* 17 Fed., 620, S. D. N. Y.:

WALLACE, J., at pp. 621-622:

> "The complainants have neither the exclusive right to make bitters compounded after the formula of Dr. Hostetter, nor the exclusive right to sell bitters by the name of Hostetter's Bitters. The preparation never had any name until it was offered to the public and christened. When a new article is made a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. If this were not so any person could acquire the exclusive right to a formula by giving a name to the compound produced, not only when the compound has not been patented, but when it might not be the subject of a patent. All who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller and not the preparation made by another. * * * A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of thing which is manufactured. *(Singer Mfg. Co.* v. *Loog,* 8 App. Cas., 15; *Wheeler & Wilson Mfg. Co.* v. *Shakespear,* 39 L. J. Ch., 36; *Young* v. *Macrae,* 9 Jur. N. S., 322.)"

Sterling Remedy Co. v. *Gorey,* 110 Fed., 372, N. D. Ohio, E. D.:

Case of "unfair" competition on "cascarets," a laxative remedy containing the drug "Cascara," combined with other ingredients. Held:

> "The word 'Cascara' is the name of a drug generally known as a good laxative, and the defendant should not be enjoined from using that name. * * * The defendant may sell tablets which are compounds of cascara, and, in appropriately naming them, he may use the word 'Cascara,' and the decree of injunction in this case must not be so sweeping as to prevent the defendant from so doing." (pp. 373-374.)

Caswell v. *Davis*, 58 N. Y., 223, 234:

The plaintiff's article was a medicine composed of iron, phosphorus and calisaya bark, sold under the name of "Ferro-Phosphorated Elixir of Calisaya Bark." The defendant began to sell the preparation under the same name. An injunction was refused below, which disposition of the case was affrmed on appeal.

The Court, by FOLGER, J., said:

> "*It is a right which everyone has*, and from the exercise of which he may not be debarred, to make an article of the same ingredients, of the same composition and of as good quality as that made by another, *when that other has no exclusive privilege of manufacture conferred by law.* Having this right to make, he has also the right to indicate the ingredients, the composition and quality of that which he has made, by any usual words or phrases apt therefore. Hence, when he adopts usual phrases which do no more than this, he but takes from a stock common to all mankind, and does not infringe upon any exclusive right of another, who has, before that, used the same or like words or phrases. Nor can the first user avoid this result, *by coupling with his purpose to indicate quality and characteristics, a purpose also to indicate origin.* Though he have that purpose also,

and the form of words used by him have also that effect, inasmuch as he cannot be given the exclusive use, without impairing the right of another, *the exclusive use will be denied.*" (Italics ours.)

As to the rule in expired patent cases referred to by Mr. Justice Holmes, it is hardly necessary to observe that the leading case is

Singer Manfg. Co. v. *June Manfg. Co.*, 163 U. S., 169, 199.

The opinion of the Court was delivered by Wnite, J. He said:

"The result, then, of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however to the condition that the name must be so used as not to deprive others of their rights, or to deceive the public, and, therefore, that the name must be accompanied *with such indications* that the thing *manufactured* is the work of the one making it, as will unmistakably inform the public of that fact." (Italics ours.)

There is no need for argument that the name of Respondent's article has not acquired a secondary meaning. The only relevant issue of fact therefore is the question whether Petitioner's selling methods were fair or not. If, on that issue, the Court shall reverse the Circuit Court of Appeals, no other question remains to be decided. This being so, a very large part of Respondent's brief is irrelevant. For instance, pages 11 to 39: The statement, even if proved, that Quin-Coca is inferior to Coca-Quinine is equally irrelevant. A few witnesses—perhaps half a dozen—make the statement, but it is merely an expression of opinion, with no reasons given. Testimony to the contrary is given on behalf of Petitioner and especially by Kelton (XQ38, Rec., Vol. I, at p. 249), one of Respondent's witnesses.

Equally irrelevant is evidence of the origin of Coca-Quinine and of experiments made in reaching the formula for it; and of the fact that the Petitioner in some way discovered the Respondent's formula (which is not proved). All we need to know is that the Respondent selected quinine, yerba santa and cocoa (ingredients common to all), and the Petitioner, as its right was, selected the same ingredients. As to how either of them "compounded" them is not important. The alleged experiments of the Petitioner at Philadelphia, which, we admit, are disproved, are not relevant even if they occurred. The Petitioner was within its right in making a similar article.

Although we regard most of Respondent's contentions as wholly irrelevant to the only question before this Court we shall discuss with as much brevity as possible the points advanced on its behalf.

II.

The contention that a "tasteless liquid quinine preparation was original with plaintiff" is refuted by the arguments in Respondent's own brief.

It is argued that Respondent sought a palatable liquid preparation, and to meet the demand for it, Coco-Quinine was developed. Obviously, a *palatable* liquid quinine preparation could not be *tasteless*.

The whole of Respondent's complaint was based upon the fact that Petitioner was making substantially the same article as its Coco-Quinine, and selling it at a lower price. There was prior to this suit no contention by Respondent that these sales were occasioned by any other method than a difference in price, and if Petitioner had been willing to raise its price to meet that of Respondent, this law suit never would have been brought. The *only* basis for such request was that Respondent was the first to produce a liquid preparation containing quinine sulphate in definite proportions, with the bitterness of the quinine disguised by yerba santa and chocolate, and that it had a common law right to the exclusive control of that product; also that the name Quin-Coco was an invasion of a trade-mark right of Respondent in the name of Coco-Quinine. Both of these contentions have been disposed of adversely to the Respondent by both the District Court and the Circuit Court of Appeals. Nevertheless, the Respondent seeks to re-argue both propositions in this court.

III.

Respondent did not originate the quinine, yerba santa, chocolate mixture.

Prior to Coco-Quinine, Respondent's brief continues (p. 11),

> "both plaintiff and defendant had a preparation on the market which druggists used for preparing extemporaneous mixtures of quinine sulphate in liquid form, the Lilly preparation being known as Yerbazine and the defendant's preparation as Quinamel."

This amounts not merely to an *admission*, but to an *assertion* that a tasteless liquid quinine preparation was not original with Petitioner, but that both parties had developed such a product.

Eberhardt, Respondent's chemist, testified that in these original preparations, yerba santa was used to disguise the bitterness of the quinine. (Rec., Vol. I, pp. 8, 13.)

There is not even a suggestion in the evidence that this preparation was original with Respondent.

The statement that Coco-Quinine was the first medicine of permanent character consisting of a mixture of liquid syrups, preservatives, yerba santa for disguising the bitterness of the quinine, and quinine sulphate, is at variance with the undisputed evidence referred to on pages 25-28 of Petitioner's original brief. This evidence is not controverted by the testimony of witnesses—mostly retail druggists—referred to on pages 12 and 13 of Respondent's brief. That testimony amounts to nothing more than that the witnesses respectively did not know

of any other preparation. Thus, for example, take the witness Knowles:

> "Q14. Did you ever know of a chocolate quinine preparation prior to your knowledge of the Lilly product? A. No." (Rec., Vol. I, p. 66.)

Or the witness Schaeffer:

> "Q8. Did you have any knowledge of another Coco-Quinine or chocolate quinine preparation before Coco-Quinine was introduced by Eli Lilly & Co.? A. No, sir." (Rec., Vol. I, p. 156.)

Nor is this testimony broadened in its application by the evidence of Eberhardt, Respondent's chemist, who testified to working out, towards the close of 1899, under instructions from Mr. J. K. Lilly,

> "a syrup containing quinine which would be as palatable as I could make it, to be put upon the market as a liquid preparation of quinine," (Rec., Vol. I, p. 8)

in the development of which he made the product now known as Coco-Quinine. The statement he made of adding chocolate as a means of giving

> "a distinctive color and a characteristic appearance and furthermore to keep in better suspension the material in the preparation," *(Ibid.)*

does not at all militate against the evidence referred to above (Petitioner's brief, pp. 25-28), showing that chocolate had been used for this purpose as far back as 1873. Nor does the testimony of Mr. J. K. Lilly alter the situation, being merely to the effect that in order to create "a palatable liquid preparation of quinine," he caused the mixture of quinine, yerba santa and chocolate to be made which he began to market in 1900 and which is now known as Coco-Quinine (Rec., Vol. I, pp. 42-43).

Dr. Eberhardt's contention (see Respondent's brief, pp. 13-16) that he employed chocolate to give the preparation *"a distinctive color and pleasant flavor,"* renders quite unnecessary all the testimony and the elaborate contention going to show that chocolate is a negligible agency in the preparation, or that other syrups than chocolate might be employed to give a different color and an equally palatable but different flavor to the mixture. So long as these simple, well known substances, quinine, yerba santa and chocolate, are open to all the world to use in such mixture as is found palatable, it makes no difference what other substance might be found to conceal the bitterness of quinine, or to impart a pleasant but different flavor to the mixture. Francis E. Bibbins, director of Respondent's pharmaceutical department, also admitted on cross-examination that the cocoa in Coco-Quinine is itself a suspending agent; that is that cocoa plays the three-fold part of giving color, flavor and suspending qualities (Rec., Vol. II, p. 832, XQs25, 26). Eberhardt's testimony is to the same effect (Rec., Vol. I, p. 12, XQ31, p. 13, RXQ39).

Both the District Court and the Circuit Court of Appeals agree that the Respondent has no exclusive right to the formula of its preparation; that anyone else might duplicate it by a preparation of his own, and offer it to the trade in competition with Respondent's preparation. We shall later deal with the objection which the Circuit Court of Appeals found to the *"manner* in which" Petitioner exercised its legal right.

Much is made by Respondent of the contention that in preparing its product, Petitioner endeavored to give it the same color and flavor as Coco-Quinine.

> "Admittedly," says the Circuit Court of Appeals, "the plaintiff has no monopoly in its formula nor has it an exclusive right to the use of any of its ingredients." (Rec., Vol. III, p. 1659.)

See also cases cited *supra*.

Therefore, even if Petitioner had sought to copy exactly the coloring and taste of Respondent's product, it would have been within its rights, but that it did so is vigorously denied by abundant evidence. Fritsch, the foreman of the wet goods department, the manufacturer of liquid preparations of the Petitioner Company in Philadelphia, testified to experiments made in 1907 and 1908, in the effort to make a tasteless syrup of chocolate quinine. These experiments were not successful and the matter was dropped (Rec., Vol. III, pp. 1495, 1499, 1503). This was before the Pfeiffers took over the Warner business (July, 1908).

Quin-Coco had previously been manufactured (1906) by the Searle & Hereth Company, an Illinois corporation, with laboratories in St. Louis, Missouri, and marketed in the fall of that year by the Pfeiffer Chemical Company (Rec., Vol. III, pp. 1196, 1228). In July, 1906, the Pfeiffer Chemical Company, a Pennsylvania corporation, acquired control of the Searle & Hereth Company (Rec., Vol. III, pp. 1196, 1228). In July, 1908, the Petitioner corporation, William R. Warner & Company, was organized under the laws of Pennsylvania and took over the old Philadelphia firm of the same name. The persons who organized that corporation, H. Pfeiffer, G. A. Pfeiffer and G. D. Merner, owned the Searle & Hereth Company and the Pfeiffer Chemical Company, and now own a majority of the capital stock of all three companies (Rec., Vol. III, p. 1234, Q4; p. 1241, XQs39, 42; p. 1227, XQs217-218). Since the organization of the Petitioner corporation in 1908, the Searle & Hereth Company, in addition to maintaining its laboratory at St. Louis, Missouri, also has had a laboratory in Philadelphia, in the same building with Petitioner corporation (Rec., Vol. III, p. 1227, XQs220, 223). From that date Quin-Coco has been manufactured

at the Philadelphia laboratory, as well as in St. Louis, by the Searle & Hereth Company.

Fritsch testified that no Quin-Coco was made in Philadelphia until March, 1909. He said that in that month he got his formula from St. Louis and made his first batch of Quin-Coco, comparing his product with the bottle of the product made by Searle & Hereth Company at St. Louis. He further testified that in making that product, he made no effort to standardize the color of the cocoa; that there are variations in color between the different batches (Rec., Vol. III, pp. 1494, 1498).

Respondent cites the testimony of a large number of witnesses to show that the preparation is dispensed by druggists, both when prescribed by physicians and when called for by customers; that it is sold by the manufacturers to the drug trade in bulk packages and the druggist dispenses the same in his own prescription bottle filled out of these bulk packages (Respondent's Brief, pp. 29, 30), and, therefore, there is a necessity for some medium *in the preparation itself* to distinguish and identify its originality (pp. 28, 29). But almost every one of the witnesses whose testimony is cited in support of this proposition, also testified that he sold the product over his own counter on the application of purchasers, sometimes on calls for Coco-Quinine (Merithew, Rec., Vol. I, p. 61), sometimes on call for chocolate quinine (Jennings, p. 93; Manning, p. 110; Richard, p. 144), and

> "some even go as far as 'syrup of quinine, brown color', depending upon the education of the customer" (Knowles, Rec., Vol. I, p. 66);

or again as "sweet quinine" (Wright, p. 69). Respondent's argument would prohibit the sale of any medicinal preparation of the same color as another in competition with it, irrespective of the formula of its

make-up, simply because it is possible to palm off one liquid of a given color for another of the same color, which might be made on a totally different formula. This would be a rather novel means of establishing a monopoly, and quite at variance with the authorities above cited as well as the conclusions of both the courts which have thus far passed upon this case, to the effect that Respondent has no exclusive right to the formula of its preparation, and, therefore, it was open to Petitioner to duplicate it by a preparation of its own, and to offer it to the trade in competition.

The testimony going to show efforts made by Petitioner to copy the exact color of Respondent's Coco-Quinine in the manufacture of Quin-Coco, was all disputed, but even if true, it was wholly immaterial, if the law be as laid down by both the District Court and the Circuit Court of Appeals. Chocolate is chocolate; a well-known substance employed as food and medicine. It has a distinctive color. Probably the whole range of variety of shade when put in solution would not enable one chocolate connection to be differentiated from another. If, as the uncontradicted evidence shows, chocolate was used in connection with quinine as a means of making the taste of quinine more palatable years before Respondent made its connection Coco-Quinine, it certainly was open to Petitioner to use the same substance for a like purpose, and a similarity of appearance is wholly immaterial.

IV.

Respondent's charges of fraudulent selling by Petitioner are not sustained by the evidence cited in support of them.

Respondent's contention that Petitioner sold its product Quin-Coco in the trade,

> "representing to the drug trade that it was identical with Lilly's Coco-Quinine, not only in therapeutic value but in color and flavor, and that it could be dispensed on physicians' prescriptions written for Coco-Quinine as well as in response to calls over the counter for Coco-Quinine 'without detection' or 'without anyone being the wiser,' holding out as the inducement for the perpetration of the supposed fraud that the druggist could make more money by handling Quin-Coco which defendant was selling at $1.30 per gallon below the price of Coco-Quinine,"

that many retail druggists yielded to this persuasion and the temptation for larger profits, purchased Quin-Coco from Petitioner and used it as suggested in supplying a demand for Coco-Quinine (Respondent's Brief, pp. 5, 6), rests upon the meagre evidence which has been analyzed and commented upon in our principal brief (pp. 29-33, 34 *et seq.*). Respondent contends that these conclusions are established "beyond question by a multitude of witnesses."

As a matter of fact, practically every witness who testified up to Respondent's full contention broke down on cross examination and, as above stated, was contradicted flatly by at least one and sometimes two witnesses for Petitioner. Almost all of the testimony failed to come up to Respondent's requirements. The witness Hooper did not testify that he was told to advise druggists they could use Quin-Coco to fill prescriptions for

Coco-Quinine. He said his instructions from Stevenson, the representative of the Pfeiffer Chemical Company, were "to sell Quin-Coco as a substitute product for Coco-Quinine." Stevenson denied giving these instructions (Rec., Vol. III, p. 1411). Hooper said,

> "In making my sale of Quin-Coco I told the druggists that it was exactly the same as Coco-Quinine made by Lilly & Co.," etc. (Rec., Vol. I, pp. 15-16.)

This was his voluntary statement, not made under instructions from his employer or the employer's representative (p. 15) and contained nothing untrue or improper. So, Kelton's testimony quoted on page 42 of Respondent's Brief was no evidence of fraud, as Quin-Coco properly could be sold to supply the demand for Coco-Quinine, if no deception were practiced. (See Rec., Vol. I, p. 101, XQ41.) Kelton, a former employee of Petitioner, called by Respondent, on cross examination said:

> "I have previously stated that I believed then and believe now that Quin-Coco was and is a superior preparation to Coco-Quinine manufactured by Eli Lilly & Co. The price also as above stated was the chief club I used with which to hammer against Coco-Quinine" (Rec., Vol. I, p. 100, XQ34)*.
>
> "XQ41. In answer to XQ29, you have specified that by 'replacer' you mean a preparation 'which in class and quality was similar to the original.' Could not a druggist honestly use Quin-Coco as a 'replacer' for Coco-Quinine by getting the consent of a physician who has prescribed Coco-Quinine, to use Quin-Coco? And, when a customer ever

*It will be remembered that the lower price was what Mr. Lilly complained of in his letters to Mr. Pfeiffer quoted on pages 1 and 2 of this brief.

the counter called for Coco-Quinine, explaining to such a customer that Quin-Coco was a better preparation and did not coagulate?

"A. That would be a matter left entirely with the druggist. My business was to sell Quin-Coco in the place of Coco-Quinine. How he sold the preparation was entirely optional with him. My own sales to the druggists were open and above board and nothing whatever in the way of a clandestine nature was between us.

"As above stated, I invariably demonstrated the difference between Quin-Coco and Coco-Quinine, stating as I have time and time again that I believed and still believe that Quin-Coco is a superior preparation to Coco-Quinine. If the druggist obtained the consent of the physician to substitute Quin-Coco when the physician had written Coco-Quinine that would be a matter entirely between the druggist and physician, for by mutual consent the Quin-Coco, as in this instance, could be substituted for Coco-Quinine" (p. 101).

"XQ43. If you will pardon me, I now ask you whether you suggested to retail druggists that they could buy Quin-Coco and handle it and 'palm' it off over the counter to customers calling for Coco-Quinine? A. If you call buying a better preparation and making more profit on said preparation than the one called for, I answer that I invariably suggested to the druggist to show the Quin-Coco in place of Coco-Quinine, but at no time, as above stated, did I ever suggest to 'palm off' said Quin-Coco instead of the original product known to the trade as Coco-Quinine" (Rec., Vol. I, p. 102).

The witness Groves' testimony, referred to on page 42 of Respondent's brief, that he heard Hagaman (Petitioner's sales agent) tell a druggist that Quin-Coco could be sold as Coco-Quinine and advise druggists to buy Quin-Coco and substitute it on calls for Coco-Quinine was directly contradicted by Hagaman (Rec., Vol. III, p.

1491). On re-cross examination, Groves testified as follows:

> "RXQ93. Will you swear that you ever heard Hagaman say to a druggist that he could buy Quin-Coco and substitute it on calls for Coco-Quinine? A. I have heard him tell druggists that Quin-Coco could be sold as Coco-Quinine, but where I cannot say.
>
> RXQ94. Can you swear that you ever heard Hagaman advise a druggist to buy Quin-Coco and substitute it on calls for Coco-Quinine? A. Yes.
>
> RXQ95. What did he say to them? A. That Quin-Coco was a similar product to Coco-Quinine, containing the same amount of quinine and was like it in appearance.
>
> RXQ96. That is what he said, is it? A. That is what we all said. That was our only method of selling it.
>
> RXQ97. And that is what Hagaman said? A. He could say nothing else.
>
> RXQ98. And that is what you used to say? A. Yes, it being the only selling point we had" (Rec., Vol. I, p. 368).

Respondent contends (Brief, p. 45), that the testimony reviewed shows that defendant's purpose in duplicating plaintiff's Coco-Quinine, particularly as to its non-essential physical characteristics imparted to it chiefly by the use of chocolate as a coloring and flavoring medium, was to take from Respondent and appropriate to Petitioner a large part of the market for Coco-Quinine, etc.

But if, as the District Court has held,

> "* * * the defendant had a lawful right to reproduce the plaintiff's preparation; to tell the plaintiff's customers that it was essentially the same as the plaintiff's product in composition and therapeutic effects; and to sell it as a substitute for the plaintiff's product * * *.

> "The plaintiff has no exclusive right in the color and flavor inevitably following the use of cocoa or chocolate which the defendant had a right to combine with quinine in a pharmaceutical preparation.
>
> "The defendant had a lawful right to call its preparation Quin-Coco, which is a descriptive name of the same effect as Coco-Quinine" (Rec., Vol. III, p. 1651),

then whether the evidence establishes what the Respondent contends or not is wholly immaterial, for Petitioner was within its legal rights.

Respecting the further evidence resting upon the testimony of "numerous retail druggists," Respondent seeks to impute to Petitioner the dishonesty of a few druggists selected from among thousands scattered throughout the country, on the theory that by producing a competitive identical article, Petitioner put it in the power of dishonest men to practice unfair competition. If the articles are identical and the Respondent has no exclusive right to the manufacture of one of them, Petitioner cannot be held responsible for the acts of dishonest dealers, and Respondent has no right to complain of competition, even though as an incidental result, dishonest dealers may reduce Respondent's sales or supplant its products. There is the same danger in all competition.

The wholesale generalization of the testimony of the retail druggists produced as witnesses by the Respondent, given on page 54 of Respondent's brief, goes beyond the actual testimony given by them. Merithew, whose testimony is summarized on page 47 of the brief, testified on direct examination that Starring, one of Petitioner's representatives, told him that Quin-Coco could be dispensed when Coco-Quinine was called for; but on cross examination he could not give the exact words used. The conversation, as nearly as he could remember it, was

a year and six months before he testified. He said (XQ29):

> "A. I cannot state his exact words, *but he referred to me* that Quin-Cuno was lower in price than Cuno-Quinine, and therefore several of the druggists were dispensing it in the cities of Michigan which I heretofore named.
>
> XQ30. And that is the substance of what he said to you? A. No, it is not. He spoke about the similarity of the preparation both in quality of quinine contained in each ounce, the physiological action and appearance. Now I am through" (Rec., Vol. I, pp. 62, 63; italics ours).

The testimony of the witness Knowles, quoted on page 49 of Respondent's Brief was elicited in the following manner:

> "Q28. Have you ever heard of a product called Quin-Cuno, and, if so, what can you tell us with reference thereto? A. A representative of William R. Warner & Co. introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of Cuno-Quinine when I could use his product at a cheaper price.
>
> Q29. Use his product for what purpose? A. For dispensing purposes, and also to sell on call.
>
> Q30. On call for what?" (Rec., Vol. I, p. 66.)

This was objected to as leading. The question was restated, and the witness said:

> "A. For Cuno-Quinine or chocolate quinine, syrup quinine or where the syrup of quinine is used.
>
> Q32. Under what name is such a product as you have referred to usually called for in prescriptions and by customers at your store? A. The prescription Cuno-Quinine. Over the counter or call, Cuno-Quinine, chocolate quinine, and some even go so far as 'syrup of quinine, brown color,' depending upon the education of the customer" (*id.*, p. 66).

On cross examination, Knowles was asked to state the salesman's exact words with reference to selling his product on call, etc., to which he answered (XQ[illegible]):

> "A. He took a sample of Quin-Cose from his grip and asked me if I handled that product. I said 'No, I have always used Cose-Quinine for all such calls.' He said, 'Well, don't you think you could handle this to your advantage.' I said 'I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to use the Cose-Quinine.' Then he stated the price that I was paying for the Cose-Quinine and that I could use his product and save the difference. I told him 'no, I will continue with the Cose-Quinine as it always gave the best satisfaction.' * * * 'That was all on that subject' (Rec., Vol. I, p. 67).

So, the testimony of the witness Wolsey, referred to on page 48 of Respondent's brief, on cross examination came down to a statement of the exact words used by Petitioner's salesman as being:

> "I would like to sell you a gallon of Quin-Cose. It would be cheaper for you to use than Cose-Quinine and you would make more money off it" (Rec., Vol. I, p. 79).

The summary of the testimony of the witness Prockner on page 49 of Respondent's Brief, gives a very inaccurate impression of the evidence itself, which was the following:

> "Q11. Have you ever been solicited to buy Quin-Cose, and if so by whom and what inducements were held out as a reason for such a purchase?
>
> * * * * * * *
>
> A. Yes, William B. Warner & Company's salesman solicited my order and the inducement was the price.

Q15. What else was said by William R. Warner & Company's salesman? A. He told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper.

Q16. Did he say anything about what use you could make of it?

By Mr. Keefe: Objected to as leading.

A. He intended me to use it instead of Coco-Quinine.

By Mr. Keefe: The answer is objected to as not stating what the salesman said.

Q17. What do you mean by 'instead of Coco-Quinine'?

Same objection as to the last question and as not calling for testimony as to what was said.

A. When I got a call for Coco-Quinine or a prescription, that it could be used instead" (Rec., Vol. I, pp. 100–107).

On cross examination, witness undertook to give the exact language used by petitioner's salesman, Richards, as follows (R. 107):

"A. Well, he told me that — he asked me whether I was using much Coco-Quinine. If I did he could save me some money on it. He said he had this Coco which was the same thing as Coco-Quinine and he then gave me the different prices between Coco-Quinine and this Coco" (Rec., Vol. I, p. 107).

Whitley, whose direct testimony is referred to as part of respondent's brief, on cross examination put a very different complexion upon it. He admitted that what the salesman told him was that this Coco was identical in every respect with Coco-Quinine, no differ-

ease whatever, and that was really all he told him, except that he said witness would save money by using it, and could dispense it the same way, on calls for Coxe-Quinine (XQ65):

> "A. He told me that I could use it and that they were using it all over his territory for Coxe-Quinine.
>
> XQ66. Then by that he meant that it was taking the place of Coxe-Quinine in his territory? A. It would appear to me that he was selling it and they were using it in place of Coxe-Quinine" (Rec., Vol. I, pp. 390-391).

We have stated above, that all of the druggist witnesses save two called by Respondent to prove unfair selling methods broke down on cross examination. One of the exceptions was W. G. Walker. He was a clerk to Whitley. He testified 10½ years after the conversation he referred to. He was a drug clerk in a village in Louisiana, and he was only a listener to a conversation with his employer when Petitioner's salesman, Wilkins, called. Whitley, his employer, had been examined. His testimony was harmless. Walker, furthermore, was called in rebuttal to testify to matters which ought to have been in Respondent's opening proofs (Rec., Vol. II, p. 301; see infra, p. 31).

Barnes was a druggist in a village in Mississippi. He did not remember the date of the interview with Hoxmiss, the Warner salesman. All he testified to was (QP) that the salesman "meant" that Qua-Coco should be dispensed upon prescriptions originally written for Coxe-Quinine.

Hoxmiss was a registered pharmacist. He had traveled for the Parke-Davis Company of Detroit, and for 1½ years had traveled for Irwin Sims. He was a trained man in selling and vending drugs. He stated the statements of Barnes (Rec., Vol. II, pp. 1086, XQ[illegible]).

Respondent, on pages [illegible] and [illegible] of its brief, seeks to summarize the purport of testimony given by the witnesses enumerated on pages [illegible] and [illegible]. In so doing, there is presented a totally erroneous view of the evidence, of the weight of the evidence, and of what actually was established by the evidence. The following is a brief summary of what each of the witnesses enumerated did testify at the place indicated in Respondent's Brief. Even this, is without showing how the testimony there given was affected by cross examination or otherwise. In our principal brief we have analysed more carefully and with discrimination the character of these witnesses and the nature of their testimony.

The testimony of what the witnesses testified was said to them by Petitioner's salesmen to induce them to buy Quin-Vien, at the places referred to, is as follows (the figures [illegible] to the [illegible] of the Record):

[illegible]

Richard, p. 165, Q, p. 143, XQ19. Quin Core better and cheaper.

Friedman, p. 166, p.22.13. Quin Core cheaper.

Roy, p. 210, Q7–p.21, Q18. Quin Core to be used in place of Cu Quinine and cheaper. At p. 211, XQ20. Qu Core could be dispensed when Chocolate Quinine or Cure Quinine called for.

W. S. Jones, p. 21 Qc20.12. Told that Quin Core could be dispensed on calls for Cure Quinine.

McMillan, p. 186Q5, p. 246, XQ25. Told that you couldn't tell difference between them.

Vaughan, p. 206, Q8.12. Demonstration by salesman by serving two products on paper.

Reid, p. 270, Q4.12. Representation that Quin Core was [illegible] Cure Quinine and cheaper.

Moseley, p. 277, Q6. Quin Core similar to Cure Quinine; [illegible] in price.

Jolly, pp. 288–[illegible]. Quin Core could be sold for Cu Quinine.

Harper, p. 299, Q3. Quin Core used on account of cheapness.

Lindsay, p. 300, Q7, p. 308, XQ18. Quin Core [illegible] Cure Quinine and [illegible].

Tillman, p. 300, Q6. Quin Core identical with Cure Quinine of much more economical.

Hayes, p. 300, Q3. Quin Core equally good as Cure Quinine of would be dispensed and sold as Cure Quinine.

Hardy, p. 300, Q. Former salesman of Pelletier [illegible] Quin Core was [illegible] to [illegible] as Cure Quinine [illegible] and could be [illegible] substitute for Cure Quinine and [illegible].

Hayes, p. 300, Q10. Quin Core same proportion as Cure Quinine at a [illegible].

Hayes, pp. 307, Q17 and 21. Quin Core [illegible] and [illegible] as Cure Quinine.

Hayes, Vol. II.

Hayes, pp. 311–[illegible], XQ20. Quin Core [illegible] Cure Quinine and cheaper.

Sheehan, p. 528, Q4. No sale for Quin Coco.

E. H. White, p. 531, Q5 and p. 532, Q6. Heard Wilkins, Petitioner's salesman, offer Whitley Quin Coco, stating could be used as Coco Quinine and at less expense and a saving on original Coco Quinine.

W. G. Walker, p. 561, Q5. Quin Coco cheaper and could be dispensed where Coco Quinine specified.

Calvert, p. 540, Q4; p. 550, Q5 and 6. Quin Coco identical and used in its stead.

Stuckey, pp. 558-59, Q7-11. Quin Coco cheaper and could be sold under label of Coco Quinine.

Rouse, p. 645, Q14. Exactly using Quin Coco when Coco Quinine was prescribed.

J. C. White, pp. 650-651, Q5-6. Quin Coco same as Coco Quinine and cheaper.

Sinclair, p. 680, Q5-8. Quin Coco same as Coco Quinine and cheaper.

Powell, pp. 685-686, Q5-11. Quin Coco just as good as Coco Quinine prescription.

Lawson, p. 690, Q4. Quin Coco same as Coco Quinine and could be used as substitute on prescriptions for Coco Quinine, were filled with Quin Coco. W. p. 690, Q5-6. Witness substituted Quin Coco for Coco Quinine and was told he could do so.

Berry (should be Berry), pp. 701-702, Q4-11. Quin Coco was same as Coco Quinine.

McCabe, p. 616, Q5. Quin Coco could be used for Coco Quinine in 80 cells as substitute. W. p. 616, Q7. Petitioner's salesman intended witness to use Quin Coco as substitute.

Jones, pp. 656-66, Q4 and 5. Petitioner's salesman said "You can't tell it from Coco Quinine."

The net result of this testimony, therefore, is that of the forty-one witnesses mentioned, only three testified to statements made by Petitioner's salesman to the effect that Quin Coco could be sold in substitution for Coco Quinine, when the latter was prescribed or called for

The remainder only referred to statements of such facts as that Quin-Core was better or cheaper than Core-Quinine, and could be used in its stead. These were either simple truths or matters of opinion. As to the eleven witnesses above referred to, their testimony is dealt with by Petitioner as follows:

Name.	Principal Brief.	Reply Brief.
Ray	[illegible]	[illegible]
Ames, W. S.	[illegible]	—
Jolly	[illegible]	—
Groves	[illegible]	[illegible]
Hardy	[illegible]	[illegible]
White, E. H.	[illegible]	[illegible]
Walker, W. G.	[illegible]	[illegible]
Stanley	[illegible]	[illegible]
Moise	[illegible]	—
Lawson	[illegible]	[illegible]
McCurdie	[illegible]	[illegible]

V.

Respondent failed to establish substantial injury by Petitioner's selling methods.

Respondent's claim that Petitioner's methods complained of resulted in successfully holding up a large trade in Quin-Core, is at variance with the earlier contentions (p. [illegible]) that Petitioner had failed to establish a market for this product. All that the testimony amounts to is, that the twenty or thirty physicians, travelling-salesmen and druggists called for Respondent, have nothing more than they testified to. The Research of druggists throughout the country, who bought Quin-Core in large quantities, were not called. The further one goes the Respondent and Petitioner to show sales by Petitioner to collateral quantity to injure Respondent's business. Either a former employee of Petitioner who testified for

Respondent, produced alist of his own sales showing the following amounts sold:

1907	$39.15	
1908	307.25	
1909	651.85	
1910	499.35	(Rev., Vol.
1911	642.30	II, pp. 504-
1912	544.75	6.)

Although Kelton ranked third on the list of Petitioner's salesmen, that is, third best in the aggregate volume of sales of all Petitioner's products (p. 604) and was generously encouraged by Petitioner (see also pp. 600-602), yet it should be noted that in our letter his attention was called to the fact that his past-due accounts, including offset and items charged to profit and loss in 1907, amounted to $2,004, as compared with the previous year, $1,625, so that his increased business had been entirely exhausted by his increased past-due accounts (p. 605), and he would seem to account for the difference between the amount of his orders and the amount actually received for Gain-Cons during the years 1909 to 1912, shown in the tables printed on pages 509 to 600 of the Record. Discussion shown by him in answering the simple question of what compensation he was getting for the work done for the Respondent in hauling up witnesses to his car (see Rev., Vol. II, p. 621, Sight to p. 606, Sight), a question which was finally answered by Respondent's counsel (Sight, pp. 627-8), requires the use of caution in considering his other testimony, additional basis for doubting which is furnished by the testimony of Kelton's, Petitioner's assistant sales manager, that he had discharged Kelton from Petitioner's employ for unreasonable cause (see Rev., Vol. III, pp. 1304-5).

The testimony of his other witnesses commented on page 39 was of a [illegible] character.

Grigsby, Rec., Vol. I, p. 97, Q14, had never sold Quin-Coco.

Griffin, p. 164, Q11, had seen three unopened bottles of it.

Burns, p. 170, Q11, had seen it on the druggist's shelves.

Porter, p. 177, XQ45, was selling five gallons of Quin-Coco to one of Coco-Quinine.

Faucher, p. 206, Qc7-8, said a good deal of it was sold, because he saw it on the shelves.

Wetzel, p. 230, Qc4, 7, had seen it in 40 per cent. of the drug stores.

Bell, p. 211-12, Qc5, 4, said it was used in three-quarters of the drug stores in his district.

The testimony of Tisdale (p. 240, Q9) and Vinson (p. 207, Qc5-6) was vague and indefinite, and that of Fly (p. 220, Q10) was purely hearsay, to the effect that many times in soliciting business from retail buyers in his territory he was asked by buyers why they should buy Coco-Quinine at $6.00 per gallon when they could buy Quin-Coco for $5.00.

Considerable testimony was introduced which is summarized on pages 30-40 of Respondent's brief, showing how Respondent created a demand for its products in the trade by what it calls "detail work," and complaint is then made that Petitioner's efforts were directed more towards supplying a demand created by others than in creating any demand of its own for its products.

This is nothing more than contending that the service by Petitioner of the right conceded by both the District Court and the Circuit Court of Appeals to manufacture and sell the product according to the formula to which the Respondent had no exclusive right, was, notwithstanding the determination of these two courts, as

invasion of Respondent's rights. Respondent quotes a portion of an answer given by Mr. G. A. Pfeiffer, Petitioner's Treasurer and General Manager, to the effect that formerly "detailing" was considered the only method of introducing new specialties, and that it was an efficient method, but that the expense of personal detailing was so high as in many cases to make it unprofitable. He does not quote the remainder of witness' answer, which was:

> "I would say the practice of personal detailing with samples has diminished a great deal in recent years" (Rec., Vol. III, p. 1230).

Respondent refers to the testimony of what is described as "a multitude of druggist witnesses," to show that Petitioner never attempted to create a market for its own preparation, Quin-Cocc, either on its merits or under its name—which is rather surprising in view of the amount of testimony precisely to the contrary. It is admitted, that a number of druggists were produced by Respondent's 100 salesmen working the entire country for some five years, to say that they at least had had no demand for Quin-Cocc. But that is too few to be persuasive, and negative testimony seldom gets anywhere.

Besides, there were the 85,000 dispensing doctors who bought and dispensed their own drugs (mostly country doctors), and the Petitioner is shown (Principal Brief, pp. 80, 90) to have solicited their trade. It appears that the Respondent solicited the prescribing doctors (85,000) and the Petitioner solicited the dispensing doctors (85,000), as well as the entire retail drug trade. Wherein lies any difference in respect of "attempting to create a market"?

Perhaps the most impossible contention of Respondent is that as Quin-Cocc was ever honestly sold, but was all "passed off" on customers, the as to a creating a mar-

but for Quin-Cece, Principal Brief, page 66. It would seem that, in the opinion of the Respondent, the retail drug trade have not only forgotten honesty but are ignorant of how to sell drugs.

The Respondent's Brief at page 67, contains statements as to "Instances of actual substitution shown by the Proofs." By this it is assumed that "*passing off*" is meant. The testimony of only eleven witnesses is there discussed. We assume that these are considered by Respondent to be its best witnesses. Certain other witnesses are merely named in a group at page 70. We will take up the eleven best witnesses:

Roeper and Martin, Lilly salesmen, once saw a Cece-Quinine prescription filled with Quin-Cece. Wright had sold Quin-Cece when Cece-Quinine was called for at his drug store, but not on prescriptions. He said Petitioner's representative had told him he could sell it same as Cece-Quinine. There was no distinction. Kessel, a by-stander, confirmed Martin. Messenger, a Lilly salesman, said "I know it to be a fact that lots of druggists carry a substitute of Cece-Quinine called Quin-Cece that they used on prescriptions where the physicians had written for Cece-Quinine." Broussard, a Lilly salesman, on one occasion saw a prescription for Cece-Quinine filled out of a Quin-Cece bottle. He refused to name the druggist. Griffin, a Lilly salesman, had seen Quin-Cece "Disposed in a good many instances when Cece-Quinine was ordered," but he specified only one instance.

Three druggists were mentioned:

- Brecher had sold it as Cece-Quinine only.
- Richard had sold it when Cece-Quinine was called for.
- Schultz purchased a bottle which he had first thought as Cece-Quinine. Griffin satisfied that that particular druggist did not so that they have any Cece-Quinine in stock.

Hone, testifying four or five years after a conversation with Jones, Petitioner's salesman, couldn't recollect the exact words, but stated that he said physicians were buying a lot of Quin-Coco for use in their practice, thereby making more money than by buying Coco-Quinine and getting the same results (Rec., Vol. I, p. 201, 7-Q.20).

There follow the more names of a group of witnesses, each of whom is said to have testified that he had sold Quin-Coco on Coco-Quinine calls.

As to the witnesses not named above who are cited (Respondent's Brief, pp. 70-71) as supporting instances of actual "passing off," their testimony at the places in the record indicated by Respondent may be summarized as follows:

Stovall, filled calls for Coco-Quinine with Quin-Coco.

Albright, sold Quin-Coco on prescription for Coco-Quinine.

Shepherd, used Quin-Coco in dispensing Coco-Quinine.

Daly, had bottles of Quin-Coco labeled Coco-Quinine.

Reid, sold Quin-Coco on calls for Coco-Quinine.

Bell, in one instance saw a clerk in a drug store bottling Quin-Coco and labelling it Coco-Quinine.

Garber, dispensed Quin-Coco on calls for Coco-Quinine, labelling it Coco-Quinine.

Lindsay, Hardy and Garner sold Quin-Coco in bottles labelled Coco-Quinine.

Turner, used Quin-Coco on prescriptions for Coco-Quinine, Lilly.

Whitley, dispensed Quin-Coco on prescription and calls for Coco-Quinine and sold it over the counter.

White, sold Quin-Coco in bottles labelled Coco-Quinine.

Walker, and Stuckey filled prescriptions for Coco-Quinine with Quin-Coco.

Burns, and Powell filled prescriptions for Coco-Quinine with Quin-Coco as did Lawson and Kessel.

That Petitioner has a right to market Quin-Coco has been affirmed by both the lower courts, and all the authorities are in accord. That its bottles and labels were not imitations, is not questioned. Unless, therefore, the selling methods were unlawful, the acts of third parties—"tricky retailers"—do not affect the Petitioner.

So much for the *proofs* on this point.

But no matter what any dishonest druggist may have done, it cannot affect the Petitioner, and the evidence is quite immaterial, for the rule is well settled that a manufacturer is not responsible for the acts of dishonest retailers in "passing off" its goods, provided it has done its legal duty in respect of its product.

Rathbone v. Champion Steel Range Co., 180 Fed., 36, C. C. A., 6th Circ. Unfair trade case on the sale of natural gas heaters.

Lowrie, C. J.:

> "There is some evidence tending to show an actual deception of customers on the part of dealers by representing defendant's heater as that of complainant. * * * So far as concerns actual misrepresentation by dealers of the identity of heaters, not only is the proof thereof not highly convincing, but *defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant*, provided defendant has done its legal duty in distinguishing its own product from that of complainant. *Royal Baking Powder Co. v. Royal Gil Pub., 1[illegible]; Hall's Safe Co. v. Herring & Co.*, [illegible] Fed., [illegible]."

Coca-Cola Co. v. Bowden, 2[illegible] Fed., [illegible], [illegible], D. C., E. D. Okla.:

Vaughn, D. J.:

> "*Defendants cannot be held responsible for what their customers did without self-suggestion, or inducement from them.*" (Italics ours.)

Again we must point out what an inhabitational number of druggists were called in this connection—out of 30,[illegible] druggists in the country, and the country was fairly secured for witnesses by the 100 salesmen of Respondent.

These proceedings and the broad averments of fraud in the bill are really an attack on the moral character and standard of the entire retail drug trade. It is really "indicting a whole nation." The subject has been referred to in Petitioner's Brief, page [illegible].

In no single instance of all these witnesses, [illegible] Bowden, was it proved that the druggist had not informed the plaintiff or the counter customer that he had not given him Coca-Quinine. It is submitted that without that complete proof of the offense the evidence is insufficient. The charge is a serious one, the proof of it fails if it be not complete.

But again, even complete proof of "passing off" by druggists does not affect the Petitioner. It is too [illegible] after [illegible] the main issue here involved (that the Petitioner's salesmen authoritatively suggested "passing off") is sufficiently proved. And proof that third parties did "pass off" is not of itself evidence that the Petitioner's salesmen suggested to such third parties that they would connect that fraud on the public. The conduct of the salesmen can be proved only by direct evidence on that point.

In other words, there is no evidence (unless that of Bowden) that any customer of a druggist was actually deceived. You cannot that the customer was not told to

[illegible] [illegible] [illegible] [

"implicated" various of petitioner's salesmen, are negligible. Many or most of them have been referred to in the Principal Brief. A few of them may require further consideration in this particular connection or a reference to other parts of this brief or of the Principal Brief, where their testimony is treated.

As to Jones: Richard's testimony, as quoted at page 96 of the Principal Brief, did not implicate Jones in any improper selling method.

As to Wilkins: W. G. Walker, a clerk in the drug store of Whitley, was called to corroborate the evidence of the latter. The following is his testimony:

> "Q. Did Mr. Wilkins ever solicit your order for a preparation called Quin-Coco, and if he did, what did he say to you respecting this item?
>
> By Mr. Rawle: Objected to as not proper for rebuttal, the subject having been fully gone into in plaintiff's *prima facie* case.
>
> A. He did." (Rec., Vol. II, p. 541.)
>
> "XQ16. When was it that Wilkins solicited the order for Quin-Coco as you have testified? A. About April, 1911.
>
> XQ17. Who was present? A. Dr. Pankey and Mr. Whitley" (*id.*, p. 543).

If this evidence is to be considered at all, it should be observed that witness testified August 12, 1916, to a conversation which he says took place in April, 1911 (XQ16), which lasted "only a few moments" (XQ19), on the subject of one article (Quin-Coco) out of Warner's entire line of pharmaceuticals (XQ20). Witness was merely a bookkeeper. It is hard to believe that Wilkins, with five thousand items to sell, should have gone elaborately into the merits of a single one, when the druggist already had a good stock of it on hand and needed no

more at the time (XQ22). The testimony was obviously not based upon recollection but upon inference.

As to Starring: M. A. Kessel testified only as to what two Warner salesmen had said to him in offering to sell him Quin-Coco. As usual, the gist of his evidence came out on cross examination, and it is all that need be considered. Thus:

> "XQ32. When Rogers asked you to buy Quin-Coco did he say that it was *similar* to Coco-Quinine, contained the same amount of quinine—two grains to the teaspoonful—and that the price was lower, and *is that the substance of what he said?*
>
> By Mr. Bradford: Objected to as an inaccurate statement of what the witness has already testified to, and as an improper question for this reason.
> A. Yes, sir.
>
> XQ33. And is *that the substance of what Starring afterwards said?*
>
> (Same objection.)
>
> A. Yes, sir." (Rec., Vol. II, pp. 738-739; italics ours.)

This does not "implicate" the Warner salesmen.

As to Rogers, said also to be "implicated" by M. A. Kessel, see Kessel's testimony just quoted, XQs38 and 39.

Rogers (Vol. III, Qs6-22, pp. 1603-5) and Starring (Vol. III, Qs26-29, pp. 1608-9), the petitioner's salesmen, were called and denied Kessel's statements.

As to Gonzales: Barnes' testimony was specifically denied by Gonzales, to whom he imputed the dishonest suggestion (Vol. III, pp. 1361-2 and 1366).

Ray's testimony is sufficiently considered at page 53 of the Principal Brief.

As to Wilson: McCorkle (Principal Brief, p. 105) and James (*ibid*, p. 106) show that Wilson made no improper statements.

The testimony of McCorkle and James was taken out of order and was objected to.

As to Devall: Scott's testimony that Devall represented that Quin-Coco could be sold and dispensed as Coco-Quinine Lilly (Rec., Vol. I, p. 114) was squarely denied by Devall (Rec., Vol. III, p. 1387).

As to Kelton: It is fully shown in the Principal Brief that Kelton, though originally a Warner salesman, was called as a star witness by the Respondent, but that he testified that his selling methods had been beyond reproach, and his testimony in this connection requires no further comment.

The testimony of Petitioner's former salesman Groves, referred to on Respondent's brief at page 84, properly analyzed, shows that when asked to state what Hagaman said to druggists, Groves replied that Hagaman said "Quin-Coco was a similar product to Coco-Quinine, containing the same amount of quinine and was light in appearance." That was all he said (Rec., Vol. I, p. 368, RXQs95-97). In his comment on the testimony of McNulty (pp. 86-87), which related not to Quin-Coco but to Castoria (Rec., Vol. II, p. 449), Respondent entirely ignores the fact that the testimony of Peabody was squarely denied by McNulty and was entirely uncorroborated (Rec., Vol. III, pp. 1565-7). Likewise Lavison's testimony cited on page 87, concerning an interview with Mr. Kelton, former employee of Petitioner, and Mr. H. Pfeiffer, was denied squarely (Rec., Vol. III, p. 1245). There was no corroboration of it and Lavison's testimony was greatly weakened on cross-examination as follows (Rec., Vol. II, p. 695):

"XQ32. And I understood you to testify above that Mr. Henry Pfeiffer told you that Quin-Coco was the same as Coco-Quinine and you could use it for Coco-Quinine in any way that Coco-Quinine was used, and that it was the same thing and much cheaper. Is that correct? A. It is.

XQ34. Can you give the language of Mr. Pfeiffer in the words in which he spoke? A. I do not know that I can give his exact words. I know that he told me that it was the same as Coco-Quinine, identically the same, and the difference could not be told, and that it could be used in any way that Coco-Quinine was used.

XQ35. That is, that they were the same preparations, pharmaceutically. Is that correct? A. That they were the same preparation in every way.

XQ36. And his was cheaper? A. And cheaper; yes, sir.

XQ37. And that is the substance of what they both told you? A. It is."

Culver's testimony, quoted Respondent's Brief, page 90, respecting his dealing with Jones, one of Petitioner's salesmen, was contradicted by Jones squarely at Record, pages 1612-13, and Respondent's counsel did not attempt to cross examine him.

The testimony of the long list of witnesses enumerated on pages 92-3, is to the effect that they handled the product known as Coco-Quinine, knowing it to be the product of Eli Lilly & Co. of Indianapolis. Inasmuch as they all testified that they bought that product from Lilly, it is not strange that they recognized it as manufactured by that firm and the stage army of witnesses enumerated amounts to nothing more than a demonstration of the fact that the purchasers from that house acknowledged that what they bought from it was sold by it! The basic fallacy of much of the argument of the Respondent lies in the generalization that the experience or one or more small retail druggists is indicative of the nature of the entire business of druggists throughout

the United States. So the list of doctors and druggists on pages 94 and 95 amounts to nothing more than that physicians who desire to prescribe Coco-Quinine, when they write that word, mean the Coco-Quinine manufactured by Respondent. As that is the only Coco-Quinine on the market, it would not seem to require the testimony of many witnesses to establish the fact. So the testimony of the witnesses enumerated on page 97, some seventeen druggists, is merely to the effect that when calls were made on them for chocolate quinine, they interpreted it as calling for Coco-Quinine and when Coco-Quinine was called for, they understood that Lilly's preparation was wanted. Many other witnesses, on the other hand, testified that when chocolate quinine was called for, they filled the order with Quin-Coco, as naturally they would have a right to do. So that testimony is of no value whatever. Respondent rarely refers to the fact that any of the testimony upon which his argument is based was controverted by any other witness. It is a very simple and easy method of building up a case to refer only to testimony of Respondent's witnesses, treated as though that were the final word of ultimate truth, and wholly ignoring the fact that other witnesses, equally credible, have testified directly in contravention of the particular evidence relied upon.

N. K. Fairbank Co. v. *R. W. Bell Manfg. Co.*, 77 Fed., 869, 877, C. C. A., 2nd Circuit: Before SHIPMAN and LACOMBE, C. JJ.

Unfair trade case in soap powder. The defendant put up its soap powder in a style of package so similar to the dress of plaintiff's soap that unscrupulous dealers might pass off defendant's package for plaintiff's. But, in considering the evidence of one of plaintiff's witnesses, LACOMBE, C. J., said:

> "A grocer in Wilkes Barre, Pa., testifies that defendant's salesman, as an inducement to pur-

chase, called his attention to the similarity of the packages, and the possibility of passing off one for the other. *The salesman contradicts this statement, and we give no weight to it.*" (Italics ours.)

Montgomerie v. *Young Bros.*, 21 Rep. Pat. Cas., 285:

In the Scotch Court of Sessions (Outer House), before Lords Justice Clerk, Young and Trayner:

Bermaline Bread. The plaintiff employed detectives to trap the defendant.

Lord Young (p. 292):

"I do not accept the evidence of detectives and employes of the description I have referred to, when contradicted by the evidence, *which I accept as honest and truthful evidence, of the servants in the shops of the Defenders.*" (Italics ours.)

The employer had forbidden the sales complained of.

Lord Young (*ibid.*):

"I cannot agree to the proposition that if a servant disobeys the master's instructions in a matter of this kind, the interdicting of the master is the remedy."

This was a case of "a servant in a shop violating accidentally or otherwise the instructions of her master."

Lord Trayner (p. 293):

"*The servants in the Defenders' shops were unanimous in stating not only that they had got the instructions from their masters, to which I have already referred, but that they were careful to keep these instructions in view and obey them, and they say they did.*" (Italics ours.)

Hostetter Co. v. *Comerford*, 97 Fed., 585, D. C., S. D. N. Y.

This was an unfair trade case upon an allegation that the defendant had refilled bottles with bogus Hostetter Bitters.

Coxe, D. J., in dismissing the bill, placed stress on the fact that *"the defendants and all of their employes deny in the most emphatic manner that they ever refilled empty bottles with bogus bitters."* (Italics ours.)

The District Court rightly characterizes Respondent's testimony as follows:

> "But the testimony in most instances consists rather of impressions of witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses, upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions" (Rec., Vol. III, pp. 1650-1651).

Thus, for example, the testimony of the witness Thurman, as to what he said to Garvin and Merner, referred to on page 108, was squarely denied by each of them (see Rec., Vol. III, pp. 1239-1240). The other testimony referred to immediately following that of Thurman, concerning the "blue list" was of little account. Hooper, Groves and Perine recognized the document; Hardy and Kuhn had one similar to it; Thurman was familiar with it; the list had been presented to Peabody; Bolenbough recognized the list and had one when in Petitioner's employ; O'Connell had such a document and said that Hagaman used it to demonstrate the Warner lines to show the similarity of their goods with other well-known makes (Rec., Vol. II, p. 975).

The Respondent's Brief at various places attacks the commercial and moral standing of the Petitioner

William R. Warner & Company, one of the leading drug manufactory houses of the country. The statements made have no fitting place in an argument before this Court. They are entirely unjustified by anything in this Record. On the contrary, one of the Respondent's own witnesses, Thorburn, Pharmacist in Pitman-Moore Company for many years, testified (Rec., Vol. I, p. 34):

> "XQ26. Mention some of the leading drug manufacturers in the country. A. Parke Davis; Sharpe & Dohme; John Wyeth & Co.; H. K. Mulford & Co.; W. R. Warner & Co.; Eli Lilly & Co., selling a general line of pharmaceuticals."

U. S. McClellan (Rec., Vol. III, p. 1418), a witness for Petitioner, General Manager of a St. Louis drug manufacturing concern, testified (Q8) that he had known William R. Warner & Company ever since he could remember. That he considered it one of the "oldest and reliable concerns in the country."

It is true, as stated by Respondent, that William R. Warner (father) died before 1908. He died many years before that. His son, William R. Warner, continued the business and is today one of the largest stockholders of the Petitioner Company, and a director.

Document No. 3: The Blue List.

This was merely a convenient list of certain Warner drugs carried by salesmen. It was a competitive list. It had not the slightest moral significance; and yet it was produced early in the taking of proofs and was greatly depended upon throughout by the Respondent.

The Respondent's brief refers to it at page 106, where it appears that the Respondent had its own list of "Competitive Preparations," being "a list of proprietary or semi-proprietary articles made by other manufacturers followed by the name of a competing preparation made

by ourselves." Mr. Lilly (*ibid.*, p. 111) testified that "it was for the information of our salesmen and detail men." Well, that was the obvious purpose of Petitioner's "Blue List." They both were intended to serve the same purpose, and both were perfectly honest. But it is strenuously argued by Respondent that the purpose of the Blue List was malign, while that of the Respondent was "innocent." Lynn testified that as soon as he knew of this list he discontinued it; but Mr. Lilly, the President of Eli Lilly & Company, talks very differently (p. 111 of Respondent's Brief), where he stands up for it and does not say it was withdrawn. How can these two entirely similar lists of goods carried by salesmen appear so different to different eyes?

It would seem needless to prolong this discussion. The evidence is voluminous. Our conviction is that the views of the District Judge respecting it are sound, and will be confirmed by this Court upon a perusal, not of all of the record, because that would seem to be unnecessary, but of some of the distinctive portions of it to which reference is made in the briefs. Judge THOMPSON said, referring to the charge of dishonest passing off of the product of Petitioner upon the customers of the Respondent:

> "The evidence upon this point has been carefully examined. In a charge of this nature the testimony could [should?] be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of the statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to defendant's salesmen, the salesman upon being called denied ever making such suggestions.

> "The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested the alleged unfair selling methods on the part of its salesmen." (Rec., Vol. III, p. 1650.)

It seems to us that the Circuit Court of Appeals must have accepted the testimony of Respondent's witnesses without close analysis, and that if it had scrutinized and weighed the testimony with the care of the District Judge, it must have reached the same conclusion that he did.

For the reasons above stated, we respectfully urge that the judgment of the Circuit Court of Appeals be reversed and that of the District Court affirmed.

April 11, 1924.

FRANCIS RAWLE,
GEORGE W. WICKERSHAM,
ROGER S. BALDWIN,
JOSEPH W. HENDERSON,
of Counsel.

WILLIAM R. WARNER & COMPANY *v.* ELI LILLY & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 32. Argued April 28, 29, 1924.—Decided June 9, 1924.

1. Names which are merely descriptive of the ingredients, qualities, or characteristics of an article of trade,—such as the names "Coco-Quinine" and "Quin-Coco," applied to a liquid preparation of quinine in combination with chocolate and other things,—cannot be appropriated as trademarks. P. 528.
2. The use of a name similar to that already employed by another, truthfully to describe one's own product, is not a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of that product. *Id.*
3. A first made and marketed a liquid preparation containing quinine and other drugs compounded with chocolate to give it color and flavor and to aid in suspending the quinine. B then, using chocolate, produced an article of the same taste and appearance, but sold cheaper; and to reap A's trade suggested to retail druggists the feasibility and economy of passing off the one for the other, when dispensed out of the bottle; which was done in many and divers instances.

Held: (a) That B was guilty of unfair competition. P. 528.

(b) He who induces another to commit a fraud and furnishes the means, is equally guilty. P. 530.

(c) When several acts of unfair competition are shown, there is warrant for concluding that they will continue, and equity will afford adequate relief by injunction. P. 531.

(d) The injunction in this case should forbid B and his agents from directly or indirectly representing or suggesting to his customers the feasibility or possibility of passing off B's product for A's, and may well require that his original packages sold to druggists shall bear labels not only distinguishing B's bottled product from A's, but also stating affirmatively that B's preparation is not to be sold or dispensed as A's, or be used in filling prescriptions or orders calling for the latter. P. 531.

(e) But the use by B of chocolate as an ingredient of his preparation should not be forbidden. *Id.*

275 Fed. 752, reversed.

Certiorari to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing on the merits a suit brought by the above named respondent to enjoin the petitioner from continuing to manufacture a medicinal preparation called Quin-Coco, if flavored with chocolate, and from continuing the use of that name.

Mr. George W. Wickersham and *Mr. Francis Rawle*, with whom *Mr. Roger S. Baldwin* and *Mr. Joseph W. Henderson* were on the briefs, for petitioner.

Mr. E. W. Bradford for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Respondent is a corporation engaged in the manufacture and sale of pharmaceutical and chemical products. In 1899 it began and has ever since continued to make and sell a liquid preparation of quinine, in combination with other substances, including yerba-santa and chocolate, under the name of Coco-Quinine.

Petitioner also is a pharmaceutical and chemical manufacturer. The Pfeiffer Chemical Company, Searle & Hereth Company and petitioner are under the same ownership and control. The first named company in 1906 began the manufacture of a liquid preparation which is substantially the same as respondent's preparation and

which was put upon the market under the name of Quin-Coco. Two years later the Searle & Hereth Company engaged in the manufacture of the preparation, which ever since has been sold and distributed by petitioner.

This suit was brought in the Federal District Court for the Eastern District of Pennsylvania by respondent to enjoin petitioner from continuing to manufacture and sell the preparation if flavored or colored with chocolate; and also from using the name Quin-Coco, on the ground that it was an infringement of the name Coco-Quinine, to the use of which respondent had acquired an exclusive right. The District Court decided against respondent upon both grounds. 268 Fed. 156. On appeal the Court of Appeals ruled with the District Court upon the issue of infringement but reversed the decree upon that of unfair competition. 275 Fed. 752.

The entire record is here and both questions are open for consideration.

First. We agree with the courts below that the charge of infringement was not sustained. The name Coco-Quinine is descriptive of the ingredients which enter into the preparation. The same is equally true of the name Quin-Coco. A name which is merely descriptive of the ingredients, qualities or characteristics of an article of trade cannot be appropriated as a trademark and the exclusive use of it afforded legal protection. The use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product. *Canal Co.* v. *Clark*, 13 Wall. 311, 323, 327; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, 453; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140.

Second. The issue of unfair competition, on which the courts below differed, presents a question of more difficulty. The testimony is voluminous, more than two

hundred witnesses having been examined; but, since the question with which we are now dealing is primarily one of fact, we have found it necessary to examine and consider it. Nothing is to be gained by reviewing the evidence at length, and we shall do no more than summarize the facts upon which we have reached our conclusions.

The use of chocolate as an ingredient has a three-fold effect: It imparts to the preparation a distinctive color and a distinctive flavor, and, to some extent, operates as a medium to suspend the quinine and prevent its precipitation. It has no therapeutic value; but it supplies the mixture with a quality of palatability for which there is no equally satisfactory substitute. Respondent, by laboratory experiments, first developed the idea of the addition of chocolate to the preparation for the purpose of giving it a characteristic color and an agreeable flavor. There was at the time no liquid preparation of quinine on the market containing chocolate, though there is evidence that it was sometimes so made up by druggists when called for. There is some evidence that petitioner endeavored by experiments to produce a preparation of the exact color and taste of that produced by respondent; and there is evidence in contradiction. We do not, however, regard it as important to determine upon which side lies the greater weight. Petitioner, in fact, did produce a preparation by the use of chocolate so exactly like that of respondent that they were incapable of being distinguished by ordinary sight or taste. By various trade methods an extensive and valuable market for the sale of respondent's preparation already had been established when the preparation of petitioner was put on the market. It is apparent, from a consideration of the testimony, that the efforts of petitioner to create a market for Quin-Coco were directed not so much to showing the merits of that preparation as they were to demonstrating its practical identity with Coco-Quinine, and, since it was sold at a

lower price, inducing the purchasing druggist, in his own interest, to substitute, as far as he could, the former for the latter. In other words, petitioner sought to avail itself of the favorable repute which had been established for respondent's preparation in order to sell its own. Petitioner's salesmen appeared more anxious to convince the druggists with whom they were dealing that Quin-Coco was a good substitute for Coco-Quinine and was cheaper, than they were to independently demonstrate its merits. The evidence establishes by a fair preponderance that some of petitioner's salesmen suggested that, without danger of detection, prescriptions and orders for Coco-Quinine could be filled by substituting Quin-Coco. More often, however, the feasibility of such a course was brought to the mind of the druggist by pointing out the identity of the two preparations and the enhanced profit to be made by selling Quin-Coco because of its lower price. There is much conflict in the testimony; but on the whole it fairly appears that petitioner's agents induced the substitution, either in direct terms or by suggestion or insinuation. Sales to druggists are in original bottles bearing clearly distinguishing labels and there is no suggestion of deception in those transactions; but sales to the ultimate purchasers are of the product in its naked form out of the bottle; and the testimony discloses many instances of passing off by retail druggists of petitioner's preparation when respondent's preparation was called for. That no deception was practiced on the retail dealers, and that they knew exactly what they were getting is of no consequence. The wrong was in designedly enabling the dealers to palm off the preparation as that of the respondent. *Coca Cola Co.* v. *Gay-Ola Co.*, 200 Fed. 720; *N. K. Fairbank Co.* v. *R. W. Bell Manuf'g. Co.*, 77 Fed. 869, 875, 877–878; *Lever* v. *Goodwin*, L. R. 36 Ch. Div. 1, 3; *Enoch Morgan's Sons Co.* v. *Whittier-Coburn Co.*, 118 Fed. 657, 661. One who induces another to commit a

fraud and furnishes the means of consummating it is equally guilty and liable for the injury. *Hostetter Co.* v. *Brueggeman-Reinert Distilling Co.*, 46 Fed. 188, 189.

The charge of unfair competition being established, it follows that equity will afford relief by injunction to prevent such unfair competition for the future. Several acts of unfair competition having been shown, we are warranted in concluding that petitioner is willing to continue that course of conduct, unless restrained. *Hennessy* v. *Wine Growers' Ass'n*, 212 Fed. 308, 311. It remains to consider the character and extent of this relief.

Respondent has no exclusive right to the use of its formula. Chocolate is used as an ingredient not alone for the purpose of imparting a distinctive color, but for the purpose also of making the preparation peculiarly agreeable to the palate, to say nothing of its effect as a suspending medium. While it is not a medicinal element in the preparation, it serves a substantial and desirable use, which prevents it from being a mere matter of dress. It does not merely serve the incidental use of identifying the respondent's preparation, *Coca Cola Co.* v. *Gay-Ola Co., supra,* p. 724, and it is doubtful whether it should be called a non-essential. The petitioner or anyone else is at liberty under the law to manufacture and market an exactly similar preparation containing chocolate and to notify the public that it is being done. *Saxlehner* v. *Wagner,* 216 U. S. 375, 380; *Chadwick* v. *Covell,* 151 Mass. 190. But the imitator of another's goods must sell them as his own production. He cannot lawfully palm them off on the public as the goods of his competitor. The manufacturer or vendor is entitled to the reputation which his goods have acquired and the public to the means of distinguishing between them and other goods; and protection is accorded against unfair dealing whether there be a technical trademark or not. The wrong is in the sale of the goods of one manufacturer or vendor as those

of another. *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, 674. If petitioner had been content to manufacture the preparation and let it make its own way in the field of open and fair competition, there would be nothing more to be said. It was not thus content, however, but availed itself of unfair means, either expressly or tacitly, to impose its preparation on the ultimate purchaser as and for the product of respondent.

Nevertheless, the right to which respondent is entitled is that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of the sale of a preparation which everyone, including petitioner, is free to make and vend. The legal wrong does not consist in the mere use of chocolate as an ingredient, but in the unfair and fraudulent advantage which is taken of such use to pass off the product as that of respondent. The use dissociated from the fraud is entirely lawful, and it is against the fraud that the injunction lies. But respondent being entitled to relief, is entitled to effective relief; and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner, which has shown by its conduct that it is not to be trusted. Clearly, the relief should extend far enough to enjoin petitioner, and its various agents, from, directly or indirectly, representing or suggesting to its customers the feasibility or possibility of passing off Quin-Coco for Coco-Quinine. The Court of Appeals held that petitioner should be unconditionally enjoined from the use of chocolate. We think this goes too far; but, having regard to the past conduct of petitioner, the practices of some druggists to which it has led, and the right of respondent to an effective remedy, we think the decree fairly may require that the original packages sold to druggists shall not only bear labels clearly distinguishing petitioner's bottled product from the bottled product of

respondent, but that these labels shall state affirmatively that the preparation is not to be sold or dispensed as Coco-Quinine or be used in filling prescriptions or orders calling for the latter. With these general suggestions, the details and form of the injunction can be more satisfactorily determined by the District Court. The decree of the Court of Appeals is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.